



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION – MILIMANI

Civil Case 742 of 2001

RAJDAYALAL (ADMINISTRATOR OF THE ESTATE OF DAYALAL CHAUHAN)
..... **PLAINTIFF**

VERSUS

KARIMBHAI & QUARBANLITE CO LTD DEFENDANT

RULING

By this Chamber Summons, the Defendant Karimbhai & Qurbanlite Co. Ltd primarily seeks an order that the time for the Defendant to file amended defence in response to the amended plaint filed on 24.9.2004 be extended to 20.12.2004 when an amended defence was actually filed. The Application is based on two grounds contained in the body of the Chamber Summons. These are that:-

“(a) This Application has been necessitated by the fact that the Plaintiffs Advocate’s having agreed to an extension of time for the Defendant to file its amended defence out of time have now gone back on such agreement.

(b) The proposed amendments are necessary and in the interests of justice to enable the Court determine the real question in controversy between the parties hereto.”

The Application is supported by two affidavits sworn by one Kaizer Karimbhai and Stephen Mogute an Advocate in the firm of O.P Nagpal & Company Advocates who act for the Applicant. Mr. Stephen Mogute depones inter alia that leave to amend the plaint was granted on 13th September, 2004 and the amended plaint was served on 29th September, 2004. On 26th October 2004 after being served with the amended plaint Mr. Mogute enquired of Counsel for the Plaintiff whether he would object to the Defendant filing amended defence out of time. The Plaintiff’s Counsel having no objection the Defendant’s advocates filed an amended defence on 20th December, 2004 but could not serve the same until 3rd January 2005. However, the reply that was filed by Counsel for the Plaintiff threatened to object to the amended defence on the grounds that the same contravened the provisions of Order VIA Rule 1(2) (b). This threat prompted his application.

In his supporting, affidavit, Mr. Kaizer Karimbhai deponed that the purpose of the amendment is to enable the Court determine the real question in controversy between the parties.

The Plaintiff has filed a replying affidavit and Grounds of Objection. It is deponed in the replying affidavit that the Defendants application is an afterthought, without merit and merely intended to frustrate the hearing of the case. It is further deponed in the replying affidavit that no reason, for the delay in filing the amended defence is demonstrated.

The application was canvassed before me on 12th July 2005 by Mr. Nagpal Learned Counsel for the Defendant/Applicant and Mr. Ngaah, Learned Counsel for the Plaintiff/Respondent. Counsel for the Applicant was of the view that the amended defence is properly on record. Counsel said so on the authority of Order 9 Rule 1 of the Civil Procedure Rules which reads:

Order IX

1. A Defendant may appear at any time before final judgment, and may file a defence at any time before interlocutory judgment is entered against him, or, if no interlocutory judgment is entered at any time before final judgment.”

In Counsel’s view the Defendant did not require leave to file the amended defence and this Application was made out of excessive caution. If he was wrong he urged me to allow the amended defence to be deemed filed with leave.

On his part Counsel the Plaintiff submitted that the amended defence could only be filed under the provisions of Order VIA Rule 2 (b) of the Civil Procedure Rules which reads:

Order VIA

“2 (b) the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaint whichever is later.”

I have considered the application, the affidavits the Grounds of Objection and the submissions of Counsels appearing. Having done so I take the following view of the matter. The Plaintiff was granted leave to file his amended plaint pursuant to the provisions of Order VIA Rule 3(1). The order granting leave to amend the Plaint did not include an order allowing the Defendant to file an amended defence. In my view under the provisions of Order VIA Rule 3(1) if the Defendant intended to amend its defence, it had to seek the leave of the Court to do so. This is because amendments without leave are only allowed before pleadings are closed and each party is allowed to amend his/its pleading only once before pleadings are closed.

Should I strike out the amended defence for having been filed without leave? I would have done so if the Defendant had not moved the Courts to extend the time within which to allow the amended defence. The objection raised by the Counsel for the Plaintiff that the amended defence on the record is null and void and that what is null and void cannot be validated is clearly misconceived. The Court has inherent power and jurisdiction to allow such an application and this is done in the interests of justice. It appears to me as if all that the Plaintiff is unhappy about is that the Defendant filed the amended defence without leave. The factors that have to be taken into consideration in deciding whether or not to allow amendments to pleadings have not been addressed by the Plaintiffs. Under Order VIA Rules 3 and 5 of the Civil Procedure Rules, the discretion to allow or refuse an application for leave to amend pleadings is wide. The object of allowing amendments to pleadings is to facilitate the determination of the real question in controversy between the parties. It is on this basis that the Plaintiff was allowed to amend his plaint. In my view the amendments in the amended defence are not only relevant but also pertinent to the determination of the real question in controversy in this matter.

In the result I allow the Defendants Application dated 11th January 2005 in terms of prayers 1 and 2 thereof. The Defendant will bear the Plaintiff’s costs of this Application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-