



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 419 OF 2018

DRY ASSOCIATES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

MULTIPLE HAULIERS (EA) LIMITED.....1ST DEFENDANT/RESPONDENT

MULTIPLE HAULIERS ICD (K) LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff's application dated 17th December 2020 seeks the following orders: -

- 1. THAT this Honourable Court be pleased to grant leave to the Plaintiff/Applicant to amend the Plaint dated 14 December 2018.**
- 2. THAT the Plaintiff do file an Amended Plaint within 14 days of leave.**
- 3. THAT the costs of the application be in the cause.**

2. The application is supported by the affidavit of **George Otieno** and based on the grounds that;

- a. THAT the Plaintiff filed its Plaint dated 14 December 2018 when it was being represented by the Firm of Bahati Mwamuye & Associates Advocates.**
- b. THAT the Plaintiff has since instructed the firm of Anmednasir, Abdikadir & Company to take over the conduct of the matter on its behalf.**
- c. THAT the Plaintiff is desirous of introducing new facts and co-Plaintiffs to the Plaint, which facts were not brought to its attention when it was represented by its previous advocate.**
- d. THAT it is in the interest of just and fairness that the Plaintiff be allowed to amend its Plaint in order to incorporate these crucial facts with a view of having the court address substantively all the issues as between the Plaintiff and the Defendants and also, to allow a just and fair determination of the matter.**
- e. THAT it is also in the interest of just and fairness that the Plaintiff be allowed to amend its Plaint in order to include crucial parties to the proceedings with a view of having the court address substantively all the issues as between the Plaintiff and the Defendants and also, to allow a just and fair determination of the matter on true and substantive merits.**
- f. THAT the amendment sought is in good faith and no new or inconsistent cause of action is being introduced by the amendments sought.**
- g. THAT the facts being introduced were in advertently left out but form part of the same cause of action pleaded in respect of which relief has already been claimed in the suit.**
- h. THAT for the purposes of determining the question in controversy between the parties and to avoid a multiplicity of suits, this application for leave to amend the Plaint is extremely necessary.**

i. THAT if this application is not allowed, the Plaintiff risks suffering substantial loss, hardship and grave injustice.

j. THAT this court has discretion to allow the amendments sought as maybe necessary for the ends of justice to be met.

k. THAT the present application has been filed on bonafide grounds and no prejudice will be occasioned to the parties if the orders sought are granted; as the suit is yet to be listed for hearing, and if any prejudice is to be suffered, the same can be adequately addressed by way of costs.

l. THAT any other grounds and/or reasons to be adduced at the hearing of this application.

3. The respondent opposed the application through the replying affidavit of **Rajinder Singh Baryan** who states that the facts sought to be introduced in the amended plaint were in the knowledge of the plaintiff but it failed to plead them. He further states that the proposed amendments would alter the character of the present suit.

4. Main issue for determination is whether the applicant should be granted leave to amend the plaint. The plaintiff seeks leave to amend the plaint so as to introduce new facts and co-plaintiffs. The respondent opposed the application on the basis that the proposed amendment will defeat the defence raised by the defendants.

5. Order 8 Rule 3 (1) of the Civil Procedure Rules which was invoked by the applicant states as follows;

Subject to Order 1 rules 9 and 10, Order 24 rules 3, 4, 5 and 6 and the following provisions of this rule, the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

6. Order 8 Rule 3(5) of the Civil Procedure Rules provides that: -

An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action. If the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed on the suit by the party applying for leave to make the amendments.

7. In *Ochieng and Others vs. First National Bank of Chicago Civil Appeal Number 147 of 1* (unreported) as cited with approval in *St Patrick's Hill School Ltd vs. Bank of Africa Kenya Ltd* [2018] eKLR the Court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings as follows: -

a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;

b) the amendments should be timeously applied for;

c) power to amend can be exercised by the court at any stage of the proceedings;

d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;

e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.

8. The dictum in the above cited cases it is that a party may at any stage of the proceedings amend his pleadings in order to bring out all the issues to be determined provided that there is no prejudice caused to the other party. The discretion to allow amendments must however be exercised judicially.

9. I have perused the pleadings filed herein and I am of the considered view that the amendment sought herein will not change or alter the nature of the case on occasion prejudice to the respondents.

10. In *Andrew Ouko vs Kenya Commercial Bank Limited & 3 Others (2014) eKLR*, Court held that: -

“the sole purpose of amending pleadings is to give the Court an opportunity to adequately consider the issues in dispute. This means that the court must very cautious while denying a party an opportunity to ventilate its case sought to be achieved through amendment of pleadings. A court should only deny such party leave to amend its pleadings as a last resort and with good or sufficient cause.”

11. In conclusion, I find that the application is merited and I therefore allow it in the following terms: -

a. The plaintiff be granted leave to amend the plaint dated 14th December 2018.

b. The amended plaint to be filed and served within 14 days from the date of this ruling.

c. The defendant is granted corresponding leave to file and serve an amended defence, in need be, within 14 days from the date of this ruling.

d. That the cost of the application shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF JULY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Rita Joyce for Miss Asli for Plaintiff.

Mr. Muiruri for Defendants.

Court Assistant: Sylvia.