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

Civil Case 811 of 2003

UUNET (K) LIMITED ……...……PLAINTIFF

VERSUS

TELEKOM (K) LIMITED ……..……...1ST PLAINTIFF

WANANCHI ONLINE LIMITED …….……...2ND DEFENDANT

RULING

This is an Application expressed to be brought under the provisions of Order VIA Rules 3, 5 and 8 of the Civil Procedure Rules, Section 3A and 100 of the Civil Procedure Act and all other enabling provisions of the Law. The Plaintiff is the Applicant and primarily seeks leave to amend its plaint. There are two primary grounds for the Application and these are that the amendment is necessary for purposes of determining the real issues in controversy between the parties and that the Defendants stand to suffer no prejudice by the proposed amendment.

The Application is supported by an affidavit sworn by one Henry Njoroge the Plaintiff's Regional Managing Director.

The Application is opposed. The 1st Defendant filed Grounds of Opposition and the 2nd Defendant filed a Replying Affidavit sworn by one Joseph Mucheru its Technical Director.

The Application was canvassed before me on 27th May 2005 and on 14th July 2005 by Mr. Munyu Learned Counsel for the Plaintiff, Mr. Ngatia Learned Counsel for the 2nd Defendant assisted by Mr. Mucheru and Ms Njeri and Mr. Gitau Learned Counsel for the 1st Defendant.

Substantiating the reasons for the Application, Counsel for the Plaintiff submitted that the Plaintiff had initially sought a mandatory injunction together with special damages which had not been particularized. The claim for a mandatory injunction had been abandoned as the ex-parte order for the same had been set aside and the special damages had now been quantified. Counsel further submitted that it had become necessary to give particulars of fraud to support the claim for the damages sought. In Counsel's view the Plaintiff was not introducing a new claim and the Defendants would not suffer prejudice if the proposed amendment is allowed. Anticipating the Defendant's response Counsel for the Plaintiff submitted that in making the application the Plaintiff was not abusing the process of the Court and was not acting *mala fide,* its main concern being to crystallize the real issues in controversy. Reliance was placed upon the case of JASHBHAI C. PATEL –V- B.D. JOSHI (1951) E.A.C.A. 42 for the proposition that an Application for leave to

amend even if necessitated by negligence or carelessness will be granted so as to enable the right question to go to trial unless the party applying was acting *mala fide* or by his blunder he had done some injury to his opponent which could not be compensated by costs or otherwise. Counsel further submitted that the application was not *res judicata* as the previous Application for leave to amend had been struck out on a technicality.

The Defendants in opposing the application submitted that the application had been refused by Ibrahim J. Counsel for the 2nd Defendant argued that the Plaintiff was litigating by installments which was not permissible. For this proposition reliance was placed upon the case of RE-RAJUVANI –V- CHIEF MAGISTRATE NAIROBI & 2 OTHERS: NAIROBI HC. MISC. APPLICATION NO. 1544 OF 2004 (UR).

It was also argued for the 2nd Defendant that the proposed amendment would in effect change the Plaintiff's original claim and for this reason should not be allowed. Reliance was placed upon MULLA'S CODE OF CIVIL PROCEDURE SEVENTH EDITION VOL. II PAGE 1849 where the Learned Authors state:

"***But the Court…. ought not to allow an amendment if it would convert the suit into another of a different and inconsistent character. The Law prohibits every amendment that would change the suit."***

The basis of this argument was that the Plaintiff had originally sought a mandatory injunction and that it was entitled to 230 Telephone lines. The proposed amendment abandons the claim to a Mandatory Injunction and claims about Shs. 36 million. In counsel's view this is an entirely different claim which should not be allowed.

Counsel further argued that a money claim would cause serious prejudice to the 2nd Defendant which is currently engaged in ventures where it is required to disclose details of pending litigation and estimated claims and if the Plaintiff is allowed to amend its Plaint the value of the 2nd Defendants undertaking and goodwill will be severely adversely affected and the resulting loss cannot be compensated by costs. Reliance was placed upon the case of JOSHBHAI C. PATEL –V-B.D. JOSHI (SUPRA) in which their Lordships, cited a passage in ESCHENCHUNDER SIGH –V-SHAMACHURN BHUTTO 11 MOO L.A.7 as follows:-

"***It is in accordance ……with principles of sound common sense and justice accordingly to which a man who brings a false case, or even brings a true case and fails to prove it should not get a decree on a different cause of action from that alleged by him…."***

For the same proposition reliance was placed upon the following case: SYLVESTER MARTIN KYALO & 2 OTHERS –V- BAYUSUF BROTHERS LIMITED (UR) in which Madan J.A. as he then was dismissed an appeal against an order refusing leave to amend. The Learned Judge held:

"***To grant leave to amend the defence which proposes to take a complete somersault from the original one would be both unfair and cause heavy prejudice to the respondent."***

Counsel for the 2nd Defendant also placed reliance upon the case of OMAR –V- E.A CARGO HANDLING SERVICES LTD (1985) KLR for the proposition that amendment should not be allowed where costs cannot compensate the other side.

