



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (Milimani Law Courts)

CIVIL SUIT 668 OF 2006

KENLINE AGENCIES LTD.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA.....1ST DEFENDANT/RESPONDENT

JOHN GITHUA NJOGU.....2ND DEFENDANT/RESPONDENT

RULING

This is the plaintiff's application for leave to reamend its amended plaint dated 18.12.2006. It is the plaintiff's case that since the amended plaint was filed the position of the parties has been altered in that a transfer of LR No.209/11475 (hereinafter "the suit property") has been effected in favour of the 2nd defendant and it has become necessary to plead further grounds relating to fraud in respect of the said transfer.

The application is expressed to be brought under the provisions of Order VIA Rules 3 and 5 of the Civil Procedure Rules and is supported by an affidavit of Jacinta Wanjiru Kigo a director of the plaintiff. It is deponed in the affidavit inter alia that in order for the real questions between the parties to be determined it is essential that the amended plaint be further reamended. It is further deponed that the transfer was registered fraudulently in defiance of court orders prohibiting any change of ownership. Annexed to the said affidavit is a copy of the proposed reamended plaint. Particulars of fraud have been pleaded and there are new prayers for cancellation of the transfer, injunction to restrain the plaintiff's eviction and in the alternative there is a prayer for compensation.

In response to the application, the first defendant's advocates' have filed Grounds of Opposition and the 2nd defendant has filed a replying affidavit. The 1st defendant contends that the orders sought if granted would cause it injustice and prejudice as in the 1st defendant's view, the plaintiff who has no sustainable claim against it is seeking an opportunity to renew its claim on an entirely new cause of action after failing to secure interlocutory orders from both this court and the Court of Appeal. The 1st defendant further contends that the orders sought have been overtaken by events as the 2nd defendant is now the registered owner of the suit property and no injunctive reliefs can be made against him.

The 2nd defendant on his part objects to the proposed amendments on the ground that it introduces a new or inconsistent cause of action from the one pleaded in the Amended Plaint. He further contends that he is already in possession of the suit property and the prayer seeking to restrain him from evicting the plaintiff has been overtaken by events. In his view the plaintiff's claim can only be for damages against

the 1st defendant.

I have considered the application, the affidavit in support thereof, the 1st defendant's grounds of opposition and the 2nd defendant's replying affidavit. I have also given due consideration to the submissions made to me by counsel and the authorities cited. Having done so, I take the following view of the matter. It is now settled that to grant or not to grant leave to amend pleadings is a matter of discretion. Each application has to be determined according to its special circumstances, the primary consideration being whether the leave to amend can be made without injustice to the other side.

The 1st defendant has not filed a replying affidavit. It has therefore in my view not demonstrated that it will suffer such injustice or prejudice as cannot be compensated by an award of costs. The fact that this court and the Court of Appeal declined to grant interlocutory orders in favour of the plaintiff by itself cannot deny the plaintiff the opportunity to reamend its plaint. It must be noted that both this court and the Court of Appeal were dealing with interlocutory aspects of the dispute and decisions made at that stage do not conclusively determine the rights of the parties.

The 2nd defendant on his part contends that he is the registered proprietor of the suit property and therefore has the protection of Section 69 B of the Transfer of Property Act. In his view, the plaintiff's claim can only sound in damages against the 1st defendant. He is particularly irked by the prayer to restrain him from evicting the plaintiff when he is already in possession. The plaintiff alleges fraud against both defendants and has given particulars thereof in the proposed reamended plaint. In the event that the plaintiff proves the allegation, it is doubtful if the registration of the 2nd defendant will be protected by the provisions of Section 69 B of the Transfer of Property Act. The transfer would therefore still be liable to cancellation. It is therefore not entirely true that the proposed reamended plaint has been overtaken by events. In my view only the prayer seeking to restrain the 2nd defendant from evicting the plaintiff seems to have been overtaken by events. The rest of the prayers in the proposed reamended plaint are still alive. I find nothing in the proposed changes which could possibly prejudice the defendants. The proposed changes do not deprive the defendants of any acquired rights or line of defence as they are perfectly entitled to resist the proposed reamended plaint by the arguments presented during the canvassing of this application.

I have also not detected such inconsistencies as would prejudice the defendants beyond compensation by an award of costs. In any event inconsistency by itself is not sufficient to deny a party the leave to amend his pleading. The inconsistency that will not be allowed is such as would cause injustice, prejudice or injury to the other side that cannot be made good by an award of costs. The position was settled long ago in **Eastern Bakery – vs – Castelino [1958] EA 461**. The Court of Appeal held as follows:

“amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated in costs.”

The holding is cordified in Order VIA of the Civil Procedure Rules. Rule 5 (1) of the said order reads as follows:-

“5 (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in the proceedings the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

Other treatises confirm this position. In Bullen and Leake 4th Edition at page 124 the Learned authors state as follows:-

“The guiding principle of cardinal importance on the question of amendment is that generally speaking, all such amendments ought to be made for the purposes of determining the real question

in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings. The Rule of conduct of the court is that, however, negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated for by costs but if the amendment will put the other side in such a position that they must be injured it ought not to be made.”

I have already found that the proposed reamended plaint will not put the defendants into such a position that they will be injured beyond what can be made good by costs.

In the result, I grant the plaintiff leave to reamend its plaint. The plaintiff is advised to exclude the prayer seeking the restraining of the defendants from evicting the plaintiff from the suit premises or in any way interfering with the plaintiff's occupation thereof because the 2nd defendant is already in possession. The amended plaint should be filed and served within the next fourteen (14) days from the date hereof.

The defendants have leave to file and serve their amended defences if necessary within fourteen (14) days of service of the reamended plaint. The plaintiff shall pay the costs of the application in any event. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 11th DAY OF DECEMBER, 2007.

F. AZANGALALA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 13th DAY OF DECEMBER, 2007.

M. A. WARSAME

JUDGE

Read in the presence of:-

Mr. Sagana for the 1st respondent and also holding brief for Issa for 2nd respondent. Mr. Omwenga for the plaintiff in open court.

M. A. WARSAME

JUDGE

13/12/2007