



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Case 47 of 2004

ALI LAZARO & 42 OTHERS.....PLAINTIFF

VERSUS

ROMOLO SEVERIN & ALSA FRIMAN BOTH

T/A

ROMOLO SEVERIN T/A SCORPIO VILLAS ENTERPR ISES.....DEFENDANT

RULING

By consent of counsel the parties, the defendants' application to strike out the suit and that of the plaintiffs seeking to amend the plaint were argued together.

The defendants' chamber summons was filed on 18th May 2005 while the plaintiff filed theirs on 3rd June, 2005. It is clear to me that the plaintiffs' application was prompted by the defendants'. The defendants seek to strike out the suit on the grounds that the same is frivolous, vexatious and an abuse of the Court's process. That the suit does not comply with Order 7 rule (2) of the Civil Procedure Rules. To support the first ground it was submitted that the defendants could not have been sued in their personal capacity and further that it was factually incorrect to suggest that they traded as Scorpio Villas Enterprises. That the latter being a limited liability company is a distinct entity from its members.

For the second ground, it was argued that failure by all the plaintiffs to swear affidavits to verify the truthfulness of the facts relating to their respective claims was contrary to Order 7 rule (1) (e) of the Civil Procedure Rules.

To this application the plaintiffs have filed Grounds of Opposition in which they argued that the application is fatally defective as it fails to comply with Order 50 rule (5) of the Civil Procedure Rules.

Regarding the plaintiff's application for amendment, it is sought that leave be granted to substitute the names of the defendants trading as Scorpio Villas Enterprises with Scorpio Villas Enterprises Ltd. They have stated that they have discovered that Scorpio Villas Enterprises is not registered under the Business Names Act and that it is indeed a limited company. Starting with the application for striking out the suit. A suit can only be struck out on any of the four grounds set out under Order 6 rule 13 (1) of the Civil Procedure Rules. That rule donates a general power for the Court to either strike out or amend the offending pleading.

The Court must be slow in resorting to the using of this power to strike out pleadings. When parties take the trouble to put together their case, they ought to have their day in Court as a Court of justice must aim at sustaining suit. As Danckwerts, L J stated **Wenlock V Maloney & others** (1965) 1 WLR 1238 at 1244

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissible and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading”

The point in this matter is, in my estimation, a very small one indeed. The amendment simply seeks to bring on board the correct defendant in place of the present defendants. Section 100 of the Civil Procedure Act donates very wide discretionary powers to Courts, to allow amendment a suit on terms deemed fit to the Court. Amendment will be permitted for the purpose of determining the real question or issue raised in the suit.

As a general rule amendments will be allowed where no injustice or prejudice is likely to be caused to the other party. The remedy of such a party will be in the award of costs. In exercise of my discretion, I allow the application fro amendment and order that the plaintiffs shall pay the costs of the application to the defendants.

It follows that leave to amend imports leave to rectify any defect in the verifying affidavit.

The defendants’ application to strike out the suit is dismissed with no orders as to costs.

Dated and delivered at Malindi this 28th day of September, 2005.

W. OUKO

JUDGE

28.9.2005

Coram

W.Ouko

Mr.Ole Kina

Mr.Shujaa for Mr.Okaga

Ruling delivered.

W.OUKO

JUDGE