

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.680 OF 2000

N.K. BROTHERS LTD PLAINTIFF

VERSUS

JOMO KENYATTA UNIVERSITY

OF AGRICULTURE & TECHNOLOGY DEFENDANT

J U D G M E N T

The Defendant applies to amend its defence in accordance with the draft Amended Defence and Counterclaim annexed to the affidavit of Professor Fredrick Onyango in support of the application.

The proposed amendment being a new paragraph 2(a), sets out the history and present legal status of the Defendant.

The amendment to para.4 denies the Plaintiff's right to charge intent under the contract. This is a matter of fact.

The proposed new paragraphs of 8 and 9 alleges the contract was void at intio due to a signing irregularity, that it offends the Government Contract Act and that finally the claim is barred, by limitation.

The counterclaim alleges negligence and breach of contract by the Plaintiff in the performance of the contract in accordance with the particulars set out. The counterclaim also alleges overpayment as particularized and claims a refund of this sum.

Mr. Hira objects to the amendments and relied on the principles of amendment set out in odgeds on pleadings as well as the case of Nairobi Golf Hotels (Kenya) Lalji Bhimji Sanghani builders and Contractors (A No.5 of 1997) a case in which the Court of Appeal upheld the decision of the Judge at first instance who allowed the Plaintiff's application for summary Judgment.

The Plaintiff was based on Architects Certificates, as is the case here, and the Learned Court of Appeal in its Judgment held that the effect of a final certificate in a contract of works of construction will depend on the terms of each contract and that in that case the architect had power to certify the final balance due and was fonctus officio. As a result of that case the Appellant could not resist payment.

The application before me is for amendment and not summary Judgment. The question to be asked here is could the amendments sought have been pleaded in the first place and do the matter raised arise out of the res gestae of the matters sought to be determined by the Court. If so would there be any prejudice to the Plaintiff in allowing these amendments.

In my view the matters raised in the amendments are relevant to the matters as they sping from the contract on which the claim is based. Whether or not the matter raised will succeed is an entirely different matter but I am of the view that the Defendant is entitled to raise these matters and have them determined by the court. In the result I allow the amendments with costs to the Plaintiff.

Dated and delivered at Nairobi this 11th day of October, 2001

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE