REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 66 OF 2003

ALI ABDI MOHAMMED ……..PLAINTIFF

VERSUS

KENYA SHELL LIMITED & BP COMPANY LTD … DEFENDANT

R U L I N G

The Plaintiff has moved this court by a chamber summons dated 29th September 2003; by which he is seeking leave to amend his Plaint.

The application is prophesed to have been made pursuant to the provisions of Sections 3A and 100 of the Civil Procedure Act (Cap 21), of the Laws of Kenya; as well as Order VI rules 3 and 8 of the Civil Procedure Rules. The application is supported by the Plaintiff's affidavit.

It is noted that the main reason for seeking leave to amend the Plaint is that in its present form, it does not contain the "pertinent facts that need determination". The Plaintiff says that the Plaint does not include pleadings for special damages. When canvassing the application, Mr. Tindi advocate submitted that the proposed amendment was intended to introduce into the Plaint, the particulars of the breach of contract, plus the special damages. It was his contention that by virtue of the provisions of section 100 of the Civil Procedure Act (Cap 21), the court has wide powers to amend, so as to bring out the real issues to be determined in the case. The said section 100 reads as follows;

> "The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding".

There is absolutely no doubt that this court is clothed with unlimited discretion to amend any proceeding in a suit. It is also abundantly clear that the court has been duly authorized to exercise the discretion to amend the proceedings at any time before judgment or final orders are pronounced.

The applicant invites me to exercise that discretion in his favour, and thus grant him leave to amend the Plaint, in terms of the draft Amended Plaint which is attached to this application. It was submitted before me that the only instances when the court may decline leave to amend a plaint were as follows;

(i) Where the proposed amendment was not necessary to determine the real issues, or

(ii) if the amendment would replace the original suit, altogether, or

(iii) if the amendment would prejudice the Defendant, or

(iv) if the amendment would introduce a new cause of action.

The applicant emphasized that the circumstances of the case before me do not fit within any of the 4 categories in which the court would refuse leave to amend the Plaint. It is the Plaintiff's case that the proposed amendments have been made in good faith, and solely for the purposes of enabling the court be in a position to determine the real issues between the parties.

It is also submitted that the Defendant would not suffer any prejudice, as it would be entitled to file a Defence to the Amended Plaint.

In response to the application, the defendant has urged me to dismiss it. The Defendant concedes that the court has an unfettered jurisdiction to allow the amendment of pleadings. However, it is submitted that in the circumstances prevailing in this case, the court ought to refuse to give leave to the Plaintiff to amend the Plaint. Indeed, the Defendant has gone further and filed an application to have the Plaint struck out. The parties herein did agree that I would make one Ruling to cover the 2 applications. The understanding between the parties, and which was also accepted by the court, is that if the Plaintiff's application for leave to amend the Plaint was successful, it would follow that the Defendant's application to strike out the Plaint would fail. The converse would be equally true: Therefore, if I should dismiss the Plaintiff's application, the Plaint would be struck out.

In support of the Defendant's application is an affidavit of Catherine Musakali-Wabumba, a legal officer with the Defendant. From the documents annexed to M/s Wabomba's affidavit, it is quite evident that the Plaintiff had sued the Defendant in Kisumu CMCC No. 130 of 2001 Ali Abdi Mohamed V Kenya Shell & B.P Co. Ltd "(The Kisumu Case)". The Plaint in that suit is also attached to M/s Wabomba's affidavit. A perusal of the Plaint reveals that the Plaintiff's claim for compensation was in respect of wrongful confinement, defamation and mental anguish. However, it is also readily evident that the underlying facts which gave rise to that suit are largely the same as those that gave vise to this suit. The main difference between the two suits is that whilst the "Kisumu case" was in relation to wrongful confinement and defamation, this case is for breach of contract. I therefore hold that the two cases have different causes of action.

A significant feature of the "Kisumu case" is that the Plaintiff did file an application to have it transferred to Nairobi.That application was supported by the affidavit of Mr. Munyala Muli. By the said affidavit, Mr. Muli indicated that the Plaintiff was desirous of amending the Plaint, so as to introduce a further claim of breach of contract. Mwera J., who heard the Plaintiff's said application, dismissed it with costs. In his Ruling, Mwera, J. noted, inter alia that the "Kisumu case" was already part-heard, and that only one more witness was yet to testify. He also held that if the Plaintiff was still minded to amend the "Kisumu case", he could do so at the High Court, Kisumu. For those reasons, the Judge declined to transfer the "Kisumu case" to the Milimani Commercial Courts.

It is the Defendant's contention that Plaintiff filed this case, as a way of circumventing the decision of Mwera J. I note that the said decision is dated 17th January 2003. It is therefore probable that the Plaintiff did file this suit in Nairobi, partially as a response to the said Ruling. However, even if it was only in response to the said decision by Mwera J., would that be reason enough, by itself, for striking out the Plaint?

The Defendant submits that by filing this suit, the Plaintiff is occasioning serious prejudice to the Defendant, as the latter is now compelled to fight multiple suits, in different parts of the country, yet the cases emanate from the same set of facts. It was also pointed out that matters in issue in both suits occurred within the geographical jurisdiction of the High Court in Kisumu. The Defendant's witnesses were said to be all based at Kisumu. By filing the suit in Nairobi, the Plaintiff will effectively compel the Defendant to incur substantial amounts in witness expenses.

The Defendant also submits that the worst prejudice it will be exposed to is the fact that he Plaintiff has already had sight of the Defendant's ammunition, as the same has already largely been exposed during the Plaintiff's cross-examination in the "Kisumu case".

