



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
Civil Suit 115 of 1995

MUKAA MUKUU CO-OP SOC. LTD.....PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA.....DEFENDANT

Coram: Before Hon. Justice Mwera

Mabeya for the Applicant/Plaintiff
Wahiga for Respondent/Defendant
Court clerk – Kazungu

R U L I N G

After the close of the plaintiff's case, it was indicated that it intended once more to amend its plaint. This was followed by a chamber summons dated 16-5-05 brought under O. 6A rr. 3, 5, 8 Civil Procedure Rules and SS. 3a, 63, 100 Civil Procedure Act. The main prayer was to the effect that the plaintiff society be granted leave to amend its plaint in the terms of the draft annexed which should be deemed duly filed and served.

It was stated in the grounds and that was repeated in the affidavit sworn by the plaintiff's lawyer, Mrs. Njagi, and in the arguments by Mr. Mabeya that the amount now appearing in the draft amended plaint had become clear and certain at Sh.2.1 when the plaintiff called its last witness. That that was not the case as at the time the suit was instituted and so with the intended amendment, and in the light of the evidence adduced, the court would finally and properly determine the issues in the cause. That it was just and proper in the circumstances that this amendment be allowed, since this court has discretion to do at whatever stage of the proceedings before judgement. And further that the defendant will suffer no prejudice because it is yet to open its case and can also further amend its defence.

Mr. Wahiga opposed the application on the grounds including the fact that the plaintiff's lawyer had sworn the supporting affidavit to the application on matter of a contentious nature. That this was done simply on the basis that since she had been conducting this case all along, she knew the facts of the figures put at "in excess of Sh. 2.1 b." in the said affidavit. That it was undesirable and unacceptable that counsel should depone to such an aspect of the dispute which at some point would require answers from the witness box – a thing counsel (Mrs. Njagi) for the plaintiff could not do. That such an aspect of this case ought to have been deponed to by the plaintiff society's officer or member who could be cross-examined on the same. That accordingly this application should be thrown out as incompetent for not being supported by a proper affidavit.

The court was further told that the plaintiff was making its case as it progressed and thereby forcing the defendant along to try and defend itself against new cases. That its defence of limitation was bound to be

taken away (since the case is based on contract and trust), and that it was too late in the day to seek an amendment having come this far in the trial and some ten (10) years since the suit was instituted. That in fact in 2001 this court expunged from the record a draft amended plaint bearing the same figures as the presents ones and thus the defendant could not understand what the plaintiff was claiming now to the effect that the sum to claim had at last become clear and established.

Both sides cited authorities which this court perused before penning this ruling.

It is not in doubt that pleadings may be amended at any stage and in most usual cases before judgement. It is also not in doubt that such amendment should be granted by the court in its discretion and should be such as to enable it to finally and effectually determine the issues in dispute. Of course all must be seen in the context of doing justice.

The history of this case is well known. On the way the plaintiff filed an amended amended amended plaint dated 20/6/2001 without this court's leave. Prayers included exemplary damages and "the outstanding sum of KSh.2,295,388,980/-." The defendant applied to have that plaint expunged from the record due to the irregularity in filing it – namely without the court's leave. A ruling of 26-9-2001 did just that. The plaint was expunged because the plaintiff had not applied and obtained leave to file such a pleading. The court added in that ruling:

"Pleadings ought to be settled at some point for all to be certain about a given case."

The present intended amendment, inter alia, prays for exemplary damages and:

"(d) The outstanding sum of KSh.2,295,388,980/-"

This is the same sum that was sought on 20-6-2001! Nothing added or deducted. So what does the plaintiff say has since become clear and established with the last witness? Nothing at all. In fact all is still unclear. See Sh.2.1 b. in the body of the application and the affidavit against Sh.2,295,388,980/- in the draft! The figure was always known and even if the plaintiff now claims that it has decided to introduce the amended pleading properly by filing this application, some thought lingers that that party is not being candid. In any case it has taken over four (4) years to wake up and make a formal application to amend? Why? No answer. Again this court repeats and in the circumstances of this case that:

"Pleadings ought to be settled at some point for all to be certain about a given case."

The plaintiff seems inclined to fashion its case as proceedings progress and in its view this court thinks that the defendant, even with avenues including amending the defence, is being put in an awkward position. The sought orders are refused with costs.

Finally the court considered the argument that the plaintiff's counsel was not suited to swear the affidavit supporting this application. It cannot be made a hard and fast rule that counsel for a party should not swear an affidavit in its cause. However such deposition should not be on contentious issues – probably on routine aspects. Here the sum termed outstanding, it such as whoever asserts it can/could be put in a witness box to prove or support. It will be a really curious day that counsel, like Mrs. Njagi inclines here, was taken from the bar and put in the witness box to be examined on the figure she depones to. It was in the circumstances quite undesirable, nay unacceptable, for her to swear the supporting affidavit. Although the application has been dismissed on other grounds, the foregoing point must be made. It could also have been a basis for striking out a matter brought forth in such a manner.

In sum the application is dismissed with costs. The defence to line up its witnesses. Parties to have priority dates for further hearing.

Orders delivered on 29th June, 2005.

J.W. MWERA

JUDGE