



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

Civil Case 120 of 2002

ASPI VARIANA..... PLAINTIFF

VERSUS

SADRU KURTI1ST DEFENDANT

CHANCERY RESTAURANT LIMITED.....2ND DEFENDANT

SHAMSHUDIN KARIM KURJI.....3RD DEFENDANT

R U L I N G

This is an application to strike out the Amended Plaintiff which was filed on 31st March 2004. The application itself is grounded on the provisions of Order VIA Rule 6 of the Civil Procedure Rules.

The grounds upon which the orders are sought are that the Amended Plaintiff was improperly on record and is otherwise an abuse of the process of the court. The other ground is that the Amended Plaintiff was filed without leave of the court, or outside the time limit which had been set by the court.

In the supporting affidavit, Shamir R.A. Shamji said that on 3rd December 2003, Kasango J. ordered that the 2nd Defendant be made a party to this suit. By the same said order, the court is said to have ordered the 2nd Defendant to file its Defence within 15 days from the date of service with the order that they be joined as a party to the suit. That notwithstanding, the 2nd Defendant contends that the court did not expressly or otherwise sanction the amendment of the original Plaintiff.

But as if that were not enough, the purported amendments were effected after the lapse of over three months from the date when the order was issued.

It is for those reasons that Mr. Ikera, advocate for the Defendants, submitted that the Amended Plaintiff should be struck out, and also that the suit should stand dismissed.

In response to the application, Mr. Omolo, advocate for the Plaintiff pointed out that on 1st November 2001, Ransley J. had ordered that this suit be consolidated with HCCC No. 176 of 1997.

A perusal of the record reveals that on 1st November 2001, the court did order that this suit be consolidated with HCCC No. 176 of 1977. Part of the order made on that date was to the effect that the 2nd Defendant be enjoined into the consolidated suit. Once the consolidation was effected, the 2nd Defendant was granted leave to file an Amended Defence, in the event that there was a claim against it.

In the light of that order, the Plaintiff submits that it would do injustice to the case if the Amended Plaintiff was struck out, as that would deprive the court the opportunity to adjudicate on the real issues in contention between the parties.

When faced with that submission, the Defendants pointed out that even if it was the court that had deemed it necessary to consolidate the two suits, the subsequent steps taken by the Plaintiffs should have been within the ambit of the laid down rules and regulations.

As far as I can see, even when Ransley J. ordered that the two suits be consolidated, he also expressly made reference to an Amended Plaintiff, which needed to be filed. No time limit was set for compliance with that Order, which was made on 1st November 2001. Therefore, the provisions of Order VIA rule 6 of the Civil Procedure Rules came into play. The rule reads as follows:-

“Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.”

Therefore, if the Plaintiff was relying on the orders made on 1st November 2001, in order to amend the plaintiff, the amendment which was made on 29th March 2003 was hopelessly out of time. In effect, the orders granting the Plaintiff leave to amend the Plaintiff had ceased to have any effect, and therefore the amendment was without the requisite authority.

On the other hand, even if the Plaintiff amended the Plaintiff pursuant to the orders made on 3rd December 2003, the amendment would still have been made without requisite authority.

Should the Amended Plaintiff be struck out for want of authority?

From the record, the 2nd Defendant did enter appearance on 22nd April 2004.

Thereafter, the 2nd Defendant filed its Defence on 10th May 2004. Therefore, in my considered opinion, the failure by the Plaintiff to comply with the time limit for amending the plaintiff did not occasion any prejudice to the 2nd Defendant. For that reason, I hold the view that it would be in best interests of justice to allow the Plaintiff's oral application for extension of the time for the amendment of the Plaintiff. The authority to hear an oral application for extension of time is provided by Order VIA rule 8.

In the exercise of the authority vested in the court to extend time, I hereby do so. Accordingly the Amended Plaintiff dated 29th March 2004 is deemed to have been filed within time. For those reasons, the application dated 7th May 2004 is dismissed. However, the 2nd Defendant shall have the costs of that application in any event. The Plaintiff will pay the said costs.

Dated and Delivered at Nairobi this 26th day of July 2005.

FRED A. OCHIENG

JUDGE