



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 4267 of 1991

**MOHAN MEAKIN (K) LIMITED
PLAINTIFF**

VERSUS

ATTORNEY GENERAL DEFENDANT

RULING

A brief background to this old litigation is as follows:

In July, 1990 the then Vice-President and Minister for Finance granted certain exemptions to Kenya Wines Agency Ltd (KWAL) which, according to the Plaintiff, gave undue advantage to KWAL, causing loss of business to its competitors. One such competitor, the Plaintiff, filed a suit by way of a Plaint dated 15th August, 1991, seeking the following orders:

“(a) A Declaration that the exemption given by the Vice-President and Minister for Finance exempting Kenya Wines Agency Limited from the Restrictive Trade Practices Monopolies and Price Control Act and communicated to the plaintiff vide the Commissioner for Monopolies and Price Commission letter of 30th July, 1990 is ultra-vires the Ministers Powers and therefore is null and void.

(b) General Damages.

(c) Costs and interest of the suit at Court Rates”.

The Defendant filed its Defence on 21st February, 1992 denying that the Minister had acted wrongfully, and denying the claim for damages.

This matter came before Walekhwa, J on 6th May, 1992 when a consent order was entered to the effect that “the exemption granted to Kenya Wines Agency Ltd. by the Vice-President and Minister for Finance was null and void. It was further ordered that the issues of general damages would proceed to hearing”.

On 5th June, 2003, the parties recorded the following Consent Order before Mbiti, J:

“(1) By Consent, any application to amend the part in respect of damages caused to be filed by 28th June, 2003

(2) Any Amended Defence relating to such amended part concerning damages claimed should be filed by 8th July, 2003

- (3) ***Any reply to the amended defence to be filed by 14th July, 2003***
- (4) ***Any document that the Plaintiff relies on with regard to the claim for damages to be served on the defendant by 1st July, 2003. The defendant to likewise serve any documents relied upon by 14th July, 2003***
- (5) ***Hearing of the suit fixed for 24th and 25th July, 2003 at 9.00 am***
- (6) ***Costs to be in the cause.***

I have deliberately chosen to incorporate herein the entire text of the above Consent Order which, as Mr Nagpal says, is “pivotal” to the application before this Court at this time.

Based on the above Consent Order, the Plaintiff filed an application to amend its Plaintiff on 20th June, 2003, seeking special damages of Kshs.1,464,837,167/= and outlining extensively the particulars giving rise to those special damages, including loss of Kshs.199,412,307/= allegedly occasioned because the Plaintiff was “forced” to sell some of its properties “below” market value in order to service its financial obligations. It is instructive to note that there was no claim for special damages, and certainly none for losses arising from sale of properties, pleaded in the original Plaintiff. The only claim in the Plaintiff was for “general damages”. I will return to this issue later. Now, the Plaintiff’s application to amend the Plaintiff to incorporate a claim for special damages of Kshs.1,464,837,167/= was allowed by the Court (Aluoch, J) on 27th June, 2003 in default of appearance by the Attorney General on that day.

The Defendant filed its Amended Defence on 21st July, 2003 essentially denying the Plaintiff’s claim, invoking the limitation period as it relates to the claim for special damages, and denying that the Plaintiff indeed suffered any damages.

It is that Amended Defence that is the subject of attack in this application. What is before me is an application dated 13th August, 2003 brought by the Plaintiff by way of a Chamber Summon under Order 6 Rule 13 (1) (b) (c) (d) and Order 6 A Rule 7 of the Civil Procedure Rules, seeking the following orders:

- (a) ***That the Defendant’s Amended Defence dated 18th July, 2003 be struck out on the grounds that the same is scandalous, frivolous and vexatious.***
- (b) ***That the Defendant’s Amended Defence dated 18th July, 2003 be struck out as it is likely to prejudice, embarrass or delay the fair trial of the action.***
- (c) ***That the Defendant’s Amended Defence dated 18th July, 2003 be struck out as the same constitutes an abuse of the process of the Court.***
- (d) ***That pending the hearing and determination of this application the time for filing Reply, if any, to Amended Defence be suspended as the Court may direct.***