Counsel for the 1st Defendant associated himself with the submissions made on behalf of the 2nd Defendant. He emphasized that the Plaint disclosed a dispute between the Plaintiff and the 2nd Defendant and the ex-parte injunction having been set aside, there remained no claim against the 1st Defendant. In Counsel's view the proposed amendment is a new claim altogether against the 1st Defendant and should be rejected. He argues that the Plaintiff is guilty of delay which delay he has not attempted to explain. Reliance was placed upon the case of KASSAM –V- BANK OF

BARODA (KENYA) LTD (2002) 1 KLR 294 where Kuloba J. observed that a late amendment may be done, but the Applicant must show why the application is made late and must satisfy the Court that the delay is not deliberate.

There was further reliance upon the case of WAMBUA –V- WATHOME & ANOTHER (1968) E.A. 40 for the proposition that leave to amend should not be allowed as it will serve no purpose in respect of the claim against the 1st Defendant which claim as against the 1st Defendant has no merit. In Counsel's view the leave sought is merely intended to retain the 1st Defendant without more.

In a brief reply Counsel for the Plaintiff submitted that the cases relied upon by the Defendants were not relevant as they dealt with different circumstances.

I have carefully considered the Application, the Affidavit in Support thereof, the Grounds of Opposition, the Replying Affidavit, the Submissions of Counsel appearing and the authorities cited. Having done so I take the following view of the matter.

From the Replying Affidavit, Grounds of Opposition and Submissions made it appears to me that the primary objections raised against the application for leave to amend are:-

1. The application is *res judicata*

2. The application is not made in good faith

3. The Plaintiff by the proposed amendment intends to introduce an entirely new cause of action.

4. The Defendants stand to suffer prejudice if the leave sought is granted.

With respect to the plea of *res judicata,* I have carefully read the ruling delivered by Ibrahim J. on 31st January, 2005 in respect of the Plaintiff's earlier application for leave to amend its plaint. It is clear that the Learned Judge did not determine the application on merits. He struck out the supporting affidavit and consequently "dismissed" the application. The fact that the Learned Judge used the term "dismissed" does not suggest that he considered the merits or demerits of the application. To put the issue beyond dispute the Learned Judge stated that he did not see the "need to delve into the other issues submitted by Counsel." It is obvious therefore that although the matters in the present application were directly and substantially in issue in the previous application between the same parties the matters were not heard and determined on merits. The issues were not resolved. The case of RE RAJUVANI –V- CHIEF MAGISTRATE LAW COURT NAIROBI AND 2 OTHERS (SUPRA) is therefore not helpful as the Learned judges in that case correctly refused to entertain a matter which had been determined earlier in the Application. In the result I find and hold that the plea of *res judicata* is not available to the Defendants.

With respect to the submissions made by the Defendants that the Plaintiff is acting *mala fide,* I have found as follows. The Plaintiff filed its suit under a Certificate of Urgency. Simultaneously with the Plaint, the Plaintiff filed an application seeking orders of temporary injunction restraining the Defendants from transferring, applying and/or using E1 circuit lines under No. 69055 pending the hearing and determination of the application and pending arbitration. When the application was placed before Kasango J. the Learned Judge granted the orders sought on a temporary basis pending hearing inter partes on 22nd December 2003. The application was placed before Njagi J. for the inter partes hearing. Before the application could be heard the Defendants raised preliminary objections based on various grounds *inter alia* that the Plaintiff had made the application to advance a mischief and that no reasons had been recorded to justify the issuance of the ex –parte orders.

It was argued before me that my brother Njagi J. had set aside the ex parte orders on the basis that the Plaintiff had mislead the Court with the result that an unwarranted ex parte order had been granted. I have perused my Learned brother's ruling. I have not come across a finding that the plaintiff was guilty of mischief or that the Plaintiff acted *mala fide*. Indeed the Learned Judge found that some of the arguments advanced before him by the Defendants did not properly constitute grounds of preliminary objection and that is why he did not strike out the application.

