



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Case 203 of 1999

MUTEMA UKI WINES & SPIRITS

DISTRIBUTORS LIMITED..... PLAINTIFF

VERSUS

R.K. INVESTMENTS CO. LIMITED.....1ST DEFENDANT

JOSEPH GIKONYO T/A GARAM INVESTMENTS.....2ND DEFENDANT

RULING

This case first came before me on 13.04.05 whereat the plaintiff was represented by learned counsel, Mr. J. Rach; the 1st defendant was represented by learned counsel, Mr. D.N. Mbigi; while the 2nd defendant was represented by learned counsel, Mr. W. Kabaiko. I was informed by plaintiff's counsel that the matter was part-heard before Waki, J (as he then was) and that upon his transfer to Criminal Division, he ordered that the matter proceeds before another Judge from where he, Justice Waki had left off.

Plaintiff's counsel submitted before me that it would be prejudicial to the plaintiff for part of the case to be heard by one Judge and another part heard by another Judge as the succeeding Judge would be unable to see the demeanour of witnesses. Plaintiff's counsel urged that the case starts afresh. Counsel for the 1st defendant as well as counsel for the 2nd defendant held the contrary view and urged that the case proceeds from where Justice Waki had left off. Among other things, both defendants' counsel noted that the application had not been made previously.

I ruled that the case proceeds from where it had reached before Justice Waki ceased to exercise jurisdiction in the case.

After my ruling, Joseph Waweru Maingi took the witness stand as the first plaintiff witness (P.W.1) and said he had started giving evidence before the previous Judge and was now continuing from where he had reached. P.W.1 did not conclude his testimony on 13.04.05 and the case was adjourned to 21.07.05.

On 06.07.05 plaintiff's counsel appeared before the Duty Judge (Ransley, J) and obtained an order for the case to be mentioned before me on 14.07.05 and it was so mentioned.

On 14.07.05 Mr. Rach for the plaintiff, Mr. Kabaiko acting for the 2nd defendant and also holding brief for Mr. Mbigi for the 1st defendant appeared before me and recorded the following consent order:

“By consent, application for amendment of plaint to be allowed as per prayers 1 and 2 of the chamber summons dated 06.07.05 with costs to the defendants in any event and with leave to defendants to file their amended defence, if any, before 20.07.05.”

Prayers 1 and 2 in the chamber summons of 06.07.05 were coined as under:

“1. That leave be granted to the plaintiff in accordance with the amended plaint annexed.

2. That the amended annexed plaint be deemed to have been duly filed and served.”

On 21.07.05 the case came up for further hearing before me as ordered on 13.04.05. Plaintiff's counsel drew attention to the consent order recorded on 14.07.05 and complained that the defendants had filed their amended defence on 20.07.05 instead of before 20.07.05 as per the consent order. Additionally, plaintiff's counsel complained that the 1st defendant had also amended his counter-claim. Plaintiff's counsel contended that both amended defences had been filed out of time without the leave of the court, which in his view cannot be done. He also faulted the amendment by the 1st defendant of his counter-claim without leave of the court which he also said cannot be done. In answer to the court's inquiry, he acknowledged that there was a counter-claim in the original defence of both defendants but maintained that the counter-claim could not be amended without the leave of the court. Plaintiff's counsel sought to rely on Order VI rule 1 which in turn makes cross-reference, inter alia, to rule 6 of the Civil Procedure Rules to support his contention in opposition to the filing of both amended defences on 20.07.05 instead of before that date and also in opposition to the amendment by the 1st defendant of the counter claim in his amended defence. Plaintiff's counsel further contended that while Order VIA rule 1 permits a party to amend any pleading without leave, this option was not open to the defendants as pleadings had closed and that leave of the court is required under Order VI rule 5 (1).

Plaintiff's counsel submitted that the amended defences by both defendants and the amended counter-claim in the 1st defendant's amended defence are not properly before court and that they should be disallowed and that if the defendants wish to rely on the amended documents, they should seek the court's indulgence to extend time for their filing. Finally, plaintiff's counsel urged that if the defendant's defence are allowed, the plaintiff should be allowed to amend its reply and defence to counterclaim and that costs should be borne by the 1st defendant in any event.

On the other hand counsel for the 1st defendant opposed the plaintiff's counsel's objection, arguing that it had no basis in law or fact. The 1st defendant's counsel submitted that after the consent order of 14.07.05 allowing amendment of the plaint, it was incumbent upon the plaintiff to serve the amended plaint but he did not. In 1st defendant's counsel's view, the document in the court file described as amended plaint is not stamped neither has it been paid for. He submitted that if there is any document to be struck out, it should be that document. He added that he did not file the 1st defendant's amended defence until 20.07.05 because he was waiting to be formally served with a formally amended plaint but the plaintiff did not serve the same on him and that it was after realizing no formally amended plaint was forthcoming that he decided to file the 1st defendant's amended defence including an amended counter-claim in order to save the hearing date of 21.07.05. Counsel pointed out that the original plaint filed on 03.02.09 had a counter-claim at paragraph 6 thereof and that the amendment of the 1st defendant's defence was caused by the amendment to the plaint. He referred to Order VIA rule 1 (4) to the effect that references to a defence and a reply include references to a counter-claim and a defence to counter-claim, respectively. Counsel for 1st defendant faulted plaintiff's counsel's objection without a formal application and viewed it as an attempt to get adjournment. He (1st defendant's, counsel) submitted that if his client's amended defence is taken to be out of time, that is a mere irregularity curable under Order XLIX rule 5. He urged that the plaintiff's counsel's objection be disallowed.

