

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1650 OF 1999

MOORE STEPHENS PLAINTIFF

VERSUS

RAZA ASLAM 1ST DEFENDANT

NORTHWEST TRUST 2ND DEFENDANT

RULING

This suit is coming up for hearing on 28.6.2001. The date was taken ex parte on 5.12.2000 after the advocates for the defendant failed to send a representative for the purpose of fixing the date, they having been invited to do so by the plaintiff's advocate vide a letter to them dated 29.11.2000.

By an application dated 29.5.2001 made under O. VIA Rule 3(3) of the Civil Procedure Rules, the plaintiff now applies for leave of the court to amend the plaint. The amendment seeks to substitute a new party namely Northwest Trust Limited for the existing party Northwest Trust. Such substitution if allowed will clearly necessitate the issuance of fresh summons and the filing of an appearance and defence by the substituted party. The plaintiff does not appear to appreciate the full extent and consequences of its action for in the same application it seeks another order, namely:-

“That the draft Amended plaint annexed hereto and marked ‘PNK ... 1’ be deemed as duly filed and served.”

Considering that the 2nd defendant is not yet a party, it is difficult to see how the amended plaint can be deemed to have been duly served. The second problem that the application raises is that if this application is allowed, the suit will have to be taken out of the hearing list of 28.6.2001. Considering that the plaintiff has been aware of the true state of affairs (if we accept what it says for the sake of argument) since November 1999 and has been sitting on whatever rights it has for roughly 20 months, on what basis should it now be allowed to introduce a new party to the proceedings so late in the day. In my assessment, no basis exists for doing so.

O. VIA Rule 3(3) of the Civil Procedure Rules which is the rule under which the application has been made provides:-

“An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.”

In view of the requirements of the above provision, the court has to be satisfied that “the mistake to be corrected was a genuine mistake” and “was not misleading.” With regard to that requirement the plaintiff states as one of the grounds upon which the application is based is that “due to an oversight on the part of the plaintiff's advocates, the word “Limited” was omitted in describing the 2nd defendant” and that “the error of the advocates should not be visited on the plaintiff”. But was the error simply one of inadvertently omitting to include the word “Limited” in the plaint?

A careful reading of the plaint shows that the plaintiff sued the 2nd defendant as a firm and not as a limited liability company. In paragraph 3 of the plaint, the 2nd defendant is described as ‘a private firm of

trustees' and the 1st defendant as 'the beneficial owner' of the 2nd defendant. If the only error committed in the process of preparing the plaint was the alleged omission of the word "Limited" then the 2nd defendant would not have been described as a private firm and the 1st defendant would certainly not have been called 'the beneficial owner'; he would have been referred to as a shareholder or something to that effect.

In my view therefore, the ground upon which this application is based is neither truthful nor genuine. For those reasons, I am not satisfied that the applicant has satisfied the requirements of O. VIA Rule 3(3) of the Civil Procedure Rules. The application therefore fails and is accordingly dismissed with costs.

Dated at Nairobi this 27th day of June, 2001.

T. MBALUTO

JUDGE