



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Civil Case 1681 of 2001

LABH SINGH HARNAM SINGH LIMITED.....PLAINTIFF

VERSUS

MANURA HAULIERS LIMITED.....DEFENDANT

R U L I N G

The plaintiff has brought its summons under Order 6A Rule 3 (1), (2), (5) and 5

(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The plaintiff seeks that it be allowed to further amend its plaint.

In argument the plaintiffs counsel stated that in the year 2000 the proposed 2nd defendant Mr. Mohamed Noor Ahmed contracted the plaintiff to supply certain services and body parts of vehicles. In payment for the said services and goods the said Mr. Noor Ahmed gave the plaintiff cheques for the total sum due kshs 1, 664, 885. 70 which cheques on presentation were dishoured. It seems that after the ruling of Hon Justice Mwera of 8th February 2003 the plaintiff, amended the plaint in accordance with the leave granted in that ruling. The plaintiff in its amendment struck out the name of Noor Ahmed and substituted it with the name of the company called Manura Hauliers Limited. The plaintiff now argues that because; (1) the present defendant has no assets; (2) the cheques issued were not of the present defendant; (3) Mr. Mohammed Noor Ahmed is the real debtor; (4) that the said Mohammed Noor Ahmed is well known to the plaintiff's director and had dealt with the plaintiff in his personal capacity; (5) that the present defendant does not have assets capable of being attached if the plaintiff gets judgment in this matter, the amendment should be allowed.

The defendants counsel opposed the application on the basis that; the draft amended plaint does not have in its title '**further amended plaint**'; it seeks to bring back a defendant that had been removed from this pleadings; the ruling of Hon Justice Mwera found that the proposed defendant was not the proper defendant in these proceedings; the plaintiff's ground of seeking the amendment on the basis that the present defendant does not have assets is untenable in law; there is no evidence to show Mr. Noor's involvement in this transaction; Mr. Noor will be prejudiced by the amendment which will put him into expense of defending himself.

Those are the arguments of counsels. Now, to deal with the issues raised by defence counsel in opposition. The fact that the draft-amended plaint, omits the word 'further' amended, is I believe not fatal

to the plaintiff's application. The defendant was not heard to say that such omission is prejudicial to it. The argument that the further amended plaint seeks to return a defendant who had been struck out of the proceedings, and this would cause him to incur **further** expenses in defending himself is I believe not sustainable. The defendant's further costs of defending himself can well be compensated by an award of costs at the conclusion of this case. The argument that to allow amendment would be to go against the ruling of Justice Mwera is rejected. Indeed my brother Justice Azangalala in his ruling in this matter dated 17th February 2005 held as follows: -

"In my view my learned brother Judge Mwera's ruling does not bar the plaintiff from seeking leave to further amend its plaint. I do not also find that the plaintiffs application to further amend its plaint is an attempt to challenge and reverse the decision of my learned brother aforesaid."

I believe I need not say more on that argument.

In response to the defendant's argument that there is no proof of the proposed defendant's involvement in the transaction is defeated by the unchallenged affidavit of Harjeet S. Sokhi sworn on 4th November 2004, particular paragraph 13 which states: -

"That I personally knew the said Mr. Noor even prior to the contract giving rise to these proceedings, and he had always dealt with the plaintiff in his personal capacity."

In the case of *Atieno v Omoro* (1985) KLR 677, it was held;

"where an amendment has the effect of adding a new party, that new party should not be prejudiced."

There was no evidence produced hereof, to show that the proposed defendant would be prejudiced.

The principle which guides the court on applications for amendments was well enunciated in the case of *KENYATTA NATIONAL HOSPITAL V KENYA COMMERCIAL BANK LTD AND ANOTHER* (2003) Z EA 528. It was held thereof.

"The principles governing the grant of leave to amend pleadings are well settled. The general rule is 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 by costs."

Those being the principle of granting the amendment I do find that the plaintiffs application has adequately met them.

The orders of the court are that: -

(a) That the plaintiff is granted leave to further amend and serve the plaint

within 7 day from this date hereof;

(b) The defendant is granted leave to file an amended defence, if need be,

within 14 days of service of the further amended plaint;

(c) The costs of the application dated 4th November 2004 shall be in the cause.

Dated and delivered this 31st May 2005.

MARY KASANGO

JUDGE