



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

Civil Case 363 of 2005

MARSHALL T. OSANYA
PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF MOMBASA
DEFENDANT

R U L I N G

By this Chamber Summons the defendant seeks leave of this court to amend its defence set off and counter-claim in the manner set out in the draft amended defence set off and counter-claim annexed to the supporting affidavit of one S.O. Simotwo, the defendant's Acting Town Clerk. There are three grounds for the application. These are:-

(a) That the amendments seek to comply with the provisions of Order VI of the Civil Procedure Rules by setting out material facts which the defendant relies upon for its defence set off and counter-claim.

(b) That the amendments are sought in good faith and are intended to bring to light the entirety of the issues to be determined by the court.

(c) That no prejudice will be occasioned to the plaintiff herein should the orders sought be granted.

In the supporting affidavit of the said S.O. Simotwo, it is deponed that the proposed amendments are necessary for the purpose of bringing to light and determining the real issues in controversy between the parties herein and that the application for leave to amend has been made in the interests of justice, in good faith and without undue delay. It is also deponed that the plaintiff does not stand to suffer any prejudice if the leave sought is granted.

The application is opposed and the plaintiff has filed a replying affidavit sworn by one Marshall Tito Osanya, the interim liquidator of the plaintiff. In the said replying affidavit it is deponed that the application for leave to amend is mischievous, ill intended and prejudicial to the interests of the plaintiff. It is also deponed that the plaintiff filed an application seeking summary judgment against the defendant. The plaintiff's application further seeks to strike out the defendant's set off and counter claim. That application was filed prior to the defendant's application for leave to amend. In the premises the plaintiff's interim liquidator depones that the defendant's application s directly prejudicial to them and

their application and amounts to abuse of the process of the court and should be dismissed.

The application was canvassed before me on 19.6.2006 by Mr. Ligunya, Learned Counsel for the plaintiff and Mr. Maruti, Learned Counsel for the defendant. Counsel for the defendant reiterated the grounds in the Chamber Summons and the supporting affidavit and emphasized that the prior filing of the application for summary judgment cannot defeat the application for leave to amend. In Counsel's view the application for summary judgment raises the importance and relevance of the defendant's application for leave to amend its defence set-off and counter-claim. Reliance was placed upon the case of **Cooperative Bank of Kenya Ltd. vs. Erastus Kihara Mureithi: HCCC No.175 of 2003 (UR)** for the proposition that the mere filing of an application for leave to amend subsequent to the filing of an application for summary judgment is not in itself prejudicial to the applicant in the application for summary judgment. Further reliance was placed upon the case of **Birking Industrial Services Ltd. vs. Kenya Breweries Ltd: HCCC No.1681 of 2000 (UR)** for the proposition that the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings provided that the amendments or joinder as the case may be will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs. According to the defendant the replying affidavit does not disclose the prejudice which will be occasioned to the plaintiff if the leave sought is granted.

Counsel for the plaintiff on his part recited the averments in the replying affidavit and argued that the application for leave to amend the defence, set off and counter claim is an attempt to circumvent the plaintiff's application for summary judgment which was filed prior to the defendant's application for leave to amend. In Counsel's view the defendant's application has been brought too late in the day and should be dismissed with costs.

I have now considered the application. In my view only one primary issue has been raised. It is whether a defendant should be given leave to amend its defence set off and counter claim if the effect of the proposed amendments would be to remove from or blunt the sting of the plaintiff's application for summary judgment. This issue seems to have been settled by the Court of Appeal in **Nova Industries (Ltd.) & 2 Others vs. Fidelity Commercial Bank Ltd: Civil Application No. Nai.315 of 1998 (UR)**. That is the decision upon which Njagi, J. relied in **The Co-operative Bank of Kenya Ltd. vs. Erastus Kihara Mureithi: HCCC No.175 of 2003 (UR)** case when the Learned Judge decided to allow an application for leave to amend to be heard in priority to an application for summary judgment. Referring to observations made by their Lordships in the said Court of Appeal decision, the Learned Judge said as follows at page 2 of his ruling:-

“In the circumstances, the Court was satisfied that failure to have the applicant's application for amendment of its defence heard prior to the entering of the summary judgment was unjust in as much as it deprived the applicants of the opportunity to raise several issues which if raised, would have given the applicants an arguable appeal.”

It should always be remembered that the granting or refusal of leave to amend any pleading is a matter in the discretion of the court. That discretion, like all other judicial discretions should be exercised not whimsically but rationally and on well settled principles. Those principles were stated as long ago as 1958 in the case of **Eastern Bakery vs. Castelino [1958] E.A. 461** as follows: That 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.

In the case at hand; hearing has not commenced. I really do not see that the plaintiff will be exposed to an injustice or peril which cannot be compensated by costs if the leave sought is granted. Besides, this suit was filed on 1.7.2005. This application was filed on 28.2.2006 just about 8 months since institution of the suit. A hearing date for the suit has not been taken. Indeed, pre trial proceedings are yet to be completed. In my view therefore, the application has not been brought with undue delay. In any event mere delay is not itself a reason to deny a party leave to amend his pleadings. In **Central Kenya Ltd. vs. Trust Bank Ltd: C.A. No.222 of 1998 (UR)** the Court of Appeal stated as follows:-

“The overriding consideration in applications for such leave is whether the amendments are necessary for the determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

In the present case there has been no delay or at least such delay as is likely to prejudice the plaintiff beyond monetary compensation in costs.

In the result I grant the defendant leave to amend as prayed and order that the draft amended defence set off and counter claim annexed to the supporting affidavit of S.O. Simotwo be and is hereby deemed as duly filed and served upon payment of the requisite court fees and on terms that the plaintiff is to have leave to amend its reply and defence to set off and counter claim within 14 days of today. I also grant the plaintiff costs of this application in any event.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 13th day of July 2006.

F. AZANGALALA

JUDGE

13.7.2006

Read in presence of:-