



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

Civil Suit 180 of 2003

NONES COMPANY LIMITED PLAINTIFF

VERSUS

UNILEVER KENYA LIMITED DEFENDANT

RULING

The Notice of Motion herein, dated 2/8/05, and filed in Court on 4/8/05, under Order 50 Rule 1 and 3 of the Civil Procedure Rules; Section 99, 100, and 3A of the Civil Procedure Act, Cap. 21, Laws of Kenya, seeks the following orders:

- a) **That the error in the proceedings be corrected by changing the Defendant's Counter-claim from K.sh.20,837 to read K.Shs.148,642/74 the said having been amended on 29/4/05, pursuant to an application for amendment of the Defence, set-of; and Counterclaim.**
- b) **That the error in the Judgment delivered by Hon. Justice Mutungi on 8/7/05 be corrected by amending the figure of the amount of Counterclaim awarded to the Defendant from K.Shs.20,837/- to K.Shs.148,624/74.**

The application is on the grounds, *inter alia* that: on 29/4/05 an oral application for amendment of the Defendant's Defence, set-off, and counterclaim, was made before Justice Mutungi, which application was allowed by the court with the result that the Defendant amended the amount claimed from K.Shs.20,837 to K.Shs.148,642/74. The Hon. Justice Mutungi's Judgment and Decree delivered on 8/7/05 does not reflect the aforesaid amended amount; in the said judgment and decree the Hon. Judge granted the Defendant's counterclaim in the sum of K.Shs.20,837/= and not K.Shs.148,642/74 as was amended as aforesaid; due to the aforesaid, there appears to be an error or mistake apparent in the said judgment in the amount awarded to the Defendant which should be amended in the interest of justice.

In opposition, vide their grounds of opposition, dated 2/9/2005, the Plaintiff/Respondent aver that: no leave was sought for the alleged amendments, and that when such amendments were made, pleadings had been closed. Further, avers the Respondents, neither the application for leave was made no granted on 29/4/05.

Having carefully gone through not only the 27 page judgment, but also the handwritten proceedings, it is important to pause at this juncture and categorically state that the learned counsel for the Respondent, Mr. Mc Oloo, is unfortunately not the one who handled this lengthy and protracted hearing. It was Mr. Enonda, during which massive documents were gone through. It became evident to the learned counsels for both sides to stick to matters of substances as otherwise the proceedings would drag on for years to the prejudice of both parties.

In brief, numerous applications were orally made by both sides in the course of the proceedings, as circumstances dictated. These were either granted or denied. Without sounding harsh to Mr. Mc Oloo, I sincerely do not believe that Mr. Enonda, who conducted the case for the Plaintiff, would handle this application in the manner Mr. Mc Oloo is doing, given what both counsels, and this court, went through in those proceedings.

However, be that as it may, it is not true that no application for amendment was made or granted by this court on 29/4/05. The evidence is in the records, at p.34 of the handwritten proceedings and at p.17 of the judgment.

On the material date, 29/4/05, evidence was adduced that upon the Respondent being removed from the contract, other contractors had to be sourced to complete what the Respondents had not been able to complete, (one of the reasons for the termination of the contract) and it is that fact which led the applicants herein to incur K.Shs.148,642/=74 over and above what it would have cost them had the Respondent finished the work as per the contract.

On that count, the applicant, orally applied, and because it was agreed by consent of both counsels, that application to amend the counterclaim to reflect that increased cost, was granted by this court.

Accordingly, those grounds and submissions are both untrue, unsubstantiated, and misleading to this court.

On the same vein, the submission that by the time the amendments were made and approved, pleadings had closed, has no force of law in light of Sections 99 and 100 of Cap. 21, Laws of Kenya, which provide as under:

Section 100:

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

In the case before me, the issue was the quantum of the counterclaim by the applicant/defendant.

Section 99:

“Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

In the interest of justice, and even common sense, it would be unheard of for this court, having granted the application for amendment of the sum claimed in the counterclaim to intentionally deny the Defendant/Applicant that which I had approved with the consent of counsel for both sides. The figure/sum in the counterclaim, from the above, is K.Shs.148,642/=74, and not K.Shs.20,000/=. The latter figure must have been an oversight/omission, since the record and the evidence on record clearly support K.sh.148,642/74, not K.sh.20,000/=.

The above deals with ground of opposition (c) that there was no error on the face of the record with respect to the sum in the judgment.

Finally, the Plaintiff/Respondent averred that the counterclaim was in the nature of special damages which therefore should have been a special finding that they were payable. With due respect this ground is either a denial of the record in the file or an effort to deny the validity and power granted to the court by the provisions of Sections 99 and 100 of the Civil Procedure Act, Cap.21, Laws of Kenya.

This court, as stated earlier on, granted the application to amend the sum claimed in the counterclaim by the applicant/defendant. Prior to the granting of the leave for the amendment, the applicant had produced the documentary evidence by way of the award of the new contract to complete what the Plaintiff/Respondent had not completed, as well as the invoices for the job done and the cost of the same, and how the figure of K.Shs.148,642/74 was arrived at.

In brief, what is called special damages were the counterclaim as particularized in the documents referred to herein above. The applicant/defendant had proved its counterclaim as required by law. Hence, the submission that the figure should have been shown to have been a special finding that way payable is unnecessary confusion. Every counterclaim is required to be proved just as the main claim by the Plaintiff in any suit. There is no way that a counterclaim can be proved without its being payable or being applied for as a set-off.

The issue in the application before me is not whether or not the counterclaim was proved, but the error in the sum proved in the counterclaim. Instead of K.Shs.148,642/74, the judgment referred to K.Shs.20,837/=.

In the result, the Notice of Motion herein, dated 2/8/05 and filed in Court on 4/8/05, succeeds and I grant the prayers therein, that is prayers (a) and (b).

DATED and delivered in Nairobi, this 6th Day of December, 2006.

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O.K. MUTUNGI

JUDGE.