For his part, 2nd defendant's counsel associated himself with the submissions of counsel for 1st defendant and contended that although prayer 2 of the chamber summons says the amended plaint should be deemed as duly filed, that order takes effect only if court fees are paid and that since no fees had been paid, the document described as amended plaint remained a mere draft. Counsel pointed out that it was not even dated or signed. He added that he, on behalf of the 2nd defendant, was under the apprehension that the defences were to be filed on or before 20.07.05 and that he had not noticed that the words “on or before” were missing from the consent order.

Counsel for 2nd defendant said plaintiff's counsel should be candid enough to tell the court that he needs

time to file reply to the amended defences and counter-claim, if necessary. Finally, 2nd defendant's counsel pointed out that this is an old case which started in October, 2002 and that the plaintiff's application to amend his plaint was brought on 06.07.05 – just a week before the date fixed for further hearing of the case.

In reply, plaintiff's counsel essentially reiterated his earlier submissions. He submitted that there was no need for him to serve the amended plaint because there was consent that the amended plaint was deemed duly served. On the criticism that he had not paid filing fees for the amended plaint, plaintiff's counsel countered that the filing fees can be paid before issuance of a decree. He urged that the court should put right that which is irregular in this matter.

I have duly considered the rival submissions of the parties.

The consent order entered into by the parties before me on 14.07.05 was, inter alia, to the effect that the chamber summons application of 06.07.05 for amendment of plaint be allowed as per prayers 1 and 2 of the application. One of the criticisms leveled by counsel for both defendants against the document referred to as amended plaint in the consent order was that the documents had not been dated or signed. Plaintiff's counsel did not specifically respond to this criticism when it was made on 21.07.05. I note that although the document in question seems to bear plaintiff's counsel's signature, it bears no date as envisaged by Order VI rule 2 (2). It is also true that the document bears no court stamp, neither is there evidence that court fees had been paid for it by the time of the consent order of 14.07.05 and even by the time it came up for discussion before me on 21.07.05. It appears, however, that after the court session of 21.07.05, plaintiff's counsel quickly arranged to pay filing fees of Kshs.67,075/= and had a copy of the amended plaint dated, signed and filed and put in the court file. I infer from this action that the intention was to pre-empt adverse decision being taken against the plaintiff for the earlier omissions regarding the amended plaint, which in my view is indirect admission by plaintiff's counsel that he had erred in making the earlier omissions.

While the omissions regarding the amended plaint alluded to in the consent order entered into by the parties on 14.07.05 are an irregularity which is curable, they nevertheless lend credence to the stand taken by counsel for both defendants that they had a legitimate expectation to be served with a formally amended and authenticated amended plaint. I accept the explanation by defendants' counsel that they did not file their clients' respective defences until 20.07.05 because they were waiting for the formally amended and authenticated plaint which never came forth and that they filed the subject amended defences "in order to save the hearing date of 21.07.05". For that reason, I enlarge the filing time for the defences to 20.07.05 and deem both defences to have been filed in time.

Plaintiff's counsel also contended that the 1st defendant could not amend his counter-claim without leave of the court. Since, as acknowledged by plaintiff's counsel, there was a counter-claim in the original defence, I find no merit in his above argument in view of the provisions of Order VI A on amendment of pleadings and in particular rule 1 (4) whose purport is that references in sub-rules (2) and (3) of that rule to a defence and a reply include references to a counter-claim and a defence to counter-claim, respectively.

Order VI A rule 5 (1), inter alia, provides:

"5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may ... on the application of any party order any document to be amended in such manner as it directs"

The parties to this suit recorded a consent to amendment of the plaint herein. Arising from the amendment to the plaint, the defendants say they found it necessary to amend their defences. With regard to the 1st defendant, he considered it necessary to amend the counter-claim part of the original defence as well. I hold that the defendants were entitled to amend their aforesaid defences. Furthermore, I hold that the amended defence and counter-claim of the 1st defendant as well as the amended defence of the 2nd defendant have been validly filed and are properly on record and I, accordingly, hereby dismiss the

plaintiff's objection thereto. The plaintiff is granted seven (7) days leave to amend its reply and defence to counter-claim and serve such amendment, if any, within the same period. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 25th day of July, 2005.

B.P. KUBO

JUDGE