In the result, the argument that the Plaintiff is acting *mala fide* is not supported. I have on my own not detected the mischief alleged.

I now turn to the complaint made against the application on the basis that the proposed amendment will introduce a new cause of action. Order VA Rule 3 (5) of the Civil Procedure Rules reads:

"*3(5) An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.*"

In the case at hand, the Plaintiff initially sought a mandatory injunction as against the 1st Defendant to retransfer 8 E1 circuits under No.69055 back to the Plaintiff. This claim is being abandoned in the proposed amendment and is substituted for general damages for fraudulent transfer of the same circuit lines. It is obvious that the intended claim for general damages is pursuant to the alleged fraudulent transfer of the circuit lines. There is therefore a nexus between the proposed claim and the original claim. The intended claim in my view arises out of the same facts or substantially the same facts as the original cause of action.

With respect to the 2nd Defendant the Plaintiff originally claimed general damages for breach of contract. The intended claim is now for special damages in the sum of Kshs 36,616,717.00 for breach of contract. The only difference proposed is therefore the specific plea for the said sum. It is clear to me that the proposed claim arises out of the same facts as the cause of action in respect of which relief has already been claimed in this suit by the Plaintiff. The nexus is obvious.

In the premises it is not correct to state that the Plaintiff by the proposed amendment intends to introduce an entirely unrelated claim. I hold therefore that the intended amendment is the type allowed by order VIA Rule 3 (5) of the Civil Procedure Rules.

The present case is in respect of circumstances that are different from the c3ircumstances in the case of JASHBHAI C. PATEL –V- B.D. JOSHI (SUPRA). In that case an amendment was sought by a Plaintiff after he had testified and after evidence had disclosed a different cause of action from the one pleaded.

The facts in OMAR –V- E.A. CARGO HANDLING SERVICES LTD (SUPRA) were also different from the facts of this case. In that case an amendment was sought after 15 years of institution of suit and the proposed amendment in effect sought to change the facts that had unequivocably been relied upon in the earlier pleading. Indeed the basis of the cause of action was intended to be altered 15 years late.

The same position obtained in the case of SYLVESTER MARTIN KYALO & ANOTHER –V- BAYUSUF BROTHERS LTD (supra) where an amendment was sought by the Defendant to deny what had been admitted in its previous pleading and the application for leave to amend was made 6 years after the event. In my view in both cases leave to amend was properly refused.

I now turn to the objection made against the proposed amendment on the basis that if allowed the amendment will occasion prejudice to the Defendants. The 1st Defendant opposed the

Plaintiff's application on the basis of Grounds of Opposition filed by its Advocates on 19th April 2005. No allegation is made in these grounds that the 1st Defendant will be occasioned any injury if leave to amend is granted. Even if such an allegation had been made I doubt whether it would *per se* have been sufficient to show the likely prejudice to be occasioned to the 1st Defendant in the absence of a Replying Affidavit. In my view therefore, the 1st Defendant has not demonstrated that if leave to amend is granted it will suffer any injustice or injury that cannot be compensated by costs.

The 2nd Defendant on its part filed a Replying Affidavit in which it was deponed that disclosure of claims against it is required to be made to third parties and if it has to disclose the proposed claim the value of its undertaking and goodwill will be severely affected. Indeed its intension to be listed at the Nairobi Stock Exchange will be jeopardized.

In my view the 2nd Defendants' fear is far fetched. There is already a claim against the 2nd Defendant by the Plaintiff. The original claim was for general damages for breach of contract. General damages claimed are at large. The upper limit is infinite. In my view the fact that the proposed amendment now quantifies the damages against the 2nd Defendant cannot make any difference if the 2nd Defendant has to disclose it to any one. An order in favour of the Plaintiff at this stage does not translate into a judgment for the sum proposed in the amendment. In the result I hold that the 2nd Defendant has not also demonstrated that if leave to amend is granted, it will suffer any injustice or injury that cannot be compensated by costs.

In Eastern Bakery –v- Castelino (1958) E.A. 461 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 the result I am inclined to grant the leave to amend as prayed in the Plaintiff's application dated 10th February 2005 in terms of prayers 1 and 2 thereof. The Defendants are also granted leave to file and serve amended statements of defence within fourteen days from the date hereof.

The Defendants shall have the costs of this Application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SETPTEMBER 2005.

F. AZANGALALA

JUDGE