The application is based on the following grounds

- (i) ***That the matters pleaded in paragraphs 4, 5 and 7 of the Amended Defence have already been canvassed before this Honourable Court and are barred by the doctrine of res judicata.***
- (ii) ***The Amended Defence wrongly purports to amend a Defence other than the only Defence filed in Court dated 21st February, 1992 and filed on the same date.***
- (iii) ***The Amended Defence goes well beyond and grossly exceeds and offends the terms of the consent order recorded in this cause on 5th June, 2003.***

(iv) *The Amended Defence does purports to amend a non existent defence claimed to have been filed on 4th November, 1992 and is therefore bad in law and inadmissible.*

(v) *The Amended Defence raises issues of limitation, cause of action, jurisdiction, and liability all of which have been finally determined by this Court by its earlier Rulings in this case and by the terms of a consent interlocutory judgment recorded in this case on 6th May, 1992.*

(vi) *The Amended Defence dated 18th July, 2003 is a replica of the Defendant's proposed amended Defence attached to its application dated 4th November, 1992 for leave to amend its Defence dated 21st February, 1992 which application was dismissed with costs by this honourable Court on 3rd December, 1992.*

(vii) *The attempt to introduce the proposed amended defence of 4th November, 1992 which was dismissed by this Honourable Court is improper and impermissible and is therefore a nullity and should be struck out and expunged from this record as such.*

and is supported by the annexed affidavit of John Mwangi, the Chief Accountant of the Plaintiff Company.

Now, what is instructive to note is that the Applicant seeks to strike out the **entire** Amended Defence dated 18th July, 2003, **not just the alleged offending paragraphs**. Of the four prayers in the application, the first three prayers seek the same – striking out of the **entire** Amended Defence, albeit for different reasons, while the last prayer seeks to delay the time for filing Reply to the Amended Defence.

Clearly, without even going into the merits of the application, no court of law would strike out a whole pleading where only some paragraphs are said to be “offensive”. **On that ground alone, this application cannot, and will not, be allowed.** The Defendant's right to deny the claim, and in this particular case the newly pleaded special damages, cannot be taken away by throwing out the **entire** Defence. However, let me examine the merits of this application as it relates to the alleged offending paragraphs. According to the Grounds stated on the body of the Application, these are paragraphs 4, 5 and 7, which read as follows:

“4. In further answer to the said paragraph the Defendant contends that if the Plaintiff suffered any damage or loss the same is not recoverable in view of the provisions of Section 20 of the Restrictive Trade Practices Monopolies and Price Control Act and Section 13 A of the Government Proceedings Act.

5. The Defendant avers that the Minister of Finance has powers under Section 5 (b) of the Restrictive Trade Practices Monopolies and Price Control Act (Cap 14 of 1988) to exempt Kenya Wine Agencies Limited from Provisions of the Act.

7. The Defendant further contends that the Plaintiff having not appeal (sic) to the Tribunal as required under Section 20 of the Restrictive Trade Practices Monopolies and Price Control Act, his right has been extinguished by lapse of time and the Court has no jurisdiction to entertain the suit”.

So, then, what is so offensive about these three paragraphs in the Amended Defence? Mr Nagpal, lead Counsel for the Plaintiff/Applicant, has submitted that the issues raised in those paragraphs are **res judicata** having been previously determined by the Court. He cites the Consent Order recorded before Hon. Walekhwa, J on 6th May, 1992 wherein the Attorney General admitted that the exemption given to KWAL by the then Vice President and Minister for Finance was “null and void”. According to Mr Nagpal, the issue of liability was “settled” by that Consent Order, and that the parties were directed to proceed to the formal proof of damages.

Secondly, Hon. Walekhwa, J's ruling of 19th May, 1992 “settled” the issue raised in paragraph 5 of the Amended Defence wherein the Defendant had invoked the provisions of the Restrictive Trade Practices

Monopolies and Price Control Act (Cap 14 of 1988).

Thirdly, Mr Nagpal submitted that two other Judges had handed down Rulings – effectively stating that the issue of liability having been settled, the matter should proceed to formal proof. These Rulings are dated 3rd December, 1992 by Hon. Mango, J and 8th October, 1999 by Hon. O’Kubasu, J (as he then was).

