



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 457 OF 2015

JUMBO COMMODITIES LIMITED.....PLAINTIFF/APPLICANT

- VERSUS -

FAHARI TRADING LIMITED.....1ST DEFENDANT

I & M BANK LIMITED.....2ND DEFENDANT

IMPERIAL BANK LIMITED.....3RD DEFENDANT

RULING

1. This court by its ruling of **17th October 2017**, granted the 1st defendant leave to file an amendment to its defence to include a counter claim. The court by that order did not specify the period within which that amended defence and counter claim should have been filed. It is not denied that the 1st defendant filed the amended defence and counter claim six months later that is, on **12th April 2018**.

2. That late filing provoked the plaintiff's notice of motion, which is under consideration, dated **27th April 2018**. By that notice of motion, the plaintiff seeks that this court disallows the said amendment and that the same be struck out.

3. In the plaintiff's view the amended 1st defendant's pleadings offends the express and mandatory provision of Order 8 Rule 6 of the Civil Procedure Rules, herein after referred to as the Rules. In support of that submission the plaintiff relied on the decision in the case ***Diocese of Kitui Registered Trustee Vs Timothy Karungu Karanja & 4 others [2017] eKLR*** where it was held:

“10. In the absence of an order which allowed the plaintiff the period within which it amended the plaint, and because the plaintiff had neither sought nor obtained an extension of time within which to amend the plaint, it follows that the Amended Plaint was filed without the leave of the court”.

4. The plaintiff also submitted that the amended pleading failed to endorse the date or order of the rules allowing the amendment.

5. Further in the plaintiff's view, the 6 months delay in filing the amended pleading was an indication that the 1st defendant was not interested in the expeditious disposal of the matter and was a blatant disrespect of the court process.

6. The 1st defendant opposed the application by relying on the replying affidavit sworn by **Jawaid Ali** the director of the 1st defendant and on the written submission.

7. **Jawaid Ali** gave in his replying affidavit a long chronology of attempts made by the 1st defendant's advocate to get instructions from the 1st defendant to file the amended pleading. Some of those depositions are as follows:

“7. THAT I am aware that after leave was granted, the applicant's advocate wrote several emails to my co-director, Mr. Shahzaad requiring the seeking instructions on the filing of the amended pleadings.

8. THAT I am aware that on 15th November, 2017, the Applicant's advocate wrote to the said Mr. Shahzaad asking for various instructions on the filing of the amended defence and counter claim. The instructions touched on court filing fees, approval of the pleadings and signing of the verifying affidavit and witness statement. (Now shown to me and marked “JA1” is a copy of the email correspondence)

9. THAT again on 23/01/2018, the said advocates once again wrote to the said Mr. Shahzaad reminding (sic) of the instructions

sought on 15/11/2017 and asking that the same be expedited. (Now shown to me and marked "JA2" is a copy of the email correspondence)

10. THAT once again on 7/2/2018, the said advocates wrote to Mr. Shahzaad on email burllytrading@gmail.com reminding of their request for instructions on 15/11/2018 and 23/01/2018. The advocates advised of the need to have the documents filed expeditiously in light of the fact that the matter was scheduled for mention on 15/03/2018. (Now shown to me and marked "JA3" is a copy of the email correspondence)

11. THAT all along I was not aware that the said advocates were trying to reach Mr. Shahzaad on email as I had no access to the email address used. Further, I later learned that Mr. Shahzaad, who was travelling around outside the country with no access to email did not see the emails from the advocates until 8/02/2018 when he finally had access to email.

12. THAT on seeing the advocates emails on 8/02/2018, Mr. Shahzaad advised the advocates to get in touch with myself and gave the advocates my email address. (Now shown to me and marked "JA4" is a copy of the email from Shahzaad)

13. THAT I on my part had no access to the email burllytrading@gmail.com used by the advocates.

14. THAT on 8/2/2018, the same day Mr. Shahzaad wrote to the Applicant's advocates, the said advocates wrote to myself advising me to sign the verifying affidavit and witness statement and return to them to enable them file the amended pleadings. (Now shown to me and marked "JA5" is a copy of the email correspondence)

15. THAT I did not see the email by the applicant's advocate until much later after the mention scheduled for the 15/3/2018.

16. THAT I am advised by the applicant's advocate whose advice I verily believe to be true that they could not file the amended statement of defence and counterclaim without a signed verifying affidavit."

8. **Jawaid Ali** proceeded to depone that the 1st defendant's advocate on **15th March 2018** sought and obtained leave on **18th April 2018** to file the amended pleading out of time.

ANALYSIS AND DETERMINATION

9. I will begin by considering whether indeed the 1st defendant was granted leave to file amended pleading out of time.

10. The record of the proceedings in the court file of **15th March 2018** shows that the 1st defendant advocate was absent when the matter came for Case Management Conference (CMC). CMC was adjourned to **18th April 2018**. The judge made an order on that day that the 1st defendant's advocate be served with a hearing notice of **18th April 2018**.

11. On **18th April 2018**, the 1st defendant's advocate was present in court. Contrary to what is deponed by **Jawaid Ali** there was no consent, apparent on the record of **18th April 2018**, which indicates that the plaintiff or any of the other parties in this action consented to the 1st defendant filing its amended pleading out of time.

12. It is clear from Order 8 Rule 6 of the Rules that the 1st defendant should have filed its amended pleading within 14 days of the date when leave to file that pleading was granted. That rule provides as follows:

"6. Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period".

13. A careful reading of that rule will reveal that the order to amend the 1st defendant's pleading issued by the ruling of **17th October 2017** seized to have effect within 14 days thereafter. My understanding of that Rule is that after 14 days from **17th October 2017**, the 1st defendant no longer had the court's leave to amend its pleading. It follows that the amended pleading filed on **12th April 2018** was filed without leave of the court.

14. 1st defendant erred to submit that notwithstanding that the amended pleading was filed out of time the court had power under section 100 of the Civil Procedure Act Cap 21 to permit the amendment. Section 100 of Cap 21 clearly provides the court with power to amend any defect or error in the proceedings in a suit. It does not empower the court to allow an amended pleading to be filed out of time.

15. It is not an answer to the application for the 1st defendant to submit that the court can invoke article 159 (2) of the constitution to permit the late filing of its pleading. Such an argument in my view would make a mockery of the Rules which require a party, after close of pleadings, to seek leave of the court to amend its pleading. If all the court needed to do was to invoke Article 159 of the constitution to permit pleadings to be filed at any time, there would be no need for Order 8 of the Rules. Further there is need for procedure to be followed for orderliness of the court process. This was stated in the case of *Moses Mwigici and 14 Others (2016)* where the Supreme Court stated:

"This Court has on a number of occasions remarked upon the importance of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with substance of the case that it benefits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent."

16. For the above reasons, I find that there is merit in the plaintiff's application.

17. Accordingly the orders of the court are:

a. The notice of motion dated 27th April 2018 succeeds and to that end the 1st defendant's amended statement of defence and counter claim filed in court on 12th April 2018 is hereby struck out.

b. The plaintiff is awarded costs of the notice of motion dated 27th April 2018.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE