



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 661 OF 2007

NASSER AHMED t/a AIRTIME BUSINESS SOLUTIONSPLAINTIFF

VERSUS

CELTEL KENYA LIMITEDDEFENDANT

R U L I N G

1. The Plaintiff has brought this Application to amend his Complaint which was dated 18th December 2007. The Application is dated 3rd April 2014 and is predicated under **Order 8 rule 3** of the *Civil Procedure Rules, 2010* as well as **section 3A** of the *Civil Procedure Act*. The Application also seeks leave for the Plaintiff to amend its Further Witness Statement dated 8th November 2013 as well as for him to file a Supplementary List and Bundle of Documents. The Application is brought before this Court on the following grounds:

“1. THAT the Plaintiff and Defendant’s predecessor, Kencell Communications Limited had entered into a business trading arrangement, which arrangement was adopted and extended to the business linkage between the Plaintiff and the Defendant.

2. THAT during the pendency of the contract the Plaintiff would purchase stock from the Defendant and sell the same through his well established distribution network and receive a distributor remuneration from the Defendant based on a remuneration structure introduced by the Defendant’s predecessor.

3. THAT the terms of the remuneration were that the Defendant paid the Plaintiff a monthly commission on the basis of the SIM packs sold by the Plaintiff and activated by the Defendant, remuneration under the Partner Support Scheme and Remuneration under the Staff Route Support Scheme.

4. THAT on 10th December 2007 the Defendant, without any prior consultation or warning, served the Plaintiff with a Notice of Termination of the contract with immediate effect.

5. THAT the Plaintiff has suffered loss and damage to its businesses due to the

wrongful termination of the contract by the Defendant on 10th December 2007.

6. THAT following the termination of the contract by the Defendant, the Plaintiff filed a Plaint claiming payment from the Defendant under various heads on 18th December 2007 as well as damages for wrongful termination of the contract.

7. THAT the Plaintiff seeks leave to amend the Plaint under the heads of Partner Support Scheme and Staff Route Support, and leave to amend the Further Witness Statement to reflect the amendments in the Plaint as well as supplementary list and bundle of documents to support the claim.

8. THAT the amendments to the Plaint and Further Witness Statement are necessary for this Honourable Court to make a just determination of the claims of the parties in the suit.

9. THAT it is just and mete in all the circumstances of the case for the orders sought to be granted”.

2. The Application was supported by the Plaintiff’s Affidavit sworn on even date therewith. To a large extent, the Supporting Affidavit repeated the grounds in support of the Application but the Plaintiff also noted that during the pendency of the Contract with the Defendant, he would purchase stock from it and sell the same through his well-established distribution network. As a result, he would receive distributor remuneration from the Defendant based on a remuneration structure as introduced by the Defendant’s predecessor. He noted that the terms of the remuneration were that the Defendant would pay to him a monthly commission based on the number of SIM packs sold by the Plaintiff and which were activated by the Defendant under the “Partner Support Scheme” and remuneration under the “Staff Route Support Scheme”. The Plaintiff went on to note that on 10th December 2007 the Defendant served him with a notice of termination of the Contract with immediate effect. He was now seeking leave of this Court to amend his Plaint to include details under the heads of “Partner Support Scheme” and “Staff Route Support Scheme”.

3. The Defendant filed Grounds of Objection dated 28th April 2014 detailing:

“1. That the Application seeking to amend the Plaint is brought six years after the suit was filed yet it offers no reason for the delay in bringing it.

2. The amendment sought does not embody a legal claim under the contracts relied on and exhibited before court or at all.

3. The Application is an abuse of the court process.”

In support of the Application, the Plaintiff filed a List of Authorities dated 20th May 2014 while the Defendant had filed its List of Authorities together with its Grounds of Objection.

4. When she appeared before the Court, Miss. Mutua, for the Plaintiff, submitted that there were specific regulations that were accidentally admitted from the Plaint from both the Partner Support Scheme and the Staff Route Support Scheme. The amendment as proposed by the Plaintiff would in no way prejudice the Defendant and would serve to address all the claims as between the parties. In reference to the Plaintiff’s List of Authorities, counsel noted that they all detailed and pointed to the fact that there was no new cause of action being introduced. If such is the case, counsel maintained that an amendment should not be refused.

