



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

Civil Case 49 of 2005

KAM COMPANY LTD.PLAINTIFF

VERSUS

SHELTER AFRIQUE DEFENDANT

RULING

I have before me an application to strike the plaintiff's re-amended plaint dated 19.10.2006 and the entire suit. The application is expressed to be brought under the provisions of Sections 3, 3A and 5 of the Civil Procedure Act Order 1 Rule 10, Order VI Rule 13 (b) (d) and 16 of the Civil Procedure Rules.

The reasons for the application are as follows:-

- (1) That the re-amended plaint is an abuse of the process of the court as the same was filed out of time and without prior leave.**
- (2) That the order of 29.9.2006 pursuant to which leave to re-amend was given ceased to have effect on 16.10.2006 and there is therefore no plaint upon which to sustain the plaintiff's suit.**
- (3) That the re-amended plaint dated 19.10.2006 is outside the ambit of the order of 29.9.2006 and the draft annexed to the Chamber Summons dated 31.5.2006 in so far as the same seeks to introduce a second plaintiff without prior leave of the court.**
- (4) That the plaintiff has despite notice on 25.10.2006 refused and/or otherwise failed to seek leave to file a proper re-amended plaint out of time.**
- (5) That the re-amended plaint dated 19.10.2006 and filed on the same date and the plaintiff's suit is a nullity.**
- (6) That the plaintiff's suit as against the 2nd defendant is bad in law and contrary to statute in so far as it seeks to impeach the validity of the title of the 2nd defendant contrary to the provisions of Section 69 B (2) of the Indian Transfer of Property Act [1882].**
- (7) That the plaintiff's suit is scandalous, frivolous and or vexatious.**

The application is supported by an affidavit sworn by one Stanley Kinyanjui, a director of the 2nd defendant. The affidavit is an elaboration of the grounds in the body of the application. The application is opposed and there is a replying affidavit sworn by one Peter Kamau Ikigu, the 1st plaintiff's Managing

Director. There are also Grounds of Opposition filed by the advocates for the plaintiffs. The plaintiffs contend that the re-amended plaint was properly filed and served upon the 2nd defendant who in turn failed to file its defence. The plaintiffs further contend that the application is res judicata as some of the issues raised in the application are issues that have been raised before and dealt with by the court. It is further contended by the plaintiffs that they have a strong case against the defendants involving fraud and large sums of money which cannot be dismissed as a nullity **ab initio**. The competence of the application is challenged on the basis that it was filed out of time in breach of the order of 29.9.2006.

The application was canvassed before me on 19.4.2007 by Mr. Havi – learned counsel for the 2nd defendant/applicant, Mr. Khalwale – learned counsel for the plaintiffs and Mr. Thiga – learned counsel for the 1st defendant.

I have considered the application, the affidavits both in support and in opposition to the application, the Grounds of Opposition and the submissions of counsel. I have also given due consideration to the authorities cited to me by counsel. Having done so I take the following view of this matter. The principal issues debated before me related to the effect of the order I made on 29.9.2006 on the plaintiff's application for leave to re-amend its plaint and the interpretation on Section 69 B (2) of the Transfer of Property Act of India.

On 29.9.2006, I allowed the plaintiff's application for leave to re-amend its plaint. The draft re-amended plaint was to be deemed filed on payment of the requisite court fees. I also gave liberty to the defendants to file amended defences if they deemed necessary within 14 days of service of the re-amended plaint. The draft re-amended plaint did not have two plaintiffs and was not signed. The applicant then did not seek leave to introduce an additional plaintiff. All that the applicant needed to do was to sign the draft and pay the requisite court fees as ordered. That did not happen. Instead a re-amended plaint was filed on 19/10/2006 which introduced a 2nd plaintiff. Since I did not specify the period within which the requisite court fees would be paid, the applicant then had to comply with Order VIA Rule 6 of the Civil Procedure Rules.

The rule reads as follows:-

“6. Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or if no period is specified within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.”

So when the plaintiffs filed their re-amended plaint on 19.10.2006, they were clearly outside the period allowed in the above rule. The order had in terms of the said rule ceased to have effect. Should I therefore strike the re-amended plaint in its entirety? I am reluctant to do so. That is because the plaintiff's original action contained in the original plaint would not be adjudicated upon by the court because of a lapse on the part of counsel. Further the rule quoted above saves the power of the court to extend the period prescribed in the rule.

With regard to the 2nd defendant's contention that the validity of its title cannot be impeached by dint of the provisions of Section 69 B (2) of the Indian Transfer of Property Act [1882] I am afraid that is a general proposition. The section is not in my view an absolute bar to any action touching on the 2nd defendant's title. For the 2nd defendant to succeed in its plea it has in my view, to exclude fraud imputation and want of notice. Those are not matters that can conclusively be determined in this application as all I have are allegations that are disputed. The 2nd defendant has also not demonstrated that it will be prejudiced beyond what is compensatable by an award of costs.

In **Trust Bank Ltd. vs. Amolo Company Ltd. – C.A. No.215 of 2000 (UR)** – the Court of Appeal observed as follows:-

“The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their merit and that “errors should not

be necessarily deter a litigant from the pursuit of his right.”

In the application at hand, the plaintiff may have erred in not filing its re-amended plaint in time because of its counsel’s misapprehension of the relevant rules. I will not visit the misapprehension on the plaintiff. With regard to the 2nd plaintiff, the order of 29.9.2006, did not entitle the plaintiff to introduce a new plaintiff or an additional party to these proceedings. Indeed no such order was sought in that regard. The inclusion of the 2nd plaintiff in the re-amended plaint was therefore improper and irregular as leave was neither sought nor obtained to do so. In the end, I will extend the time for filing a re-amended plaint for a further 7 days from the date hereof. The said re-amended plaint should be served upon the defendants within the stated 7 days. The defendants are granted leave to amend their defences if they deem it necessary within 14 days of service of the re-amended plaint.

With regard to costs, I am of the view that the same cannot follow the event in this application. That is because even though I have not allowed the 2nd defendant’s application, the application was not without merit as stated above. The plaintiff shall pay the defendants the costs of this application.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 5th day of June 2007.

F. AZANGALALA

JUDGE

Read in the presence of:- Mr. Khalwale for the plaintiff, Mr. Thiga for the 1st defendant and Mr. Havi for the 2nd defendant.

F. AZANGALALA

JUDGE

5/6/07