

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1249 OF 2000

BARLANY CAR HIRE SERVICES LIMITED PLAINTIFF

VERSUS

CORPORATION INSURANCE LIMITED DEFENDANT

R U L I N G

This application is for leave to amend Plaintiff. Draft amended Plaintiff is annexed. The suit has not been heard. Ground for seeking the order to amend is that it has become necessary to amend the Plaintiff dated the 20th June 2000 in order to enable the Honourable Court to determine the real question in controversy between the parties herein. The application is opposed and replying affidavit sworn by the Defendant's counsel was filed on 13.11.2000. The main ground of opposition is that the proposed amendment seeks to raise an issue which is already res judicata as the court has decided on the issue.

No prejudice is being alleged by the Respondent. As to whether the issue raised in the amendment has been decided upon is in doubt as the application that was before court was on whether to refer the matter to arbitrator or not. The court gave reasons from a Preliminary point before it. The question raised in the amendment was touched on but no final conclusive decision can be said to have been made at the time. I do agree the comments made by court at that time were clearly obiter dictum. It is important to note that the court went ahead and stated in the same ruling as follows:

“I will abstain from striking out the Plaintiff for a further 28 days so that the Plaintiff has an opportunity within that time to apply to amend its Plaintiff if so advised”.

It is important to note further that court later on made another remark in another Ruling as follows:

“Whether the litigants go to arbitration or the Plaintiff successfully argues its pending application to amend its Plaintiff, in either forum the Plaintiff will be heard”.

As I have stated hereinabove, no prejudice has been alleged by the Respondent in case the amendment is allowed. If the Plaintiff will after amendment contain matters that are to the mind of the Defendant res judicata, the Respondent/Defendant will have opportunity to raise the same in its amended Defence. In the case of Eastern Bakery vs. Castelino (1958)

“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs”.

I do grant this application. Plaintiff has leave to amend its Plaintiff and the annexed amended Plaintiff deemed as duly filed upon court fees for the same being paid. Defendant allowed ten days from the date hereof to file amended Defence. Plaintiff will pay costs of this application to the Defendant plus costs occasioned by the amendment. Orders accordingly.

Dated and dated at Nairobi this 6th day of December 2001.

ONYANGO OTIENO

JUDGE