



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO.324 OF 2003
CALTEX OIL KENYA LTD.....PLAINTIFF
VERSUS
EAST AFRICAN SPECTRE LTD.....DEFENDANT

RULING

This Application is expressed to be brought under the provisions of Section 3A and 100 of the Civil Procedure Act, Order VIA, Rules 3,5 and 8 of the Civil Procedure Rules and all the enabling powers and provisions of Law. The Applicant seeks leave to amend the statement of defence and Counter Claim against the Plaintiff. The Application is sought on the grounds that:-

- (i) The amendments are necessary for the determination of the real issues in this suit.***
- (ii) The amendments are necessary to correct inadvertent typographical errors made in the Statement of Defence.***
- (iii) The Respondents will not suffer prejudice that cannot be compensated by way of costs.***
- (iv) The Defendant has and intends to Counterclaim against the Plaintiff.***
- (v) It is in the interest of justice that the proposed amendments be allowed.***

The Application is supported by an affidavit sworn by one Cliaus Owira Ragen the Defendant's Human Resources Manager.

The Application is opposed and the Respondent has filed Grounds of Opposition. The application was canvassed before me on 13th May 2005 by Mr. Otieno Learned Counsel for the Applicant and Mr. Imende Learned Counsel for the Respondent. Counsel for the Applicant submitted that on scrutiny of documents produced in the suit, he realized that the statement of defence should be amended and a Counter Claim set up. Counsel further argued that the proposed amendments do not depart from the original statement of defence and are necessary for the determination of the real issues in dispute. In any event Counsel argued further the Respondent will not suffer prejudice which cannot be compensated by way of costs. Reliance was placed on the decision of the Court of Appeal in Eastern Bakery –v- Castlino (1958) (E.A. 461 for the proposition that amendments to pleadings sought before hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs.

The Plaintiff's advocate in opposing the Application submitted that the proposed amendments should not be allowed as they depart from the Defendants' earlier pleading and therefore contravene the express provision of Order 6 Rule 6 of the Civil Procedure Rules and are prejudicial to the Plaintiff. Reliance was placed on the decision of the Court of Appeal in *Kyalo –v- Bayusuf Brothers Ltd* (1983) KLR 229 for the proposition that amendments that contain allegations completely inconsistent with the previous pleadings in the same suit cannot be allowed especially if they are late as they would delay a fair trial and prejudice the other party.

In Counsel's view this application has been brought too late and the proposed amendments are not in any event justified. Reliance was placed on the case of *Ali Mohamed Ali Bashir –v- The A.G. Nairobi HCCC No. 2251 of 2000 (UR)* in which Ringera J. as he then was dismissed an application for leave to amend on the grounds that the Applicant had not given any good reason why the amendment was sought and that if allowed would defeat the Defendant's defence of limitation which had already been taken as a point of Preliminary Objection.

In a brief reply Counsel for the Applicant reiterated that the proposed amendments are not a departure from the Defendant's earlier pleading as was the case in the *Kyalo –v- Bayusuf Brother's Ltd's* case (supra) where an admission was made first and was subsequently sought to be changed in the proposed amendment. Counsel relied upon the case of *Blue Shield Insurance Co. Ltd –v- Richard Mbondo and Another: Nairobi HCC No.1811 of 1999 (UR)* where Ringera J. as he then was allowed an amendment to a plaint when the Plaintiff's witnesses had testified. Counsel for the Defendant also relied on the case of *National Industrial Credit Bank Limited –v- Isaac Kondoro Gituru: Nairobi HCCC No. 1590 of 2000 (UR)* where Ringera J. as he then was allowed an amendment to set up a set off rather than a Counter claim which had been made against the Plaintiff.

I have now considered the Application, the Affidavit in support thereof, the Annexures, the Submissions of Counsel appearing and the authorities cited. Having done so I take the following view of the matter. The Plaintiff has raised primarily three objections to the leave sought. The first one is that the Defendant has not placed any material before the court justifying the intended amendments. This objection is not well taken. Our rules do not prescribe the type of material to be placed before the Court before the exercise of the discretion to grant leave to amend. The supporting affidavit sworn by Clianus Owira Ragen aforesaid explains that the leave to amend has been sought after scrutinizing the documents produced in this suit. This is sufficient. In my view even a fresh appraisal or interpretation of existing documents or other material would be sufficient basis for an application for leave to amend a pleading.

The second objection raised by the Plaintiff is that this application has been brought too late. While appreciating that each case has to be decided on its own peculiar facts, I am of the view that the delay of about one year to bring this application is not an inordinate delay. The suit has not been set down for hearing yet. In any event under the provisions of Order VIA rule 3(1) of the Civil Procedure Rules leave to amend pleadings can be sought at any stage of the proceedings. In fact even during a trial Ringera J. as he then was in *Blue Shield Insurance Co. Ltd –v- Richard Mbondo and another supra* allowed an amendment after the trial had commenced and the Plaintiff's witnesses had testified.

The third objection raised by the Plaintiff is that the intended amendment constitutes material departure from the pleadings earlier filed and contravenes the express provisions of Order 6 Rule 6 of the Civil Procedure Rules and is prejudicial to the Plaintiff. The Plaintiff's claim inter alia is based on breach of contract by the delivery by the Defendants to the Plaintiff of Defective goods. The statement of defence denies breach of contract and at paragraph 13 the Defendant admits receiving some cylinders back from the Plaintiff for repairs but denies the repairs were occasioned by inherent defects. In the proposed statement of defence paragraph 13 is sought to be amended to plead that the cylinders were returned for adjustment to the originally agreed specifications and not for repair. This pleading is alleged to contravene Order 6 Rule 6 of the Civil Procedure Rules. I am afraid I detect no inconsistency in this pleading and even if there was Order 6 Rule 6 aforesaid is a permissive rule and the Court has a discretion to either allow such leave to amend or decline the same. In *Eastern Bakery –v- Castelino* (supra) the Court of Appeal held inter alia that:-

“(ii) amendments to pleadings sought before hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs.”

In this case the Plaintiff has not demonstrated by affidavit evidence how it will be prejudiced if the proposed amendment is allowed. In my view a mere statement in the Grounds of Opposition is not enough. I find and hold that the Plaintiff does not stand to suffer an injustice that cannot be compensated by costs. Whatever complaints the Plaintiff may have to the proposed amendments may still be dealt with in a Reply or by amendment to its plaint and defence to Counterclaim.

In the result I am inclined to grant the leave to amend as prayed and order that the amended defence and Counterclaim be deemed duly filed and served on terms that the Defendant pays the requisite fees and that the Plaintiff has leave to amend its reply and file defence to the Counterclaim within fourteen (14) days from the date hereof.

The Plaintiff shall have the costs of this Application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2005.

F. AZANGALALA

JUDGE

Read in the presence of:

Ondonyo for Kaluma for Defendant/Applicant and

Saende for Plaintiff/Respondent

F. AZANGALALA

JUDGE

2.6.2005