



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO 227 OF 1996

SULTANALI PYRALI MOLUPLAINTIFF

GEORGE A. DREW T/A ISLAND PROPERTIES.....PLAINTIFF

VERSUS

KENYA RAILWAYS & ANOTHER.....DEFENDANT

RULING

This application dated 1st October 2001 and filed on 24th October 2001 is brought to court under order 23 rules 2 and 12 and order 6A rules 3 and 8 both of the Civil Procedure Rules. It is seeking mainly two orders and these are first, that the court makes an entry to the effect that the second plaintiff is deceased and the cause of action survives or continues to the surviving plaintiff above and secondly, that leave be granted to the first plaintiff to amend the plaint in terms of the amendments shown in the draft amended plaint which is annexed to the application. The application is also seeking that the suit proceeds as against defendants and is further seeking that the cost of this application be provided for. No grounds were set out in support of the application but it is stated that the application is grounded upon the affidavit of Sultanali Pyrali Molu. That affidavit states that the second plaintiff was his former partner and that same second plaintiff died on 31st January 2000. The two were partners in the business of Island Properties. The first plaintiff is now the sole partner in the same business. He ends that short affidavit by stating that as the cause of action survives in his favour he should be allowed to continue with the suit and to that extent, to amend the plaint. He annexed Death Certificate and Certificate of Registration and a draft amended plaint to that affidavit. The same applicant/first plaintiff filed a supplementary affidavit, with leave of the court. That affidavit was dated 18th June 2002. In that affidavit, the applicant annexed certificate of Registration of Change of Particulars dated 23rd January 2001 showing that he is the sole partner in the business firm. He also annexed a statutory declaration sworn by the sole executor of the estate of the deceased 2nd plaintiff confirming that the estate of the deceased second plaintiff has no interest in the business carried on under the name of Island Properties and that the applicant is now the sole proprietor of the sad business. He maintains that as the sole surviving partner and as he is now the proprietor, the suit property continues in his name. He ends that supplementary affidavit by emphasizing that as he was the first plaintiff and is now the surviving partner, and as he had cause of action against the respondents, the same cause of action survives and continues as against the defendants.

The first defendant was served but did not file any documents in opposition to the suit. It was also served with the hearing notice but neither itself through its own officers nor its advocate attended court for hearing. The second respondent/defendant opposed the application and filed a replying affidavit sworn by its Manager, Munir Thabit. He produced correspondences between 2nd respondent's counsel and the applicant's counsel. He stated further that the legal advice he received was that upon the death of George Allan Drew, the partnership business of Island Properties was deemed to have been dissolved and that upon that dissolution this suit automatically abated. Lastly he stated that a part from the change in title

and paragraph 1, of the amended plaint, the amendments proposed are not within the scope of the Chamber Summons under consideration and therefore should not be allowed by the court.

That applications for amendments to pleading before hearing are normally to be granted without much ado if they can be made without injustice to the opposing party is now a well settled principle in law and I need not belabour it as indeed Mr Shah, the learned counsel for the second respondents also readily accepted the same. If any authority is needed for that proposition then the case of *Castelino vs Eastern Bakery* [1958] EA 461 will suffice.

In this case however the second respondent raises three points which it contends militate against granting of the orders as prayed for in the application. Two of these are in the affidavit namely that the partnership was by law dissolved upon the death of the second plaintiff and that being the case the suit abated and thus (if I understand Mr Shah), there is no plaint to be amended as the suit has automatically abated. The second point is that the amendments proposed are outside the scope of the Chamber Summons. It seems to me that this was meant to hold before Mr. Khanna amended his Chamber Summons by inserting order 6A rules 2 and 8. However, Mr Shah contended also that the amendments sought are so drastic that they would alter the whole substratum of the suit. Thus Mr Shah contends that if the amendment is allowed, a new suit would be introduced in place of the original suit. The third matter which is not in the affidavit and was not in any grounds of objection (as no grounds of objection was filed) was that there was inordinate delay in filing this application as the second plaintiff died on 31.1.2000 and the application was filed on 1.10.2001, i.e. over 1 year 9 months after the death of the second plaintiff.

I will consider the application with these objections in mind.

