



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 786 OF 2002

LABELLE INTERNATIONAL LIMITED & ANOTHER..... 1ST PLAINTIFF

TEJINDER KAUR BIRDI.....2ND PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LIMITED & ANOTHER....1ST DEFENDANT

ISMAIL M.H. MAWJI2ND DEFENDANT

RULING

1. The **Notice of Motion** before the court is dated 4th June 2015 and is filed by the Plaintiff. The application seeks the following orders.
 1. *That the plaintiffs be and are hereby granted leave to amend the plaint in the terms of the draft amended plaint annexed hereto.*
 2. *That the amended plaint be deemed as duly filed and served upon payment of the requisite court fees.*
 3. *That the costs of this application be provided for.*
2. The application is premised on the grounds set out therein and is supported by the affidavit of the 2nd plaintiff Tejinder Kaur Birdi sworn on 4th June 2015.
3. The Applicants case is that he believes that the plaint filed herein does not plead the amount of loss of business and credit suffered by the Plaintiff Company and that it is a requirement of law that such amount of loss suffered must be specifically pleaded in order for the court to conclusively and effectively adjudicate on the matter in controversy between the parties. The Applicant believes that the proposed amendments to the Plaint in so far as they bring out the quantum of the loss of business and credit will enable the court to conclusively and effectively determine the issues in controversy between the parties herein. The Applicant's case is that since the filing of this suit in 2002, a lot of issues have come up necessitating the amendment of the plaint filed herein in order to bring all the issues pertinent to this case before court to conclusively and effectively adjudicate on the matters.
4. The 1st Defendant has opposed the application through the Grounds of Opposition dated 22nd June 2015, on the grounds that the plaintiffs have no right to seek leave to amend the plaint after judgment has been entered in the suit, and that the application is a belated afterthought.

5. Parties filed submission to the application which I have carefully considered. Amendment of pleadings is provided for by law, and the court has a wide discretion in determining whether or not to grant the leave to amend pleadings. Therefore, the issues for determination herein are;

i. ***Whether the court can at this stage, and in the nature of the case before the court, grant the leave to amend the plaint.***

ii. ***Who is to bear the costs of this application.***

6. The law on amendments of pleadings are found under Order 8 Rule 3 and 5 of the Civil Procedure Rules which provides:

“the court may at any state of the proceedings, on such terms as to costs or otherwise as may be just and in such other manner as it may direct, allow any party to amend his pleadings”.

7. 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 in the suit by the party applying for leave to make the amendment.

The Plaintiffs seek leave to bring before this court quantum of loss of business. As can be noted from Paragraph 15 of the plaint, though the claim for loss of business was pleaded, the quantum thereof was not given. So the plaintiff submitted that the proposed amendments do not amount to new claims.

8. It is clear that amendments to pleadings should be freely allowed at any stage of the proceedings on terms as to costs or otherwise as may be just. However, it is the duty of the court to determine what circumstance merit the grant of the leave.

9. I have perused the court file herein, and it appears to this court that the dispute before the court has been substantially litigated upon, with parts of the same ending in the court of Appeal. It further appears to this court that the decision to amend the plaint is an afterthought meant to re-open the suit afresh and so bring to the active court scene matters which ought to have been active at the commencement of the suit. It is to be noted that this suit was filed in the year 2002, and judgment had been entered for the 1st defendant on its counter-claim pursuant to which the 1st defendant proceeded to sell the secured property and is now pursuing the plaintiff for the residue. The application for leave to amend the plaint appears meant only to provide the plaintiff with a fresh legal gravitas to fight the 1st Defendant's claim. It is not meant to clarify issues before the court. The allegation that the plaintiff is seeking lost business of Kshs.1,300,000 and seeks to claim the same through the proposed amendments clearly brings out the intension of the plaintiff to seek all possible ways of countering the defence and counter-claim. It cannot have taken the plaintiff fourteen (14) years to find out that it lost income which it now seeks to recover through amending the plaint. The application for leave to amend the plaint is an afterthought and is brought in bad faith to steal a match in adversarial proceedings before the court.

10. Under subrule (5) of rule 3 aforesaid an amendment may be allowed in certain circumstances 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 in the suit by the party applying for leave to make the amendment.

12. That being the law, the Court must then determine if the proposed amendments will so prejudice the Defendants as to occasion them injustice beyond compensation in costs. At the beginning of the trial issues for determination were framed by both counsel; those issues were largely informed by admissions and concessions on the part of the 1st Defendant.

13. The proposed amendments, as can be seen from the draft amended plaint annexed to the application, are extensive. Some new paragraphs are added to the plaint. There are also amendments to the reliefs sought. Moreover, the 1st Defendant has already exercised its statutory power of sale over the suit property. The Plaintiffs, by these proposed amendments, are seeking to plead their case afresh and in great detail.

14. If these proposed amendments are permitted, the 1st Defendant will be faced with much more expanded case than it has already defended. It appears to me that the case would have to be heard afresh. Witnesses would have to be summoned 14 years later, and the parties would have to present their respective cases. This is an old matter and with each passing year the memories of witnesses become hazier. Why should the Defendants have to go through the trial of the Plaintiffs' case again after having obtained judgment on their counterclaim?

15. The deficiencies in the Plaintiffs' case ought to have become apparent to them much earlier. Why did they not apply to amend at that stage? In this application, they have sought to blame their previous counsel. Assuming that the blame is merited, it is still not a sufficient reason to allow the amendments sought at this late stage. The Court of Appeal had this to say in the case of MUNICIPAL COUNCIL OF THIKA AND ANOTHER VS LOCAL GOVERNMENT WORKERS UNION (Thika Branch), Court of Appeal, Civil appeal No. NAI 41 of 2001.

“We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing amendment at a very late stage of the proceedings”.

16. Pursuant to the foregoing paragraphs of this ruling, the Plaintiff's application under reference is dismissed with costs to the 1st defendant.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 11TH DAY OF FEBRUARY 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

M/s Auka for Plaintiff

No Appearance for Defendant

Teresia Court clerk