



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

**Civil Case 92 of 2006**

**LAKE JIPE SAFARI LODGE LIMITED .....PLAINTIFF**

**VERSUS**

**KENYA WILDLIFE SERVICE.....DEFENDANT**

**RULING**

I have before me an application by way of Chamber Summons under Order 6A Rule 6, Order 25 Rules 1, 5 and 6 of the Civil Procedure Rules and Section 401 of the Companies Act. The application seeks that the plaintiff's amended plaint dated 10<sup>th</sup> January, 2006 and filed in court on 14<sup>th</sup> February 2006 be struck out with costs to the defendant. It is the contention of the defendant that the plaintiff was given leave by the court on 16<sup>th</sup> December, 2005 to amend the plaint. And that the plaintiff filed the amended plaint on 14<sup>th</sup> February 2006 which is outside the limit provided in the Civil Procedure.

The defendant also has sought an alternative prayer that the plaintiff do within a time to be fixed by this court give security in the sum of Kshs. 10 million for the defendant's costs of this suit. The 3<sup>rd</sup> prayer in the application is that if the plaintiff fails to give security for the defendant's costs as aforesaid then the plaint be struck out with costs to the defendant.

The plaintiff upon service of the Chamber Summons dated 31<sup>st</sup> March 2006 filed a Notice of Motion under Order XLIX Rule 5 of the Civil procedure Rules seeking;

- (1) That this Honourable court be pleased to extend the time for filing the amended plaint.**
- (2) That the amended plaint herein filed on 14/02/2006 be deemed to have been duly and properly filed within time.**
- (3) That costs of this application be in the cause.**

It is the case of the Plaintiff that it was given leave to amend the plaint on 16<sup>th</sup> December, 2005 but in order to file the amended plaint, an additional sum of Kshs.65,750/= was required by the court. It is alleged that the plaintiff was unable to raise the said sum of money immediately. And that it was only able to raise the said sum of money after the lapse of the time for so doing. It is alleged that as soon as the plaintiff got the monies, the amended plaint was filed though late.

The application on behalf of the defendant was well argued before me by **Mr. Gitonga Murugara** who

submitted as follows: That there is no material to show why the amended plaintiff was filed late and that there is no material evidence to controvert the prayers sought in the application of the defendant. On the allegations that the plaintiff had difficulties in raising the requisite court fees, he submitted such a company which brings a claim of over 400 million but unable to pay such minimal fees would never be in a position to pay the costs in the suit. He therefore urged me to struck out the amended plaintiff and/or in the alternative make an order for security of costs.

**Mr. Arwa** learned counsel for the plaintiff argued that the Notice of Motion dated 10<sup>th</sup> May, 2006 and also opposed the defendant's application dated 31<sup>st</sup> March, 2006. He urged me to exercise my discretion in favour of the plaintiffs who are in pursuant of a genuine claim.

There is no dispute that the plaintiff sought and obtained leave to amend its plaintiff, which was granted on 16<sup>th</sup> December, 2005. It is contended by the plaintiff's advocate that at the time leave was granted the said Advocates had closed for Christmas holidays. It is further deponed that when the Advocates for the Plaintiff resumed, they requested for the filing fees from the plaintiff. It is alleged that the plaintiff did not have the money and the same had to be raised from the directors. The amended plaintiff was therefore subsequently filed on 14<sup>th</sup> February, 2006. According to **Mr. Arwa** Advocate the delay was for a period of 39 days and that there is no prejudice occasioned by the delay in filing the plaintiff.

It is the case of the plaintiff that the delay was caused by circumstances outside the control of the plaintiff. **Mr. Arwa** Advocate put forward three mitigating factors which caused and/or contributed to the delay in filing the plaintiff. The first point is that the plaintiff's business was raided and closed by the defendant hence the want of means was caused by the defendants themselves. Secondly because the defendant is the root cause of the plaintiff's problems, then they should not benefit from their own wrong by striking out the plaintiff. Thirdly it is alleged that the delay was caused by the closure of the offices of the plaintiff's Advocates for Christmas holidays, which are outside the control of the plaintiff company. Against that background the plaintiff seeks for extension of time within which to file the amended plaintiff.

I appreciate the court has unfettered discretion on both applications by the plaintiff and defendant. Such discretion has to be exercised in order to sustain the case of the parties, so that the matter in dispute can be determined on merit. In this case, the court did not specify the period for filing the amended plaintiff. In such situation the party granted leave to amend is required to file its pleadings within 14 days. However the court is empowered to extend the period upon sufficient reasons and in order to achieve substantive justice between the parties. The import of Order 6A Rule 6 is that the court has wide and unfettered powers to extend the period for filing an amended pleading. Of course the rationale is to do justice to the claim and defence of the parties. The primary concern of the court is to do justice and in order to measure to that yardstick, the court must always endeavour to sustain the cause of the parties. The court has to weigh the injustice resulting from an order refusing to extend time and merit determination of the dispute. The purpose of coming to court is to assert a right allegedly infringed by a party and in my view that right has to be determined on merit and on substantive justice.

I think there is sufficient material and credible testimony that mitigates against the striking out the plaintiff's pleading. I am not minded to strike out the amended plaintiff simply because there is a delay of 39 days. The plaintiff has adequately and sufficiently explained the reasons for the delay. I am persuaded that the reasons offered are plausible and meet the test of this court.

The other issue is whether to give an order for security in the sum of Kshs. 10 million for the costs of the defendant against the plaintiff. The plaintiff's claim against the defendant is for a sum of Kshs.440,172,000/= being the value of goods left at the lodge which were either stolen and/or vandalized due to the actions of the defendant. The plaintiff claims to have incurred substantial loss and damage due to the actions and/or omissions of the defendant. It is the contention of the plaintiff that it had a lease agreement with the defendant to operate its business within the designated area. It is alleged that the defendant on 14<sup>th</sup> November, 2000 sent its officers to the site to forcefully evict all the employees of the plaintiff from the lodge rendering the operation of the plaintiff company to halt. That position is heavily contested by the defendant, who accuse the plaintiff of flagrant breach of the agreement to the detriment

of the parties herein. The defendant has also counterclaimed a sum of Kshs.1,378,695/= against the plaintiff. That state of affairs is still pending for determination. I reckon that the present suit was filed in the year 2001 but the failure of the plaintiff to comply with the decision of the court made on 16<sup>th</sup> December, 2005 is what prompted the actions of the defendant.

It is the contention of the defendant that a party who is unable to pay a sum of Kshs.65,750/= with no assets known would ultimately fail to pay any costs awarded. There is no indication that the plaintiff's suit is frivolous or vexatious or that it has no reasonably good prospect of success. I have no material to show that the plaintiff's suit is not bonafide but meant to gain unfavourable advantage over the defendant.

The question is whether the powers given to the court by Order 25 Rule 1, 5 and 6 of the Civil Procedure Rules and Section 401 of the Companies Act can be used to scuttle the claim put forward by a poor litigant. The inability of the plaintiff to pay the filing fees within the specified period is the basis for the defendant's application for seeking security for costs. In my view no specific conditions or criteria are imposed before the court can exercise its discretion to order for security for costs. The court can address whether the plaintiff's claim is bona fide or whether it is a sham put forward to seek a false mileage.

As stated the present suit was filed way back in the year 2001. The present application by the defendant for security for costs was filed in the year 2006. The question which I must ask myself is why the said application is undertaken almost 5 years after the filing of the suit. It means the application was promoted by the failure of the plaintiff to file its amended plaint within the specific period. In my view the inability of the plaintiff to file its pleadings within the required period is not a basis to give an order for security for costs.

It is incumbent upon the defendant to show that the present application for security is not being used oppressively so as to stifle a genuine claim from reaching the eyes of justice. In any case it is alleged that the plaintiff's want of means has been brought about by the conduct of the defendant. The question therefore, is that whether the court should place an impediment upon the case of the plaintiff which has been in court corridors for the last 6 years, simply because the plaintiff was late in filing a particular document contrary to the rules of procedure.

It is my position that a party's impecunious position and being in financial difficulty are not justifiable reasons to order for security for costs. The court does not look at the financial muscle of the parties but whether the plaintiff's claim or defendant's defence is bona fide to warrant a full hearing and determination. My take is that a party who has a bona fide claim should not be forced to abandon his claim for lack of means. That would make the whole purpose of seeking justice futile. And definitely justice would be at the preserve of the rich and the powerful who can show their muscle around. Poverty is not to be made a bar to bringing or sustaining a suit simply because the defendant thinks that it would eventually win the contest and therefore would be entitled to costs, which needs interim protection by placing a caveat on the claim of the plaintiff.

It is my view that, mere poverty of a plaintiff is not itself a ground for ordering security for costs, if this were so poor litigants would be deterred from enforcing their legitimate rights through the legal process. One consideration is whether the defendant would be put to undue expenses by defending a frivolous and vexatious suit by an impecunious party whose likelihood of paying costs is nil. In such circumstances I am expected to weigh the scales of justice, in order to determine the merits and demerits of ordering security for costs. By doing so the court should be slow to whittle away the rights of persons pressed by financial difficulties to sustain their cause of action. My view is that poverty notwithstanding, the plaintiff has a natural right to litigate for any cause of action which can prima facie pass the test of being bona fide dispute craving for determination.

The plaintiff is crying loud and clear that its financial downfall was brought about by the defendant. In essence the plaintiff is saying that the defendant should not be allowed to derive any benefits from its own misconduct. By shutting out the plaintiff from pursuing that alleged cause of action would amount to oppression. The dream and hope of the plaintiff started in the year 2001, when it brought its alleged

cause of action to the corridors of justice. I think it is fair and prudent to allow that hope to reach the final destination. That destination is to determine the matter on merit without any restriction, impediment or caveat, so that the plaintiff's hope is not dashed prematurely. If such is done the powers donated by Section 401 of the Company's Act and Order 25 of the Civil Procedure Rules would become an oppressive weapon against impecunious parties.

Having considered the age of the suit, having addressed my mind to the merits and prospects of success of the plaintiff's case against the defendant, I am persuaded to disallow the application for security for costs. The material available dictates that the matter must be allowed to proceed without any restrictions. To place restriction on the hope of the plaintiff 6 years down the line after the race had started would put unfair pressure to the contest. Of course if the plaintiff is unable to measure to the restriction, it would have lost the race and the court would have played a great role in the match being stolen from the plaintiff.

**In the premises the Chamber Summons dated 31<sup>st</sup> March, 2006 is dismissed with no orders as to costs. And the Notice of Motion dated 10<sup>th</sup> May, 2006 is allowed with no orders as to costs.**

Dated and delivered at Nairobi this 8<sup>th</sup> day of May, 2007.

**M. A. WARSAME**

**JUDGE**