



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

Civil Case 668 of 2001

ZOEAL TRANSPORTERS LIMITED.....APPELLANT

VERSUS

THE TRUSTEES OF LUTHERAN WORLD FEDERATION.....DEFENDANT

RULING

The Plaintiff filed an initial plaint herein dated 25th day of April 2001. It was filed the same date of 25.4.2001. It was amended on 10.9.01 and the amended plaint filed on 13.9.01. The defendant filed an appearance dated 28th September, 2001 and filed on 2.10.2001. There is a defence to the amended plaint dated 16th October 2001 and filed on 17th October 2001. Then there is an amended defence amended on 2nd November 2001 and file don 2nd November 2001.

Upon perusal of the court record, this court has traced on application by way of Chamber Summons dated 10th September 2005 filed under Sections 3A of the Civil Procedure Act, Order VIA rules 3(1) 5 and 8 and order L rule 15 (2) of the rules and all other enabling provisions of the law. Prayer 1 of that application sought leave to be granted to the plaintiff to further amend the plaint herein in terms of the draft further amended plaint, annexed herewith, prayer 2 is to the effect that upon prayer 1 being granted the draft further amended plaint annexed to the application was to be deemed as properly filed and served on the defendants on any terms that the Honourable Court may find fair and just and that costs of the application be in the cause.

A perusal of the court record reveals entries made by the court on 21.7.2006. On this date counsels of both parties attended Court. A consent order was made where by the plaintiffs' application dated 10.9.2005 and filed on 11.7.2006 was allowed by consent. By this consent it meant that the plaintiff was allowed to further amend its plaint. By the same order the defendant was allowed 14 days to file and serve an amended defence from the date of service upon them of the further amended plaint. The orders were made by the Senior Deputy Registrar.

The defendant then filed an application by way of Chamber Summons dated 8.2.2007 under order VI rule 13 (1) (d) and VIA rule 6 of the Civil Procedure Rules and all other enabling provisions of the law seeking orders that the further amended plaint further amended and dated 10.9.2006 and filed on 3.10.2006 be and is hereby struck out on the ground that it is an abuse of the process of the Court.

The Plaintiff opposed the same vide their grounds of oppositions dated 27th February, 2007 and filed on 1.3.2007. This application came up for hearing on 24.5.2007 Counsel for the defendant did not appear to prosecute it. In opposing the same counsel for the plaintiff made the following submissions:-

- 1) That the application is incompetent.
- 2) It is misconceived.
- 3) It is vexatious.
- 4) It is a nullity.
- 5) The court has no jurisdiction to entertain it.
- 6) The order sought is fake.
- 7) They did not enter appearance and so under the relevant rules pleadings can be amended at any stage of the proceedings.
- 8) That the supporting affidavit is erroneous as it was given long before the application was made and dated.

On the basis of the foregoing counsel asked the court to dismiss the application.

This Court has considered the said submissions in the light of the sequence of events taking place on the court record as outlined above and finds that submissions that the defendants had never entered appearance and therefore pleadings never closed is erroneous as it is on record that the defendants entered appearance, filed a defence and even amended their defence. Counsel made that submission without appraising himself of the current position on the court record. The current position is that an application was duly made by the Plaintiff to further amend the plaint. That application was disposed off by consent before the Senior Deputy Registrar. The orders were made on 21.7.2006. So long as those orders stand the defendant has no jurisdiction to attack the further amended plaint on record. It was prayed that it be treated as being duly filed and served. The orders of 21.7.2006 allowed it as prayed. All that is left is for the plaintiff to pay for it.

The only ground in opposition was that it had been filed out of the time allowed by order 6A rule 6. This was taken care of by the consent of 21.7.2006. As for allegation of a defective affidavit there is no doubt that it is alleged to have been sworn on 18.12.2006. The application is dated 8.2.2007 one month and 21 days later. In terms of Section 5 of the Oaths and Statutory Declarations Act Cap.15 Laws of Kenya

ffidavit is deemed to have been sworn and dated on the date indicated. Order 18 rule 9 states “*Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned*”. No special reason was shown to this court for it to reject the affidavit solely for it having been sworn before the application was dated. Although it is a “suit” mentioned in that rule this court has no doubt that the provisions also applies to an affidavit sworn in support of an application.

For those reasons the defendants application of 8.2.2007 be and is hereby ordered to be dismissed both on merit and procedurally because the defendant did not come to prosecute it on merit because it was made erroneously in contravention of the consent orders made on 21.7.2006.

(2) The plaintiff Respondent will have costs of the said application.

DATED, READ AND DELIVERED AT NAIROBI THIS 28TH DAY OF MAY 2007.

R. NAMBUYE

JUDGE