



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 161 OF 2012

FREIGHT FORWARDERS KENYA LIMITED PLAINTIFF

V E R S U S

AYA INVESTMENTS UGANDA LIMITED DEFENDANT

RULING

1. Plaintiff's claim against the Defendant is for the sum of US. Dollars 92,348.68 being charges of clearing and forwarding containers at Mombasa Port.
2. Defendant filed its Defence on 22nd October 2012 denying that claim and further alleged that the Plaintiff had failed, neglected or refused to clear and transmit its cargo to its destination. In paragraph 7 of that Defence Defendant stated-

“7. By reason of the matters aforesaid the Defendant who operates inter alia a hotel business in Uganda has been further exposed to losses and/or inconvenience as the subject goods were intended for use in its establishment. The aforesaid matters constitute a counterclaim in respect of which the defendant shall within the rules amend its defence accordingly to include such counterclaim. The said counterclaim which has previously variously been brought to the attention of the plaintiff will eliminate or substantially diminish any claim the plaintiff may entertain as against the defendant.”

3. On 6th November 2012 Plaintiff filed a Notice of Motion dated 5th November 2012 which seeks judgment on admission.
4. Defendant in turn filed on 15th November 2012 a Notice of Motion dated 14th November 2012. Defendant seeks leave of the Court to amend its defence to incorporate a counter claim and set off. That is the application being considered in this Ruling.
5. By a draft amended Defence Defendant seeks to counter-claim and set off US Dollars 64,296 being the amount for hire of trucks, costs of assembled staff (costs not quantified) and compensation of accruing warehouse and port charges (charges not quantified).
6. The application was opposed by the Plaintiff on the grounds that it is frivolous and abuse of the Court process, that it is brought in bad faith and on the ground that the Defendant can file a separate action against the Plaintiff for the alleged amount proposed to be set off.

7. Plaintiff in its submissions did not elaborate on its claim that Defendant's application was frivolous and abuse of the process of Court. Plaintiff did however submit that Defendant's application was aimed at delaying the quick and fair disposal of the suit and to keep Plaintiff from realizing its just due in this action. It is this which Plaintiff termed as bad faith. Plaintiff further submitted that Defendant had deliberately delayed in filing the counter-claim and had inflated its claim raising suspicion that it was a conjured up claim. That the invoices relied upon by Defendant raised by Fifi Transport were intended to hoodwink the Court in complicating this action because Fifi Transport Ltd was related to the Defendant Company.
8. Defendant in support of its application relied on the decision of Brett M. R. in CLARAPEDE – Vs- COMMERCIAL UNION ASSOCIATION (883) WLR 262 where he stated-

“However negligent or careless may have been the first omission and however late the proposed amendment the amendment should be allowed if it can be done without injustice to the other side. There is no injustice if the other side can be compensated by costs.”

9. The principle set out in the above case is what has guided our Courts in its consideration of the applications of amendment of pleadings. Our Courts have frequently stated that amendments to pleadings ought to be freely allowed if they can be made without injustice to the opposite side. In this regard see EAST BAKERY –Vs- CASTELINO (1958) E.A. 461. Order 8 Rule 3 grants the Court that discretion to permit amendment. The power to amend pleadings is provided in the Rules for the following purpose-

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just. Order 8 Rule 5(1) of the Civil Procedure Rules.”

10. Although Plaintiff has opposed the Defendant's application I find that the opposition raised is without merit. The application in my view is not frivolous as alleged because the Defendant wishes to raise a set off to Plaintiff's claim on the ground Plaintiff was negligent in clearing its goods. I could also find no basis of alleging that Defendant's application is made in bad faith. The issues raised by Plaintiff to show bad faith are issues, in my view, that should be raised in reply to the defence and defence to Counter claim. The fact that Defendant's counter claim is premised on the invoices of its sister company does not show bad faith.
11. The Defendant's application was not filed after inordinate delay. Defendant filed its defence on 22nd October 2012. The present application for amendment of defence was filed on 15th November 2012. That was within a period of less than a month. There was no delay in the filing of the application.
12. The Plaintiff erred in submitting that the Defendant should have filed a separate claim for the amount it seeks to set off. This is because the Defendants claim relates to the same transaction as the Plaintiff claim in this action. To therefore hear the Defendant's claim in this action would enable the Court reach a final judgment of that transaction. This is what is stated in Order 7 Rule 3 of the Civil Procedure Rules. In that Rule it is stated-

“3. A Defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed

of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”

It is in my view convenient for both Plaintiff's and Defendant's claims to be heard together.

13. There are however certain claims of Defendant in the proposed amended defence which must be quantified to enable the Plaintiff correctly respond to them in its defence.

14. The following are therefore the orders of the Court-

- a. **The Defendant is hereby granted fourteen (14) days from this date hereof to file and serve its amended Defence and Counter-claim as prayed in Notice of Motion dated 14th November, 2012. Such amended Defence shall have all sums claimed quantified.**
- b. **The Plaintiff is granted leave to file its reply and defence to the Counter-claim within fifteen (15) days of being served with the amended Defence and Counter-claim.**
- c. **The Costs of the Notice of Motion dated 14th November 2012 are awarded to the Defendant in any event.**

DATED and DELIVERED at MOMBASA this 15TH day of MAY, 2014.

MARY KASANGO

JUDGE