



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 4 of 2008

GEORGE NYAKUNDI OMBABA.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

RULING

1. This case is part-heard before me. The Plaintiff's case is closed. On the 9/07/2008, the Defendant asked for adjournment to enable him call his witness at a later date. Defence hearing was fixed for 30/09/2008. On the 22/07/2008, the Plaintiff filed an application dated 21/07/2008 by way of Chamber Summons under Order 9A Rules 7 and 11 of the Civil Procedure Rules seeking the following orders:-

1. *(Now spent)*
2. *THAT leave be granted to this Plaintiff to amend his plaint as per annexure "A".*
3. *THAT leave be granted to Plaintiff to adduce further evidence notwithstanding the closure of his case*
4. *THAT the annexed Amended Plaint be treated as duly filed and served.*
5. *Costs in the court (sic).*

2. The grounds in support of the application are that it is necessary to plead special damages and that the proposed amendments will assist the court in determining the real question in controversy. The Plaintiff has also sworn an affidavit in support of the application and says that the amendment is necessary for purposes of assisting the court in determining the real question in controversy. He also says that the proposed amendment will not cause any prejudice to the Respondent.

3. The application is opposed. There are four (4) Grounds in Opposition as filed on behalf of the Defendant on 29/07/2008:-

- (a) *That the application is bad in law and an abuse of the court process.*
- (b) *That the prayers sought will greatly prejudice the Defendant and are statute-barred.*
- (c) *That the sums claimed are very high and the amendment is an after thought.*
- (d) *That the application is defective as there is no prayer for the matter to be heard during the*

***vacation.***

4. In my view, grounds (c) and (d) are not valid grounds. Ground (d) in particular does not apply since the application was not heard during the vacation. As for ground (c) the quantum of sums claimed does not and should not affect a party's right to amend a pleading. I shall therefore only confine myself to an analysis of submissions made as they affect grounds (a) and (b) above.

5. At the hearing of the application, Counsel relied on their respective pleadings. Mr. Owuor for the Applicant submitted that there is nothing bad in law in the Applicant seeking leave of the court to amend his plaint and that amendment of pleadings can be done at any time during the proceedings. He also submitted that the proposed amendment would not cause any prejudice to the Respondent. Mr. Onyancha who appeared for the Respondent argued that the issues now raised in the amended plaint are different from those in the plaint and that the same would prejudice the Defendant since there would be no time for the Defendant to put in its amended defence. Neither counsel cited any authority to the court.

6. Order 9 Rules 7 and 11 of the Civil Procedure Rules, under which the application is brought provide entry of judgment in default against the Government and procedure for bringing applications under this Order. The court is not sure that the Plaintiffs counsel looked carefully to confirm the specific rules under which this application ought to have been brought. The correct order for applications of this nature is Order 6A Rule 3(1) which gives this court the power to grant orders for amendment of pleadings at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such a manner as it may direct. It would seem to me too, that counsel for the Defendant did not notice this error on the Plaintiff's application, but that notwithstanding, I think that Order 6 Rule 12 and Order 50 Rule 12 of the Civil Procedure Rules would come to the aid of the Plaintiff. I only need to say here that care needs to be taken by counsel to do their work properly.

7. The question that arises for determination is whether the Plaintiff's application is meritorious. There is abundant case law both from the High Court and the Court of Appeal giving effect to Order 6A Rule 3(1) of the Civil Procedure Rules subject to Order 23 Rules 3,4,5 and 7. I have looked at the above rules and find that they would not stand in the way of the Plaintiff's application. The Defendant alleged that the proposed amendments were statute barred, but there was no proof of such allegations at the hearing hereof.

8. In the result, I would allow the Plaintiff's application and grant him leave to amend his plaint in terms of the draft amended plaint. The draft amended plaint should be properly filed and served upon the Defendant upon payment of the requisite court fees. The Plaintiff should do so within fourteen (14) days of this ruling. The Defendant shall be at liberty to file an amended defence in accordance with the rules of amendment. Once the amended pleadings are closed, the Plaintiff shall have leave to adduced further evidence in support of his case. Costs of this application shall be borne by the Plaintiff.

It is so ordered.

**Dated and delivered at Nairobi this 17<sup>th</sup> day of October 2008.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:

..... For the Plaintiff

..... For the Defendant