



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Civil Case 1017 of 2002

CROWN BERGER (K) LIMITED..... PLAINTIFF

VERSUS

PATSA HARDWARE (K) LIMITED..... DEFENDANT

RULING

This is an application expressed to be brought under the provisions of Order VIA Rules 5 and 8 of the Civil Procedure Rules. The Applicant is the Defendant and seeks leave to amend its defence on the ground that the amendments are necessary to enable the Court determine all the issues in controversy between the parties.

The Application is supported by an affidavit sworn on 13.10.2005 by one Mohamed Essak Yakub a Director of the Defendant. The application is opposed and there are Grounds of Opposition filed for the Plaintiff by its Advocates.

The application was canvassed before me on 1.11.2005 by Mr. Oluoch Learned Counsel for the Defendant and Mr. Orowe Learned Counsel for the Plaintiff. Counsel for the Defendant relied upon the supporting affidavit aforesaid and submitted that on being served with particulars and documents by the Plaintiff he formed the view that amendments of the defence was necessary, hence this application. Counsel further submitted that if the leave sought is granted, the Plaintiff will suffer no prejudice that cannot be compensated by costs. For this proposition Counsel placed reliance upon the case of CENTRAL KENYA LTD -V- TRUST BANK LTD & AOTHERS: C.A. NO. 222 OF 1998 (UR).

Counsel also argued that the proposed amendments were necessary for the just determination of the controversy between the parties and although there had been delay, the same *perse* could not deny the

Defendant the leave sought.

In his response Counsel for the Plaintiff relied upon the Grounds of Opposition filed and emphasized that the Defendant was guilty of inordinate delay and that the proposed amendments offend the rules of pleadings particularly Order 6 Rule 6 of the Civil Procedure Rules. It was Counsel's further argument that the amendments if allowed will prejudice the Plaintiff.

I have considered the application, the affidavit in support thereof, the Grounds of Opposition, the Submissions of Counsels appearing and the case cited by Counsel for the Defendant. Having done so, I take the following view of the matter. As the Court of Appeal observed in CENTRAL KENYA LTD –V- TRUST BANK AND OTHERS (SUPRA)

“the settled rule with regard to amendment of pleadings in that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

I have perused the proposed amendments to the written statement of defence. I have not detected any inconsistent cause of action in the same. I also do not think that Order 6 Rule 6 of the Civil Procedure Rules has been contravened.

With respect to delay and alleged prejudice to the Plaintiff, I am not satisfied that the same would occasion injustice to the Plaintiff. The Plaintiff chose to resist this application on the basis of Grounds of Opposition alone. It did not file a replying affidavit to explain the prejudice that it would suffer if this application is allowed. A mere allegation in the Grounds of Opposition and from the Bar in my view was not sufficient to show prejudice. In the premises I am unable to hold that the delay in bringing this application and the proposed amendments will occasion to the Plaintiff prejudice that cannot be compensated by costs.

The Court of Appeal in CENTRAL KENYA LTD –V- TRUST BANK AND OTHERS (SUPRA) observed at page 9 of its judgment as follows:-

“The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay

is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the Law is that amendments to pleadings are to be freely allowed unless by allowing them the opposition side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

In my view the Applicant has satisfied all the conditions for the grant of leave to amend its defence and the Plaintiff has not demonstrated that if the amendment is allowed it will suffer prejudice or injustice which cannot properly be compensated for in costs.

In the result I allow the Defendant’s application dated 13.10.2005 and filed on 17.10.2003 in terms of prayer 1 thereof. The costs of this application are awarded to the Plaintiff.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2005.

F. AZANGALALA

JUDGE