First, on the question of delay, I do agree there was delay in filing this application and I cannot say the period is reasonable. However neither order 23 rule 2 nor order 6A rule 3 spell out any time limit for the application seeking prayers 1 and 2 herein. Indeed no time limit can be spelt out for an application for amendment as it is an application that can be made at any time even after the case is heard but before judgment. As to prayer made under order 23 rule 2 all the rule enjoins the Court to do is to make an entry on the record and the suit proceeds against living party or is allowed to continue being prosecuted by the living party. No time limit is provided for the application to be made. This objection cannot therefore stand.

The other point raised was that the amendments proposed are not within the scope of the Chamber Summons under consideration. The argument here was that the amendment sought, as can be seen from the draft amended plaint is so drastic that it alters the whole substratum of the suit. I have perused the draft amended plaint. The main amendment apart from the amendments consequential upon the death of the second plaintiff is mainly in the prayers and that is that whereas in the original plaint the first prayer was for specific performance and was against first defendant, in the proposed amended plaint, that prayer for specific performance is removed and now prayers (e) and (f) are inserted which are both seeking declarations. Order 6 A rule 3 (5) states as follows:

“(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 my mind, the amendments that are sought are as far as the 2nd defendant is concerned mainly amendments that arise as consequence of the death of the second plaintiff. The amendments that are said to be offensive are mainly amendments that affect the first defendant, which, as I have stated has not objected to them at all. I think the reason why amendments to pleadings are generally granted without much fuss particularly before hearing is because such amendments help to have all matters between the parties in the suit availed to the court so that the court may be in a better position to have an informed view of the entire case and that ensures justice.

The last point is that the death of the deceased 2nd plaintiff did in itself dissolve the partnership so that

the suit between the partners and the defendants automatically abated. I was shown some authorities on this proposition. Partnership Act Chapter 29, states at section 37(1) as follows:

“37 (1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.”

The position in general is that as between the partners, partnership is dissolved any time a partner dies. The next question is what about the interests that were acquired or that were in the process of being acquired by the partners? In short what happens after the partnership is dissolved? I have considered the provisions of sections 43, 44, 46 and 47 of the Partnership Act as well as paragraph 186 of *Halburys Laws of England* Volume 35 Fourth Edition. What I do gather from the same provisions is that the dissolution of the partnership in whatever way does not mean that the partners who remain (in this case the first plaintiff) forgoes his rights including the right to realize (if he is successful) the fruits of a civil suit started during the partnership. In paragraph 186 *Halsburys Laws of England* Fourth Edition, Volume 35 it is stated:

“186 After dissolution partnership continues only for winding up:

After dissolution, the partnership subsists merely for the purpose of completing pending transactions, winding up the business, and adjusting the rights of the partners. For these purposes, and these only, the authority, rights and obligations of the partners continues.”

And in section 46 of the Partnership Act Chapter 29, there is a suggestion that in case of death of a partner, then remaining partner can continue with the business and the estate of the deceased partner will have a share of the profits made. My understanding is that for the purposes of the transactions already started before the partner died, the remaining partner can complete them. In this case, the estate of the deceased 2nd plaintiff has made it clear that it is not interested in the partnership business any more. There was a property which is the subject of this suit. I do not see how the remaining partner cannot continue with the case involving that property as it is a transaction that was started during the partnership. In my humble opinion to accept the suggestion that the suit has abated because one partner died would result into absurdities as it could mean in effect that where two partners are suing for what they conceive to be theirs or are being sued for what another person conceives to be his then any time one of the partners dies that is the end of the suit as it abates. It would make it an extreme risk doing any business with a partnership.

I do feel that even after the death of a partner, the remaining partners would continue by way of winding up the partnership, with transactions into which they were involved with third parties.

Having considered all aspects of this application, I do feel it is merited. I will grant it in terms of both prayer 1 and 2. The death of the 2nd plaintiff is entered in the court records. The first plaintiff can continue with the suit. The first plaintiff is allowed to amend the plaint in the manner indicated in the draft amended plaint. The amended plaint to be filed within seven days of the date hereof. The 2nd respondent will have the costs of the application and the costs thrown away. Orders accordingly.

Dated and delivered at Mombasa this 24th day of September, 2002

ONYANGO OTIENO

JUDGE