

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.262 OF 2000

KENFREIGHT (E.A) LIMITED PLAINTIFF

- versus -

STAR EAST AFRICA CO. LIMITED DEFENDANT

RULING

The Defendant's application dated 26th July, 200, was made under O. VI r 13(1)(a) and O.VII of the Civil Procedure Rules and S.3A of the Civil Procedure Act. Mr. Kagram's opening prayer under O.VI r.13(1) (a) was abandoned so the application has been centered only on Order VII of the Rules. Wherein the Defendant wants the plaint to be struck out because it did not comply with requirement under that order.

There was an amendment to the original plaint and in that amendment the Plaintiff averred that no previous proceedings existed in another court over the same matter. That averment was omitted in the previous pleading and against that Mr. Kagram was right in asking that the plaint be struck out for omitting an important averment as is provided under Order VII, but the amendment corrected the omission, it pre-empted Mr. Kagram's application but Mr. Kagram however has stepped up his argument on the new position posed by the amendment and if I understand him correctly he now says that because initially the omission existed so at that point in time there was no plaint consequently an amendment would have just been a mirage and could not have been effectual.

With respect to Mr. Kagram I have failed to see the logic and his stepped up reasoning and I venture to say that it cannot be the law. One small example will suffice. This court can strike out a pleading that does not show a cause of action. In legal parlance that means that there was no action at all ab initio where there is no cause of action disclosed. So as is here the fact that a pleading left out a necessary averment does not mean that it never existed and that it cannot be amended. What it means is that it is defective and the effect of the defect can be avoided by an amendment. The effect can be fatal if not corrected. The corollary to this is the inherent power of the court to effect amendment on any pleading for whatever defect, and this is possible of the matter here unless for some reason the court lacks jurisdiction. The case quoted to me by Mr. Kagram the decision of Sir. Udo Udoma, C.J. of Uganda in the case of Kagenyi v. Musiramo & Another 1968 E.A. p.43 is not a question of defective pleading but illustrates the fact that where there is no jurisdiction the court can take no action. This court has jurisdiction and could amend this pleading but this is not necessary the pleading is wholesome as amended, and I do not think Mr. Kagram is entitled to question an amended pleading which has been amended in time and has corrected what was missing.

The application is dismissed with costs.

Dated this 22nd Day of November, 2000.

A.I. HAYANGA

JUDGE