



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2929 OF 1997

HARBINDER SINGH SETHI.....PLAINTIFF

Versus

ROBERT J. WILHELM.....1ST DEFENDANT

R U L I N G

The applicant who is the 1st defendant in this suit has taken out this Chamber Summons and he prays that he be granted leave to amend his defence.

The proposed amended defence is attached to his application.

He bases his application on the grounds that the necessity to amend his defence arises out of the contents of the particulars that were provided by the plaintiffs and further, that the proposed amendments are material to enable the court to effectually and completely determine all the issues in dispute between the parties to the suit.

The application is opposed by the plaintiff, who has sworn the replying affidavit. It is his contention that prior hereto, this applicant had made an unsuccessful attempt to have the suit against him struck out, and not having filed a review application to have that dismissal order reviewed, he cannot now make this attempt, which he contends is based on nonexistent grounds, namely illegalities.

It is also opposed on the grounds that the applicant seeks to introduce new matters which differ from matters raised in his original defence and that some areas of the proposed amended defence are in direct conflict with the defence on record.

In his defence on record, this applicant confirms that he is an employee of the 2nd defendant. It is worthy to note at the stage that for some unexplained reasons the 2nd defendant was never served with the summons to enter appearance and the plaint in this suit.

Be that as it may, this applicant denied the existence of an agreement between him and the plaintiff and further that the plaintiff rendered the services that he was expected to render, and as a result of which there “was total lack of consideration” on the part of the plaintiff. He averred in the said defence, that the contract between his employer and the plaintiff and on the basis of which the plaintiff based his claim has never been concluded.

On perusal of the proposed amended defence, I find that the proposed issues would tend to support the issues raised in the defence on record. I fail to agree with Mr. Ongicho, the learned counsel for the respondent, whose submission it was, that the proposed amendments seek to introduce a new set of allegations not included in the original defence.

In his supporting affidavit, the applicant depones that certain allegation arose on the particulars filed by the respondent on 29th March 1999.

I have perused the same and I find that it clearly indicates that the respondent had acted as an intermediary for the applicant “to have full access to the Managing Director and the Company Secretary of Kenya Power & Lighting Company Limited, which resulted in a contract for the purchase of a helicopter by the said company”.

Having provided such particulars, wouldn't it be only fair to allow the applicant to defend himself and thereby to clarify the issues so raised? The applicant proposes to lay down the facts and issues which he wants clarified and determined by the court. The issues raised in his proposed amended defence cannot be said to be frivolous or scandalous, neither can they be said to be “a new set of allegations or a new cause of action” as Mr. Ongicho urges me to find.

The other issue for my determination is whether the application is statute barred. In his submission, counsel for the respondent urged the court to find the same which is based on tort statute barred, not having been brought within the statutory period of three years. He relied on the Appeal case of Joseph Ochieng and Others v First National Bank of Chicago CA No. 149 of 1991 (unr) where the Court of Appeal found that the plaintiff's plea to amend their plaint to include special damages had been rightly dismissed by the Court appealed from. The Court of Appeal noted that order VI rule 3(5)

“does not permit an amendment where the statute of limitations would have barred the claim”

In the current application, the original defence was filed on 8th January, 1998 and this application was filed in November 2000. Mr. Kibet, the learned counsel for the applicant, made submissions to the effect that the limitation period cannot apply to this applicant or a defendant for that matter but would only apply to the plaintiff in a suit.

I would agree with Mr. Kibet's line of submission for the reasons that, it is the plaintiff who sets the action in motion, and the defendant is entitled to bring out all his defences to the claim. It would be unreasonable or unjust to find that a defendant is statute barred from raising his defence to a claim.

In any event the Court of Appeal decision on the aforementioned case dealt with an issue affecting a plaintiff and not the defendant and in the circumstances it would not readily apply in this particular matter.

Had the defendant, being the applicant, herein sought to raise a completely new matter or a completely new cause of action, which I have found is not his intention here, then and depending on the circumstances, the submissions of Mr. Ongicho would apply, otherwise no.

Having found as I do, I wish to restate the legal principle which both counsel are agreed upon and as laid down in Odgers on High Court Pleadings and Practise 23rd Edn. at page 199:

“Either party is ordinarily given leave to make such amendment as is reasonably necessary of his case provided that there has been no undue delay on his part and provided also that the amendments will not injure his opponents or affect his vested rights.....”

To my mind, the proposed amendments which have been raised in this application, which is not in any way similar to the earlier application for striking out the plaint, will enable the court to determine the real question in coherency in the suit. For the aforementioned reasons, I would and I do allow the application in terms of its prayers no. 1 and 2.

The costs of the application shall be in the cause.

Dated and delivered this 21st March 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Mr. Kibet for the applicant

Mr. Ongicho for the respondent