It is my considered view that even if this suit was filed in an attempt to circumvent the decision by the court, when it refused to transfer the "Kisumu case" to Nairobi, that would not be sufficient reason to strike out the Plaint. The Plaintiff had sought to have the "Kisumu case" transferred to Nairobi; and he intended to apply for leave to amend the Plaint to add a claim for breach of contract. His attempt to have the case transferred failed. Yet in his mind, the Plaintiff had already decided that he has a claim for breach of contract. He therefore filed this suit, some seven days after the Ruling by Mwera J. There is no good reason why that Plaint should be struck out, just because it was filed after the Plaintiff was deprived of the avenue which he intended to use to bring the same action. Indeed, I would say that the decision of Mwera J. left the Plaintiff with no alternative but to institute another suit, if he was still desirous of seeking compensation for breach of contract.

On the other hand, notwithstanding the obiter remarks of Mwera J., that the High Court of Kenya, at Kisumu, would have jurisdiction, the Plaintiff decided to institute suit at Nairobi. The choice of Nairobi is, in my view, questionable. And in that regard, I accept all the complaints raised by the Defendant. A reading of paragraphs 3 and 4 of the Plaint in the "Kisumu case", reveals that the facts giving rise to the suits occurred in Kisumu and Busia. Also, in his Ruling, Mwera J. has expressly stated that the matters in issue were handled by the Defendant's Kisumu office. It is also noteworthy that by paragraphs 3 (aa) and 5 (aa) of the proposed Amended Plaint, the Plaintiff is confirming that the matters in issue took place at Busia, Yala and Kisumu. In view of these facts, the most logical place to institute this suit ought to have been at the High Court of Kenya, at Kisumu. The Defendant's witnesses who handled the contract are based at Kisumu. The Defendant's Kisumu branch office is the one that dealt with the Plaintiff at the material time. If the suit is tried in Nairobi, the Defendant will be faced with a substantial bill for its witnesses. Furthermore, the Plaintiff has not put forth any good reason for filing the suit in Nairobi, instead of Kisumu.

And in any event, the said action, of filing this suit in Nairobi, is a clear contravention of the provisions of Section 15 of the Civil Procedure Act. The said Section provides as follows;

> "Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction –
>
> > (a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
> >
> > (b) any of the defendants (were there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or
> >
> > (c) the cause of action, wholly or in part, arises".

As the Defendant herein is a body corporate, it would be instructive to consider the following;

> "Explanation. (2) – A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place".

In this case, the Defendant has a subordinate office at Kisumu. The cause of action also arose within the geographical area in respect to which the High Court at Kisumu has jurisdiction. It therefore follows that the suit ought to have been instituted at Kisumu, and not Nairobi.

However, the Defendant has not raised an objection to the Plaint on the grounds that it was filed before a court other than that where it ought to have been filed. The Defendant's application to strike out the Plaint is founded on Order VI rule 13 (1) (b) of the Civil Procedure Rules, and Section 6 of the Civil Procedure

Act. Order VI rule 13 (1) (b) reads as follows:

> "At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –
>
> (a) ……
>
> (b) it is scandalous, frivolous or vexatious"

In canvassing the application, the Defendant did not satisfy me that the Plaint was either scandalous, frivolous or vexatious. The fact that it ought to have been filed at Kisumu does not render it scandalous, frivolous or vexatious. Meanwhile, Section 6 of the Civil Procedure Act stipulates that;

> "No court shall proceed with the trial of any suit or proceeding in which a matter, in issue is also already and substantially in issue in a previously instituted suit or proceeding between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed".

Thus if the matter in issue in this suit were the same as that in the Kisumu case, this court would have stayed this suit.

When there are two cases involving the same parties in relation to the same subject matter, the latter suit would not necessarily be struck out; however, it would be stayed.

I therefore hold that the Defendant has failed to satisfy the court that the Plaint ought to be struck out on the basis set out in its application. I therefore dismiss with costs, the Defendant's application dated 17th November 2003. I however note that the suit ought not to have been filed in Nairobi. I leave it to the Defendant to decide what to make out of that finding. Meanwhile, as regards the Plaintiff's application for leave to amend the Plaint, there is no doubt that the proposed amendments are substantial. The Defendant asserts that if the amendments are to be made, it should be done in the "Kisumu case". Yet in the same breath, the Defendant points out that the "Kisumu case" was almost concluded, as only one more witness is still to testify. I believe that it would probably occasion more prejudice to the parties if the proposed amendment, which would introduce a completely new cause of action, was to be allowed in the "Kisumu case" at the stage it has reached.

Further, the only steps that have already been taken herein are the filing of the Plaint and Defence. If amendments were allowed to the Plaint, at this early stage in the proceedings, I hold the view that the Defendant would not suffer such prejudice as cannot be compensated by an award of costs.

And whilst I accept that the Defendant may have "exposed" his line of Defence through his cross-examination of the Plaintiff's witnesses in the "Kisumu case", such "exposure" is mutual. The Plaintiff too, would have similarly shown his hand, when he was cross-examining the Defendant's witnesses. I therefore find that neither of the parties would be unduly compromised in comparison to the other.

In view of the fact that the Defendant would be fully entitled to file a Defence to the Amended Plaint, I believe that by exercising that right appropriately, they can fully answer it.

I therefore exercise my discretion and grant leave to the Plaintiff to amend the Plaint in terms of the draft Amended Plaint. The said Amended Plaint should be filed and served within the next 14 days.

The costs of the Plaintiff's application dated 29th September 2003, shall be borne by the Plaintiff in any event.

The need for the said application was occasioned by his previous inadequate Plaint; thus when he seeks to amend the said Plaint, so as to enable the court determine the real question in controversy between the

parties, the Plaintiff cannot expect the court to order that the costs be paid by the Defendant.

DATED at Nairobi this 7th day of April 2004.

FRED A. OCHIENG

Ag. JUDGE