

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 237 of 2004

STAR FISH COTTAGES LTD.PLAINTIFF

VERSUS

HALIMA AMIR BOIDEFENDANT

R U L I N G

By an oral application made pursuant to Order VIA rule 5 and 8 of the Civil Procedure rules, Mrs. Kipsang, learned advocate for the defendant, prayed for leave to be allowed to amend the Chamber Summons dated 1st December 2006. Basically the learned advocate wanted to add to her summons *Order XXXIX rule 4 of the Civil Procedure rules* and secondly to add the words “*set aside and or discharge unconditionally the exparte interim order of injunction*” to prayer 2 of the aforesaid summons.

Mr. Ndegwa, learned advocate on the part of the plaintiff vehemently opposed the application. He argued to the effect that the intended amendment would introduce a totally different prayer which would be detrimental to his client’s case. The learned advocate was of the view that the summons dated 1st December 2006 does not exist because it had been extinguished by the amendment of 5th December 2006.

I have considered the rivaling submissions. I have also perused the court file. Order VI A rule 8 of the Civil Procedure Rules allows this court the discretion to entertain an oral application to amend pleadings. The purpose of amendments is to enable the court to determine the real issues in controversy. That is why when it comes to the power to amend pleadings courts have a wide discretion to freely allow amendments so long as the amendments do not totally alter the character of an action. The proposed amendment is basically to introduce the provisions of the law or rule relied upon and to add a new prayer. The plaintiff has said that the intended amendment will introduce a totally different prayer. I have anxiously considered these submissions and I am convinced that the plaintiff will not suffer any prejudice if the oral application for amendment is allowed. The fact that a new prayer will be introduced does not mean that the amendment should not be allowed. The cardinal point is that the amendment should be geared towards resolving the real issues in dispute.

The other ground of objection is to the effect that the chamber summons dated 1/12/2006 has been extinguished by the amendment effected on 5/12/2006. The record shows that on 13/12/2006 Mr. Ndegwa advocate recognized the pendency of the aforesaid application when he consented for the withdrawal of the amended chamber summons dated 5/12/2006 and at the same time fixing of the summons dated 1/12/2006 for hearing on 6/02/2007. In fact it was him who read the terms of the consent. A party cannot be allowed to blow cold and hot at the same time.

In the end I allow the oral application with costs to the plaintiff in any event. Let the defendant amend and serve the chamber summons dated 1/12/2006 in terms of the oral representations within 14 days from the date hereof.

Dated and delivered at Mombasa this 22nd day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mrs. Kipsang for the defendant and Mr. Obonyo h/b Ndegwa for plaintiff.