



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 104 of 2007

CORNER HOLIDAY INN LIMITED.....1ST PLAINTIFF

PETER KIMEMIA NJOROGE.....2ND PLAINTIFF

VERSUS

ANDREW KURIA WANGUNYU.....DEFENDANT

R U L I N G

The Plaintiffs by Chamber Summons dated 30th January 2008 brought under order 1 Rules 1,3,6 10(4) and 13; order VIA Rules 3,5 and 8 of the Civil Procedure Rules and Section 3 of the Civil Procedure Act and all other enabling provisions of the law sought to amend their annexed thereto. There are seven (7) grounds on the face of the application as the basis of the application as follows:

- 1. That the Plaintiffs need to plead more particulars in the plaint.**
- 2. That the said particulars were inadvertently omitted when the plaint was filed.**
- 3. That no rights have accrued to the defendant yet and he will not be prejudiced by the proposed amendments.**
- 4. That the amendments will enable the court to fully determine the actual matters in controversy.**
- 5. That the proposed 3rd Plaintiff and 2nd Defendant are necessary parties to the suit.**
- 6. That the presence of the proposed 3rd Plaintiff and 2nd Defendant is necessary to enable this Honourable court fully determine and or adjudicate the actual matters in controversy.**
- 7. That no prejudice will be occasioned to the defendant by the proposed jointer of the proposed parties.**

The application is supported by the affidavit of Peter Kimemia Njoroge the 2nd Plaintiff who deposes that he deposes it on his won behalf and on behalf of the 1st Plaintiff who has authorized him to swear it. There is also another Supporting Affidavit sworn by Muriuki Gitau Joseph. There is filed a Replying Affidavit by Andrew Kuria Wangunyu on 3rd March 2008.

It is submitted for the Applicants that it is necessary to amend the plaint to bring in necessary parties to the suit and also to bring in a further claim against the Defendant so that it is placed before the court the real issues in controversy for the court's proper determination of the matters in issue. It was further submitted that the Defendant would not suffer any prejudice. It was further submitted that it is meet to allow the proposed amendment so as to avoid the need for a multiplicity of suits and also to save on judicial time. The Applicants submitted that the matters advanced by the Defendant in his Replying Affidavit are properly advanced at the hearing of the suit itself or in their application dated 17/09/2004. It was stated that the Defendant does not raise any issue of suffering prejudice if the amendment is allowed.

The application was opposed and counsel for the Defendant submitted that the suit sought to be amended was incompetent and in any event there were pending applications which should be disposed off in priority to the Applicants' application. It was submitted that to allow the proposed amendment is to act in vain in the circumstances of this matter and the Defendant will be required to defend himself unnecessarily causing him prejudice. In reply counsel for the Applicant stated that the Defendant's application referred to is four years old and the plaintiffs cannot wait for ever. The defendant will have his day in court when he decides to prosecute his application.

I have considered the application and the submissions by counsel appearing. The principles governing the grant of leave to amend pleading are well documented and the courts have been very consistent in the application of those principles.

In the case of **TILDE –versus- HARPER (1878) 10 Ch.D.393** Bramwell L.J said:-

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide or that by his blunder he had done some injury to his opponent which could not be compensated by costs or otherwise.

And in the case of **G. L. BAKER LTD V MEDWAY BUILDING AND SUPPLIES LTD [1958] 3 ALLER 540 at P. 546** it was stated in allowing an amended by Jenkins L.J. that

“...for the purpose of determining the question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings.”

The principle is that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs. The main principle is that an amendment should not be allowed if it causes injustice to the other side, see the case of **EASTERN BAKERY –vs- CASTELINO [1958] E.A. 461.**

It appears from these authorities and other on the same subject that an application for amendment of pleadings is always in the discretion of the court. Provided the application is made in good faith and without undue delay amendments to pleadings sought before the hearing should be freely allowed if they can be made without occasioning injustice to the other side, and there is no injustice if the other side can be compensated by costs. Even where there is delay, the amendment will be granted if the other side can be compensated by costs.

Guided by the above decisions and so as to serve the greater justice between the parties herein and having perused the Plaint the Defence and the draft amended plaint I grant the orders sought in Chamber Summons dated 30th January 2008. The plaintiffs' draft Amended Plaint to be filed and served within TEN (10) days of the date hereof. The Defendant is granted leave to file and serve an amended defence, if he so wishes, within TEN (10) days of the date of service of the amended plaint. The plaintiffs will pay the costs of this application to the Defendant.

DATED DELIVERED IN NAIROBI this 2nd day of May 2008.

In the presence of

Mr. Githinji for the Respondent

Mr. Ibrahim for the Applicant

P. M. MWILU

JUDGE

O2.05.2008