



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 115 OF 2015

SHIVA CARRIERS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

HOPEWELL (K) LIMITED.....1ST DEFENDANT/RESPONDENT

APEX STEEL MILLS LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. There are 3 applications before me for consideration. The first one is dated 13th January, 2016, filed by the 2nd defendant seeking orders to strike out, with costs, the amended plaintiff dated 17th November, 2015 and filed in court on 15th December, 2015. The second application was filed by the 1st defendant on 2nd February, 2016. It seeks orders that the amended plaintiff be struck out with costs. The third application was filed in court on 5th February, 2016 seeking leave to amend the plaintiff and for the amended plaintiff attached to the application to be deemed as duly filed. The plaintiff also sought orders that the defendants be at liberty to file their respective amended defences if they so wish and for costs to be in the cause.

2. At the time of hearing the application the plaintiff's counsel did not turn up in court. The court proceeded to hear the submissions of the Counsel for 1st and 2nd defendants.

DEFENDANTS' SUBMISSIONS

3. Mr. Nanji, Learned Counsel for the 2nd defendant submitted that the plaintiff had admitted in their amended application that the plaintiff was incompetent as the plaintiff did not obtain leave to amend the plaintiff after pleadings had closed. He prayed that the 1st defendant's application be allowed and for the plaintiff's application to be dismissed with costs.

4. On her part, Ms Rajab for the 1st defendant associated herself with the submissions of Mr. Nanji and added that her application was unopposed.

ANALYSIS AND DETERMINATION

The issues for consideration are if the amended plaintiff dated 17th November, 2015 should be struck out and if the plaintiff's application filed on 5th February, 2016 should be dismissed with costs.

5. The 1st defendant's application was supported by the affidavit of George Gitu sworn on 2nd February,

2016. At paragraphs 5, 6 and 7 thereof, he deposes that a copy of the 1st defendant's defence and counter claim was served on the plaintiff's Advocates on 14th September, 2015 and that pleadings closed on 19th October, 2015.

6. At paragraphs 9 and 10, of the said affidavit, it is deposed that the plaintiff could not amend the plaint without leave of the court and that the amended plaint contains 11 new paragraphs which are based on the ruling of the Honourable court. It is averred at paragraph 11 of the said affidavit that the amendments to the plaint are an abuse of the court process and will embarrass or prejudice the 1st defendant.

7. The 1st defendant filed grounds of opposition on 12th August, 2016 in response to the plaintiff's application filed on 5th February, 2016. These are to the effect that:-

i. The application is misconceived and amounts to an abuse of the court process as it contravenes the express provisions of order 8 rule 3 as no leave was sought before filing and/or introducing the amendments contained in the amended plaint dated 17th November, 2016 and filed in court on 15th December, 2016 (sic);

ii. The amended plaint annexed as DS ought not to have been filed unless this Honourable court has (sic) given directions as regards to costs (sic) and/or any other direction the court would deem just;

iii. The amended plaint introduces 11 more paragraphs based on the reasoning of this Honourable made in the ruling of the applicant's application dated 31st August, 2015 which if allowed will prejudice the 1st defendant which has already revealed its line of defence; and

iv. It is in the best interest of justice that the application be dismissed with costs to the 1st defendant and the amended plaint filed on 15th December, 2016 (sic) be expunged from the record.

Ms Rajab did not expound on the above grounds of opposition.

8. The 2nd defendant filed a supporting affidavit to its application dated 13th January, 2016 sworn by its Counsel on record. At paragraphs 5 and 6 thereof, the deponent deposes that the 2nd defendant entered appearance on 18th September, 2015 and filed a defence and counter claim on 2nd October, 2015. A copy of the said defence and counterclaim was served upon the plaintiff's Advocates on 5th October, 2015.

9. Paragraph 7 of the said affidavit states that neither a reply nor a defence to counterclaim was filed and served on the deponent within 14 days after service of the defence and counterclaim. The pleadings therefore closed on 19th October, 2015. At paragraphs 9 and 10, the deponent states that the plaintiff filed an amended plaint on 15th December, 2015 without leave of the court after closure of pleadings, which was contrary to the law. This, in the deponent's view, is an abuse of the court process. The 2nd defendant filed a replying affidavit to the plaintiffs' application filed on 5th February, 2016 which was in opposition to the said application.

10. Order 2 rule 13 of the Civil Procedure Rules provides that:-

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”

11. Order 8 rule 1(1) provides as follows:-

“A party may, without the leave of the court, amend any of his pleadings once at any time before pleadings are closed.”

12. In this case, the plaintiff amended its plaint which it filed in court on 15th December, 2015. No leave of the court was sought before so doing. The court record reveals that the 1st defendant filed its defence and counterclaim on 11th September, 2015 whereas the 2nd defendant filed its statement of defence and counterclaim on 2nd October, 2015. The said pleadings were served on the plaintiff's counsel at different times. The pleadings closed on 28th September, 2015 with respect to the 1st defendant and on 19th October, 2015 with respect to the 2nd defendant. It therefore follows that the amended plaint filed on 15th December, 2015 was filed outside the required timelines allowed under Order 8 rule 1(1) of the Civil Procedure Rules.

13. Order 2 rule 15 of the Civil Procedure Rule provides that:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

a. It discloses no reasonable cause of action or defence in law; or

b. It is scandalous, frivolous or vexatious; or

c. It may prejudice, embarrass or delay the fair trial of the action; or

d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

14. Applying the above provisions of law, it is clear that the plaintiff did not bother to seek leave of the court before filing an amended plaint. The filing of the said pleading is therefore an abuse of the court process. I hereby strike out the amended plaint filed in court on 15th December, 2015. I award costs to the defendants.

15. Although the plaintiff filed an application on 5th February, 2016 seeking leave to amend the plaint. There was no attendance of the plaintiff or its counsel in court on 18th August, 2016 when the said application was scheduled for hearing. I note that the said date was taken in court by consent of the Advocates for the three (3) parties on record. I therefore dismiss the said application with costs to the defendants.

DELIVERED, DATED and SIGNED at MOMBASA on this 7th day of October, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the plaintiff

Ms. Murage holding brief for Ms. Rajab for the 1st defendant

Mr. Nanji for the 2nd defendant

Mr. Oliver Musundi Court Assistant