



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 1168 OF 2001

STOCKMAN ROZEN KENYA LTD.....PLAINTIFF

VERSUS

DA GAMA ROSE GROUP OF COMPANIES LTD.....DEFENDANT

RULING

The defendant filed an application on 17.10.2001 under order 6A rr 2,4, order 7rr 1(2), 3, order 6 r 13 (1) (d) Civil Procedure Rules for orders that the amended plaint filed hereon 27.9.2001 and served on 5.10.2001 and especially paragraph 4 thereof be disallowed. It was prayed in the alternative that only the said paragraph 4 would be struck out.

Mr Ngatia argued *inter alia* that the said amended plaint did not comply with order 6A r 7 Civil Procedure Rule and it did not contain the number of the Rule in pursuance of which the amendment was made. Further that the amended plaint was not accompanied with a verifying affidavit as required in such pleadings. It was furthermore added that the amended plaint did raise a totally different cause of action from the one initially pleaded. The court heard that while the original plaint spoke of a claim for goods sold and delivered, the amended defence brought forth as the basis, costs of looking after “dormant eyes rose plants” in animated suspension and preserving the same. That the defendant had failed to collect its plants. The end prayer was *inter alia* for what was expressed as NLG 170,718 (with interests, VAT, and costs).

Mr Kaburu countered that his claim was in order to amend the plaint as it did before closing of pleadings. That it could as well raise a new cause of action so long as it arose from transaction and facts. That it was no matter that the plaint had not cited the provisions of law by which it had been amended and served. This was termed a procedural matter that prejudiced nobody but served substantive interests of justice. That a verifying affidavit was only required to come along with the initial plaint and not when amendments to it later were effected.

The following cases were cited and referred to by both sides:

Rahilu Khan vs Standard Chartered Bank Ltd & Another Civil Appeal 262/99 (C.A),

National Bank of Kenya Ltd vs Kinyanjui HCCC 201/2001

Wilfred Musingo vs Habo Agencies Ltd HCCC 2047/2000

Microsoft Corporaion vs Mitsumi Computer Garage Ltd & Another HCCC 810/2001 and

Hagod Simonian vs Johar & Others [1962] EA 336

This court takes the liberty not to recite the cases above, the provision of law relied on and the submissions in full. However the substance of each shall as much as is possible feature in the following determination.

It is not disputed that the initial plaint with a verifying affidavit was filed here on 26.7.2000 for a claim of a sum due on goods sold and delivered. On 20.9.2001 a defence, and counterclaim, was filed and served. On 27.9.2001 the amended plaint under attack was filed. The court heard that it was served on 5.10.2001. In accord with order 6A Rule 2 (1) Civil Procedure Rules this application was filed within 14 days. It is thus without more that the amendment to the plaint was before pleadings closed (see order 6 Rule 11 CPR) and so the leave of this court was not required by the plaintiff in order to amend and serve the plaint. All this does not appear in dispute, either in law or fact, and when Mr Ngatia submitted he did not do much as touch on order 6 Rule 13 Civil Procedure Rules cited in this application. But emphasis lay on the following provisions of law; order 7 Rule 1(2), 3 and order 6A Rule 7 Civil Procedure Rules. That is how they appeared first in the head of application and then ground (a) in the body of the application order 7 Rule (2), 3:

- “1. (1)....
(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.
(3) The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub-rule (2) of this rule.”

In this matter, the defendant has applied that the (amended) plaint should be struck out or a part thereof for failure to comply with order 7 Rule 1 (2) Civil Procedure Rules. Mr Ngatia urged this court to do just that because what the court had before it if it has to remain is the amended plaint. It is the basis of trial and determination of this suit. So according to him, it should be accompanied by a verifying affidavit. That the plaintiff did not file one and accordingly his amended plaint is incompetent. As said earlier Mr Kaburu remained of the view that a verifying affidavit is filed once with the initial plaint and subsequent amendments thereto need none. It is true to say that Civil Procedure Rules do not state that a subsequent amended plaint should again feature a verifying affidavit. But do the decided cases point to such a requirement?

It is no doubt that an amended plaint is what stands before the court and it defines the case of the plaintiff together with the issues to be tried. The original plaint is no longer material (see the *Rahilu Khan* case above). Nobody has any problem with this state of things but this court will need to look elsewhere to come up with a finding whether a verifying affidavit should or should not accompany an amended plaint. It cannot be in the case of *National Bank of Kenya* (above). There the verifying affidavit filed was found incompetent. And so the plaint was considered as not having been accompanied by any. The *Microsoft* case (above) bears the learned Justice Ringera’s remarks as he considered competence or lack of it, of some verifying affidavits placed before him in that suit. That matter was ventilated, on preliminary points. The learned judge remarked:

“The third point of preliminary objection is entirely well taken. Order VII does not require any verifying affidavit to accompany an amended plaint or indeed any other pleading, save the plaint originating the action.”

Mr Ngatia was almost about to say that that remark was *obiter*. This court does not agree. The matter had been raised and submitted upon in the case. No provision of law or case supported the stance other than that that Ringera J took. To this court, that is basically the proper position. It shall not be assumed contrary to the intention of the Rules Committee, that since it stated that a verifying was required to accompany a plaint, it follows that an amended plaint, too, should have a verifying affidavit with it. Had that been the committee’s intention it should have said so. It is no matter that an amended plaint makes the original pleading immaterial as far as the plaintiff’s case and issues to be tried and determined go. One verifying affidavit, once filed remains in effect.

The issue of the amended plaint producing a totally new cause of action would have had better address

had the contested amendment been brought by way of application to amend (see order 6A r3 (2), (3) CPR). But that is not the case here. So not much time need be expended on that aspect. Let us now move to order 6A rule 7 which the applicant invoked.

“7 (1) Every pleading and other document amended under this Order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made. (2)..... (3).....”

We are all agreed that the plaintiff amended the plaint before the close of pleadings as provided for order 6A (1) Civil Procedure Rules. The amendment was done at Nairobi on the 23.9.2001. This was not done pursuant to the court’s order allowing the amendment. So the plaintiff did not have to endorse the date of such an Order (mark you it is not said at what part the endorsement should be in the amended plaint). But the plaintiff was enjoined to endorse on the amended plaint the number of the rule in pursuance of which the amendment was made. The endorsement is mandatory. The word used is “shall”. That means failure to comply has fatal effects. In this amended plaint, the plaintiff has not endorsed the number of the rule mandating the subject amendment. It is thus not a technical or procedural omission. Order 50 rule 12 Civil Procedure Rules speaks of stating the provisions of law, order or rule under which an application is made not being a basis of that application failing. Here we are not dealing with an application. We are faced with an amended plaint on which the plaintiff did not endorse the number of the rule under which the amendment was effected. The overall impression left is that the amended plaint under attack is incompetent on account of order 6A. r.7 Civil Procedure Rules and it is struck out. That leaves the original plaint on record and what the plaintiff makes of the ruling.

Prayers granted with costs.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of January, 2002

J.W. MWERA

JUDGE