Thus, Mr Nagpal submitted that the issues raised in the offending paragraphs were *res judicata*, and he cited several authorities relating to the doctrine of *res judicata*, and the principles governing the striking out of pleadings. Briefly, he relied on the following:

1. In ***Mburu Kinya vs Gachini Tuti (1978) KLR 69*** a 2nd application to set aside the Judgment was held to be *res judicata*. The Court held that the proper way for the applicant was to challenge the decision of the 1st application by an appeal against it or by review.
2. ***Halsbury Laws of England*** 4th Edition Volume 16 paragraph 858 – 862 which reads (at paragraph 974):

“The doctrine of *res judicata* is not a technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end to litigation”.
3. In ***Kasereka vs Gateway Insurance Company Ltd (2003) 2 EA 502*** where the Plaintiff was struck out for being frivolous, vexatious within the meaning of Order VI Rule 13 (1) (b) of the Civil Procedure Rules.
4. In ***Melika vs Mbuvi (2001) 1 E A 121*** the Court relied on the doctrine of *res judicata*.
5. In ***Ashmore vs British Coal Corporation (1990) 2 QB 338*** pleadings were struck out on the ground that the same is an abuse of the court process.
6. ***Bullen and Leake*** 12th Edition was relied on to urge the court that it had inherent jurisdiction to strike out pleadings.
7. ***Spencer, Bower, Turner and Handley***, “The doctrine of *res judicata*” 3rd Edition P86 was cited to urge a finding on *res judicata*.

Finally, Mr Nagpal argued that paragraph 2 of the Amended Defence also raised “new issues” of limitation and should be disallowed.

In his reply, Mr Muiruri, for the Attorney General, argued that the Amended Plaintiff raised new and substantial issues which were not *res judicata* and that the Defendant had the right to respond to those issues. The Amended Defence did just that. He relied on ***Co-operative Merchant Bank Ltd vs George F Wekesa C A No 54 of 1999 (unreported)*** where the Court held that striking out was a draconian action which should only be taken in plain cases. The ***D T Dobie & Company Limited vs Muchina (1982) 1 KLR 1*** was relied on to urge the court that the Amended Defence raised triable issues and could not be struck down.

Now, are paragraphs 2, 4, 5 and 7 “offensive” in that they raise new issues or issues that are barred by the doctrine of *res judicata*, or have been “settled” through Consent Orders that have been entered into by the parties? I do not think so. Those Consent Orders and Rulings related to the original Plaintiff filed on 15th August, 1991. The Amended Plaintiff filed on 30th June, 2003 raised, in my view, substantially new issues that had not been pleaded in the original Plaintiff. As I said before, the Plaintiff, by this new amendment, sought special damages of Kshs.1,464,837,167/=, including loss of Kshs.199,412,307/= allegedly occasioned because it was “forced” to sell some of its properties below market value in order to service its financial obligations. There were no such claims in the original Plaintiff where only “general damages”

were claimed. The Defendant was now faced with a whole new claim of “special damages” and was fully entitled to respond to it, including invoking any statutory defences it had **in relation to that new claim**. In other words, it was fully entitled to claim, as it did in its Amended Defence, that that particular claim was statute barred; that the Statutory Notice under the Government Proceedings Act in respect of **that** claim had not been issued and served on the Attorney General; and that the provisions of Restrictive Trade Practices Monopolies and Price Control Act had not been complied with. In my humble view, the Defendant is entitled to raise these defences, and for the trial judge to determine its validity. I disagree with Mr Nagpal that the Consent Order of 5th June, 2003 recorded before Mbiti, J precluded the Defendant from raising any defences it had in the face of a new and changed claim advanced by the Plaintiff. That Consent Order does not state anywhere, as Mr Nagpal urged me to believe, that the Defendant was restricted to amendments “relating to damages only”. I do not see the word “only” there, and even if it were so, it is in the inherent right of any litigant to apply for amendments at any stage of the proceedings, and for the Court to determine any such application on its merits.

As both parties would agree, and as a whole chain of cases indicate, striking out is a draconian action which should be taken only in plain cases. This certainly is not one of those plain and straightforward cases. The claim here runs into more than a billion shillings of tax payers’ money. The interest of justice demands that the Defendant be allowed to present its answer to the claims that are made. Accordingly, and for the reasons outlined, **this application is dismissed with costs to the Defendant**.

Dated and delivered at Nairobi this 25th day of September, 2006.

ALNASHIR VISRAM

JUDGE