



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE 189 OF 2006

1. ABDULHALIM MOHAMED SHALLO

2. SHEIKH ABDULKADIR MOHAMED SHALLO PLAINTIFFS

- Versus -

PANDYA MEMORIAL SOCIETY t/a PANDYA HOSPITAL DEFENDANT

R U L I N G

Before the court is an application by Notice of Motion dated 31st October, 2007, and made under Section 3A of the Civil Procedure Act, Order 1 rules 10(2) and 13, O. VIA rules 3, 5 and 8 and O. VIII rules 7, 9 and 10 of the Civil Procedure Rules, and all the other enabling provisions of the law. The applicant applies for the following orders:-

1. *THAT leave be granted to the defendant to amend the defence and counterclaim in the manner shown in the proposed annexure to the affidavit in support of the application.*
2. *THAT the proposed pleading be adopted as properly filed in this suit.*
3. *THAT directions be given as per Order VIII.*
4. *THAT the suit be transferred to the Subordinate Court for disposal.*
5. *THAT the costs of this application be provided for.*

The application is supported by the annexed affidavit of RAJESH SHUKLA, the Chief Administrator of the defendant, and is made on the ground that there is some confusion in the identities of the 1st names of the 1st plaintiff and the actual patient treated and cared for by the defendant.

The plaintiffs responded to the application by filing a replying affidavit sworn by the 1st plaintiff on 13th November, 2007. In that affidavit, the deponent deposes, inter alia, that the application was not brought timeously; that it is an abuse of the process of the court and an afterthought; and that it raises new issues and is wholly unmeritorious.

At the hearing of the application, Mr. Shah appeared for the applicant while the respondents appeared in person. After considering the application and hearing both sides, I find that there are only two issues to be determined. These are whether the proposed amendments to the defence and counterclaim should be allowed and secondly, whether this matter should be transferred to the lower court.

With regard to the first issue, the principles of law governing the amendment of pleadings are clearly set out in our case law. A good summary thereof was given in the case of EASTERN BAKERY v. CASTELINO [1958] E.A. 461 in which Sir Kenneth O'Connor said at p.462:-

“It will be sufficient to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs.”

This statement directs the course which the court ought to take since this case is still at the pre hearing stage, and there has been no evidence in proof of any injustice which may befall the respondents if the proposed amendments are granted.

Furthermore, in “*Precedents of Pleadings*” by Bullen and Leake and Jacob, 12th Edition at page 128, the learned authors have this to say on amendments:-

“The circumstances in which amendments of pleadings may be sought are infinitely various ... Each case must be decided having regard to all the surrounding circumstances of the particular case ... the first and in a way the paramount consideration is whether the application for leave to amend is made in good faith. For this purpose, good faith means that the amendment is sought for the purpose of raising the real question in controversy between the parties, and is not dishonest or intended to overreach the opposite party, or made for any other ulterior motive and relies on facts which are substantially true and germane to the matters in controversy between the parties ...”

In the circumstances of this case, I am satisfied that the application for leave to amend is brought in all good faith in order to bring to the fore the true identities of the parties to the dispute, which in turn will enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. This is expressly mandated by O.I rule 10(2) of the Civil Procedure Rules. And for this purpose, it is also significant to note that under O. 1 rule 13, an application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by summons or at the trial of the suit in a summary manner. The applicants were, therefore, within their rights to make the application.

As for the transfer of the case from the High Court to the lower court, one of the issues raised by the respondents was that this application was incompetent as it was brought by a Notice of Motion whereas O. VIA rule 8 prescribes that applications under that Order be made by chamber summons. My response to this argument is simply that this application combines prayers under the Civil Procedure Rules, as well as the application for transfer of this case from the High Court to the lower court which is provided for under the Civil Procedure Act. O. L rule 1 of the Civil Procedure Rules provides the procedure to be followed in applications. It states simply:-

“All applications to the court, save where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open court.”

Since Section 18 of the Civil Procedure Act does not and cannot prescribe the mode in which applications thereunder should be made, it follows that all such applications should be made by Notice of Motion.

Secondly, O. L rule 9 is also relevant. It provides:-

“Where any application authorized by these Rules to be made at Chambers is made in court, any additional cost occasioned thereby shall be borne and paid by the party making the same, unless the court shall order otherwise.”

This rule makes it clear that the making of an application by way of a Notice of Motion instead of a Chamber Summons is not necessarily fatal. But if such an application attracts an additional cost, then such cost would be borne and paid by the party making the application.

In the instant case, in view of the application to transfer the case to the lower court, the applicant had no

option but to file a Notice of Motion. However, the respondents resist the transfer of the case on the ground that they stand a chance of getting a higher award of damages in the High Court than in the lower court. One cannot blame them. They are entitled to their day in either court.

For the above reasons, I accordingly make the following orders:-

- 1. That leave be and is hereby granted to the defendant to amend the defence and counterclaim in the manner shown in the proposed annexure to the affidavit in support of this application.*
- 2. That the proposed pleading be deemed to be properly filed upon the payment of the requisite court fees.*
- 3. That if the court fees have not yet been paid, then such fees be paid and the amended defence and counterclaim be served upon the plaintiffs and the additional defendant within 7 days from today.*
- 4. That the additional defendant be at liberty to file and serve his defence to the suit and counterclaim within 14 days of service.*
- 5. The application for the transfer of this suit to the lower court is hereby dismissed.*
- 6. The defendants will bear the costs of this application in any event.*

Dated and delivered at Mombasa this 24th day of April 2008.

L. NJAGI

JUDGE