



REPUBLIC OF KENYA

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

Civil Suit 312 of 2001

SHAH HIRJI MANEK LIMITED.....PLAINTIFF

VERSUS

RAMESH PREMCHAND SHAH1ST DEFENDANT

SUNNY SYTLE MANUFACTURERS.....2ND DEFENDANT

UKAY ESTATES LIMITED.....3RD DEFENDANT

NAKUMATT HOLDINGS LIMITED.....4TH DEFENDANT

R U L I N G

The third and fourth defendants seek leave of the court to amend their defences by an application by way of chamber summons dated 4th May 2006.

The plaintiff's claim against the third defendant is on the basis of being an alleged maker of promissory notes in favour of the 2nd defendant and the plaintiff being holder in due course.

The plaintiff's claim against the 4th defendant is on the basis of an alleged guarantee endorsed on the back of the said promissory notes.

The main defence of the third and 4th defendants, in their defence filed in court on 4th April 2001 was that the plaintiff's suit was defeated by the doctrine of res judicata in that the plaintiff filed a previous suit which suit had been concluded, on a claim of promissory notes.

The third and fourth defendants filed an application seeking the striking out of the plaintiff's suit on the ground of breaching the doctrine of res judicata. That application was dismissed on 29th May 2001. The third and fourth defendant appealed against that dismissal and similarly the court of appeal declined to grant orders in their favour. The court of appeal delivered its ruling, as aforesaid on 17th February 2006.

While the third and fourth defendant's appeal was pending parties consented to stay of proceedings on conditions; one such condition was that on conclusion of the appeal parties were to obtain court's direction on the hearing of plaintiffs pending application to strike out the 3rd and 4th defendant's defences.

Before that application by the plaintiff could be heard the third and fourth defendants moved the court by its present application for leave to amend their defence.

The amendment sought will indeed booster the defence for its pleads as follows: -

- That the defendants did not issue the promissory notes;
- The promissory notes were forgeries;
- Denies the defendants issued guarantees;
- Denies the said promissory notes contained endorsements by the defendants;
- The defendants deny having any contractual or other relationship with the plaintiff.

The third and fourth defendants argue that the proposed amendments are necessary for the purpose of enabling this court to determine the real question in controversy between the parties.

The defendant's applicants relied on the case EASTERN BAKERY – V – CASTELINO [1958] E.A. 461, where it was held:

“* 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 side can be compensated by costs.

*** The principles applicable to amendments of plaints are equally applicable to amendments of statements of defence.”**

Applicants' counsel submitted that no prejudice will be occasioned to the plaintiff by the proposed amendment. That the plaintiff's application to strike out the defence can be entertained after the amendment, if indeed the plaintiff would be of the view that the defence raises no defence to the plaintiff's claim.

The plaintiff in opposition seems to have been aggrieved by the defendants applicants attempts to amend their defence prior to the hearing of the plaintiff's application for striking out the defences. That the defendants application was to defeat the plaintiffs aforestated application. That accordingly the application to amend defence was an abuse of the court's process. Plaintiff relied on the case of HCCC no. 1264 of 2002 SIETOCO (K) LIMITED V FORTUNE COMMODITIES LTD and another (UR) where the court was faced with a situation similar to the one before court. The plaintiff was faced with an application to strike out the plaint and before that one could be argued the plaintiff sought to amend the plaint. The court in dismissing the application to amend stated: -

“Granting the orders sought would also enable the applicant to steal a match on the respondent in view of the respondent's pending application.....”

The plaintiff also relied on the case of, KETTERMAN & OTHERS – V – HANSEL PROPERTIES LTD [1988] 1 ALL ER, in support of his proposition that amendment at very late stage was to allow the defendants an opportunity to renew the fight on entirely different defence.

Plaintiff sought the court's finding that the amendment sought is an after thought and should be disallowed.

The court is afforded by Order VIA Rule 3 wide discretion to allow amendment of pleading. This Rule provides: -

“.....the court may at any stage of the proceedings, on such terms as to cost or otherwise as may be

just and in such manner as it may direct, allow any party to amend his pleadings.”

The guiding principle which governs the exercise of that discretion under the aforesaid rule is “**that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be readily granted, while care should be taken to see that injustice and prejudice of an irremediable character are not afflicted upon the opposite party under the prentice of amendment.**” (MULLAR The code of Civil Procedure 16th edition).

Having in mind the above guiding principle I find that the application is merited. The defendants in their proposed amendment have not, at all, altered the character of the plaintiff’s action. Instead that amendments bring into sharp focus the defence being raised by the defendant. So having so found and in view of the wide discretion afforded by the rules the court hereby grants the following orders:

(1) The 3rd and 4th defendants are granted leave to file and serve an amended defence within seven (7) days from day date. Such amendments to be in terms of the draft amended defence annexed to the chamber summons dated 4th May 2006.

(2) That the costs of the chamber summon dated 4th May 2006 shall be in the cause.

MARY KASANGO

JUDGE

Dated and delivered this 21st June 2006.

MARY KASANGO

JUDGE