REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 549 OF 2001

(From the original Civil Suit No. 4030 of 2001 of CMCC at Milimani)

FIDELITY SECURITY LTD. …………………………………..APPLICANT

VERSUS

JOHN ONYIENGO OGWANG …………………………..RESPONDENT

JUDGMENT

This appeal arises from the ruling of the Senior Resident Magistrate (Mrs. Nzioka) delivered on 27th September, 2001 at Milimani Commercial Courts Nairobi.

It related to an application by chamber summons by the appellant – then defendant, to amend its defence dated 31st March and filed in court on 6th April 1999.

By consent letter dated 16th and filed in court on 26th April 1999 and signed by counsel for both parties, it was agreed

> **"By consent, chamber summons dated 31st March 1999 be and is hereby allowed as prayed. The plaintiff be at liberty to amend and file an amended plaint within 14 days from the date of the filing of the consent.**"

The amended plaint was filed in court on 25th June 2001 the appellant filed an application for orders that both the plaint and amended. Plaint be struck out for having been filed into court out of time and without the court's leave. The application was supported by the grounds set out on the body thereof and also on the facts stipulated in the supporting affidavit.

All these were intended to show how both the original and amended plaints were filed in court outside the requisite period under the Limitation of Actions Act or by the consent letter.

The application was heard by the Senior Resident Magistrate on 29th September, 2001 whereupon she delivered her ruling thereon on 27th September 2001 dismissing the application. The appellant was unhappy with the ruling and appealed to this court in a memorandum of appeal dated and filed in court on 1st October 2001 with 3 grounds of appeal.

The first 2 grounds faulted the learned magistrate for failing to strike out the original and amended plaint for being filed in court out of time while the third ground attacked her for taking into account irrelevant matters while making her ruling.

The appeal was heard by this court on 21st January 2003 wherein counsel for both parties appeared

and either urged or opposed the appeal.

Counsel for the appellant submitted that the amended plaint was incompetent in so far as it was filed outside the period provided in the consent order dated 16th and filed in court on 26th April 19999.

On this ground the respondents counsel countered that the appellant had not demonstrated to this court that it had suffered any prejudice because of the amended plaint being was filed in court a day after the required time.

As far as I can see, this is beside the point. Both the lower court and counsel for the respondent acknowledge that the amended plaint was filed one day after the time limit set out in the consent order.

What does this mean? That a party can vary or set aside a consent order or letter at will! He cannot do so. Neither has the court a discretion to vary or set aside what parties have agreed upon in their document.

The principle enshrined in a consent letter is that of a contractual relationship between the parties which can only be varied or set aside by another consent. Unless, it is shown by the party wishing to change it that it was entered into by fraud, mistake, misrepresentation or such other cause which would warrant setting aside or varying a contract.

There was no submission in the lower court or in this court to establish any of the above circumstances to warrant the learned magistrate increasing the time required for the respondent to file the amended plaint.

Counsel for the appellant was therefore perfectly right in praying that amended plaint filed in court be struck out for being incompetent.

In such a cases, the question of applying rules of natural justice or meeting ends of justice to the parties does not apply as there was a meeting of the minds by counsel for the parties when they entered into the consent letter dated 16th April 1999. As regards striking out the original plaint, counsel for the appellant stated that as the cause of action arose on 23rd July 1992, the claim should have been filed by 22nd July 1995. I think this submission was based on the belief that this was a tortuous claim which should have been made within 3 years from the date of the cause of action.

But what about if the business relationship between the parties herein was of a contractual nature, which I feel was the position: Would the same principle apply? The answer could be either way. If yes, it would mean the suit should have been filed in court within 6 years, thus by 22/7/98.

Here the suit subject to this appeal was filed in the lower court on 24.6.98 which I am satisfied was not outside that limitation period.

If therefore, as is now clear, the amended plaint were to be struck out, I would say the respondent would have something to fall back to as his original plaint is still in place.

And if, as I think, there is room for the pursuit of the respondent’s claim on the basis of a contract, then it would have been premature for that particular plaint to be struck out. The learned Senior Resident Magistrate, unfortunately, did not go into this though the application before her had sought another order to this effect.

In the ultimate result, my findings on this appeal are that the learned Senior Resident Magistrate had no authority to add one more day to the period within which the respondent should have filed its amended plaint and that on that score, the application should have been allowed and the amended plaint filed in court 11.5.1999 struck out.

At the same time the magistrate should have made a finding on the prayer relating to the original

plaint which according to the record, she did not do but which, in my view, should remain on record for the respondent to base his claim on if he wishes to continue with it.

Thus this appeal succeeds in part with half costs to the appellant.

Delivered this 4th day of January, 2003.

D.K.S. AGANYANYA

JUDGE