

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Suit 164 of 2000

SWAN MILLERS LTDPLAINTIFF

-VERSUS-

JAMES OGUMBODEFENDANT

Coram J. W. Mwera, Judge

Mwamu for Defendant/Applicant

Wasuna for Plaintiff/Respondent

Raymond CC.

R U L I N G

Under Order 6A rule 3(5), of Civil Procedure Rules and Sections 100, 3A Civil Procedure Act, the defendant filed a chamber summons dated 25/4/2005 for orders that he amend his defence herein. That on the reconsideration of that defence, apparently filed here way back on 10/7/2000, it has become clear that the same should be amended so that the court will be in a better position to resolve all issues in controversy. That the step is sought before the trial of the case opens and the plaintiff will not be prejudiced; it may as well consider to amend (further?) its' plaint; if need be.

A draft copy of amendments was appended to the supporting affidavit and Mr. Mwamu urged this court to grant them. That the defendant wished to argue that a trust was involved and fraud featured in the transaction in respect of that plot of land known as LR/BLOCK 7/465 - the suit property. In the same intended amendments, the defendant has added claims of prescriptive rights. Mr. Wasuna while opposing the application **inter alia** pointed out, and seemingly properly so, that prescriptive rights can only be waged by way of an originating summons and not a plaint. He added that the sought amendment had been delayed for over 4 years and that that should disentitle the applicant from orders in his favour. And that in any case, while all started off with trespass now the cause is being transformed in character to encompass a trust. Mr. Mwamu, even as he conceded that prescriptive rights can only be waged here by way of an originating summons, nevertheless urged this court to allow that part of the intended amendments that is merited.

In this court's view, and applying Order 6A rule 3(1) of Civil Procedure Rules as cited, it may allow amendments to pleadings at any stage of the proceedings, on terms and costs deemed just and it may also direct the manner of the amendments. That can be done even if a new cause is created/substituted. Of course there are Grounds within which to allow that move.

Here the trial is yet to commence. The defendant perceives that the intended amendments will help the court in it's determination of the cause. Let that be so but only as limited to the part of trust. A cause involving trust can only be brought to the court's attention to determine, by way of a plaint. The granted orders exclude the intended claim on account of prescriptive rights. Those can only be brought by way of an originating summons. To that extent are orders granted. However, costs here go to the plaintiff, which may if it chooses amend its own pleadings - again at the defendant's expense. The amended defence to be duly filed, paid for and served within usual time.

Orders accordingly.

Delivered on 16th day of May 2006.

J. W. MWERA

JUDGE

JM/hao