

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 192 of 2006

MOHAMED S. BAKHRESAPLAINTIFF

V E R S U S

NASRA ABDULWAHAB AHMED DEFENDANT

RULING

The Plaintiff seeks leave of this court to amend his plaint. He claims that as the suit properties were in danger of being spirited away he filed this suit in a hurry before discovering much. He says he has since the filing of the suit discovered secret accounts held by the defendant and other matters that he wants to bring to the attention of the court.

In presenting the application the plaintiff's lead counsel submitted that the plaintiff will during the hearing of this suit demonstrate that the defendant siphoned funds from the account she held with him into the secret accounts even though some are in the names of third parties.

The defendant strongly opposes the application. Apart from denying that she was at any time disposing of the suit properties to require the plaintiff to file this suit in a hurry she has averred in the replying affidavit that there is nothing she hid from the plaintiff. She has stated that the plaintiff at all times knew of all the accounts she held in her name and those in their joint names. She further states that the amendments the Applicant seeks to make will not assist to determine the real issues in controversy in this case as the accounts the plaintiff wishes to introduce are in the names of people who are not parties to this suit. She fears that if the plaintiff is allowed to introduce them that will confuse and obscure the issues in this case.

The law is quite clear on amendments to pleadings. As was stated by the Court of Appeal in **Central Kenya Ltd. –Vs- Trust Bank [2002] 2 EA 365** amendments to pleadings should be freely allowed unless the opposite party will be prejudiced or suffer injustice which can not properly be compensated for in costs. With that principle in mind, when counsel finished arguing this application I thought it is one of those run-of-the-mill applications for amendment that I would allow and let the parties fight it out at the hearing. But after a careful consideration of the matter I am of a different view on some aspects of the amendments sought to be introduced.

The defendant has specifically averred in the replying affidavit that the accounts sought to be introduced are in the names of the third parties who are not parties to this suit and that to allow them to be introduced will obscure the issues. I agree with that averment.

In the draft amended plaint the names of the holders of those accounts have not been given. Further more the plaintiff has not specifically denied the defendant's assertion that those accounts are in the names of third parties. If I understood his counsel well, his argument was that even if those accounts are in the names of third parties the plaintiff will during the hearing demonstrate that funds were transferred from the defendants account or those jointly held with the plaintiff into those third party accounts. But that is not what is stated in the proposed amendment. In paragraph 13A it is alleged that funds were transferred into those accounts "from unknown accounts." This is not the kind of amendments the courts should freely and liberally allow to be made. I agree with counsel for the defendant that to allow the plaintiff to introduce those accounts will obscure the issues in this case.

To allow the amendment relating to those accounts will obviously drag the names of their holders into this suit without making them parties. I am sure that will lead to allegations of their relationship, if any, with the defendant or what advantage the defendant would gain by transferring her funds with the plaintiff into those accounts. That is going to be murky and obfuscate the issues in this case as I foresee the holders of those accounts going to seek to be joined in this case to refute the allegations that the defendant transferred funds into their accounts to defraud the plaintiff. If that happens those people are going to try to demonstrate the source of the funds deposited into those accounts. That is not an issue in this case and I agree with the defendant that that is not only going to delay the quick disposal of this case but will also cause prejudice to her.

Besides that the court will not make orders touching on accounts of people who are not party to this suit. I think it will be enough for the plaintiff to show, if he can, that the defendant cannot account for the funds withdrawn from their accounts or those held for him in her name. If he wishes to trace those funds into other people's accounts he must make those people parties to this suit.

For these reasons the amendments relating to those accounts, that is paragraph 13A of the proposed amended plaint and those referring to those accounts are refused. The plaintiff is however allowed to make the other amendments.

Save as hereinabove stated his application is dismissed with costs.

DATED and delivered this 11th day of July 2007.

D.K. MARAGA

JUDGE