



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.257 OF 2003

V.K. CONSTRUCTION CO. LTD. PLAINTIFF

VERSUS

MPATA INVESTMENTS LTD. DEFENDANT

RULING

The Chamber Summons herein, dated 26/4/04, under Order 6A rules 3, 5 and 8 of the Civil Procedure Rules, and Sections 3A; 63 (e) and 100 of the Civil Procedure Act seek the Orders that:-

- 1. Leave be granted to the Defendant to amend its statement of Defence in this action in terms of the annexed Draft Amended Defence.**
- 2. The annexed Draft Amended Defence be deemed as duly filed and served upon payment of the court fees.**
- 3. Costs to be in Cause.**

The application is supported by an affidavit by Kenichi Yamaguchi, the Managing Director of the Defendant, of even date, and is on the grounds that: it is necessary and permissible to amend the defence to bring out the actual facts in issue or dispute between parties for determination of law and facts in this suit; to show the actual amounts paid by the Defendant to Plaintiff and correct arithmetical error; the amendment will not prejudice the Plaintiff if granted and is made without undue delay.

The grounds of opposition by the Plaintiff dated 21/5/04 aver that the application is: bad in law, incompetent, an abuse of the court process; seeks to substitute and/or substantially alter the entire defence is belated since the Defence was filed on 18/7/03 and Defendant filed and argued an application to strike out the Plaintiff's claim, which application was dismissed by this court; that it will prejudice the Plaintiff who has filed and served its list of documents and authorities; no reason has been given to warrant the amendment since all information was with Defendant when the defence was filed on 29/5/03 and finally, the application was late.

I have carefully read the pleadings and the submissions by counsel for both sides – made on 25/5/04 – and compared the Defence dated 29/5/03 with the Draft Amended Defence and have reached the following findings and conclusions:

- (a) Matters of principle must not be confused with matters of detail. If an amendment is permitted by the prevailing rules and the law, it does not matter whether the amendment substitutes a billion for a shilling.**

Under the provisions that this application is brought – Order 6A rule 3, - amendment may be allowed even where the effect is to add or substitute a new cause of action if that cause of action arises out of the same facts.

Accordingly, to oppose this amendment because the figure claimed will change by Kshs.20 million is really a detail which constitutes no more than a legal farce.

(b) To hold that since the Defendant/applicant filed an application to strike out the plaint as disclosing no reasonable cause of action, which was dismissed by this Court, this application to amend should not be allowed, is tantamount to saying that this court should be biased against any party, at any stage, for any reason.

I need not remind counsel for the Plaintiff that this court does not, and can't, function like that without occasioning injustice.

(c) So long as the amendment sought and applied for facilitates full adjudication of the issues in controversy between the parties, that amendment is authorized by the obtaining legal provisions.

(d) The Plaintiff's submissions on delay has no legal merit. Under Order 6A rule 3(2), even if the period is otherwise statute barred, so long as the amendment is just in facilitating full determination of the disputed issues, this court has the and power to grant the amendment.

In light of the above findings and conclusions which I have reached, I hold that the amendment sought in the Draft Amended Defence are on all fours in line with the principles embedded in Order 6A of the Civil Procedure Rules.

Accordingly, the application succeeds and I rule as under:-

(a) Grant leave to the Defendant to amend its statement of Defence in this action in terms of the Annexed Draft Amended Defence.

(b) Deem the Draft Amended Defence to be duly filed and served upon payment of the requisite fees.

(c) Costs of this application to be in the Cause.

DATED and delivered in Nairobi this 29th day of April, 2005.

O.K. MUTUNGI

JUDGE