5. In turn, Mr. Ojiambo, learned counsel for the Defendant, noted that the Plaintiff had detailed that the contract as between the parties were entered into between him and the Defendant’s predecessor company. The Plaintiff now sought to bring an additional claim as per paragraphs 7 A and B as well as under paragraphs 11 A and B. He noted that the issues that the Plaintiff sought to introduce would involve shop infrastructure and an incentive for distribution which he was

attempting to introduce for the year 2007. Counsel criticised the detail of paragraph 7 and from the pleading there was no telling what period the claim related to. The Defendant's challenge was that the number of staff that the Plaintiff paid out was not within its knowledge. The Plaintiff was coming seven years later and counsel asked the question: why now? In Mr. Ojiambo's view, the Defendant would suffer prejudice in trying to contra the Plaintiff's new claims some 7 years later. Referring to the Plaintiff's list of authorities, counsel noted that they all had the common theme that amendments to pleadings should normally be allowed. However, where there has been considerable delay, the Court should take this into account and he referred to the case of **Kyalo v Bayusuf Ltd (1983) KLR 229** in which the court had considered that a delay of 6 years did not merit a pleading to be amended. The Plaintiff had not produced any explanation as to the delay in bringing his Application before Court and could not expect any sympathy from the Court. Counsel referred to the case of **Mowa Publishers Ltd & Anor. v Attorney General & Anor. (1991) KLR 294** in which the applicant therein had not produced any explanation as to the delay. Mr. Ojiambo's 3rd authority was that of **Kassam v Bank of Baroda (K) Ltd (2007) 1 KLR 294**. In that case, the Court found it necessary for an applicant to show reasons for delay and further, that the delay was not deliberate.

6. In her response, Miss Mutua for the Plaintiff, repeated that there was no new cause of action contemplated in the amendments to the Plaint as proposed. The new paragraphs 7A and 7B as well as paragraphs 11A and 11B merely allowed the Court to understand more fully paragraphs 7 and 11 of the Plaint already before the Court. The Plaintiff was simply attempting to particularise what the Plaint detailed in paragraphs 7 and 11. The Defendant could not be heard to claim that this was information that was not within its knowledge at the time. Counsel noted that the Application also sought to put in further documentation to support the Plaintiff's claim and such documentation would be available to the Defendant. Counsel further pointed out that it was not correct that the payout period for staff was not indicated, it was quite clearly detailed in the proposed amendment in paragraph 7B. Miss Mutua also noted that Mr. Ojiambo had indicated that the reason for the delay in presenting the application for amendment had not been explained. She observed that the Plaint was filed by Lubuella & Co. Advocates and that her firm had come on record in 2009. When a further witness statement was filed on 8th November 2013, the advocates now on record for the Plaintiff realised that there was a problem between the original Plaint and the witness statement. There had been no delay by the Plaintiff in having the case certified for hearing. The Defendant had not even filed its own documents and because of its delay, the matter was not ready for hearing. As regards the issue of delay, counsel referred the Court to the case of **Waljee's (Uganda) Ltd v Ramji Punjabi Bugerere Tea Estates Ltd (1989) EA 188**. As regards amendment of pleadings, the Plaintiff's counsel pointed the Court to the findings in **Barclays Bank DCO v Shamsudin (1973) EA 451** and **Alpha Knits Ltd v Kenindia Assurance Company Ltd & Anor. (2007) eKLR**. Counsel concluded her submissions by repeating that, in her view, there would be no prejudice to the Defendant by this Court allowing the amendments to the Plaint.
7. The principles upon which amendments to pleadings may be made are as set out and stated in the Court of Appeal's decision in **Eastern Bakery v Castelino (1958) EA 461**. The principles were summarised as hereunder:

“1. Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.

2. There is no injustice caused to the other side if it can be compensated with costs.

3. The court will not refuse an amendment simply because it introduces a new case.

4. There is no power to enable one distinct cause of action to be substituted for another nor to change, by means of amendment, the subject of the suit.

5. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed

amendment, e.g. by depriving him of a defence of limitation.

6. The principles applicable to amendments of pleadings are equally applicable to amendments of written statements of defence.

7. A judge has discretion to allow amendment to the statement of defence to introduce a counterclaim provided that such an amendment does not transgress any of the aforesaid principles”.

It was the Defendant’s submission that the amendment sought by the Plaintiff should not be allowed as the application before Court had been made after a delay of 7 years. In support of this submission, the Defendant’s counsel pointed to the Kyalo, Kassam and Mowa Publisher cases (supra). The holding in the former case out of the Court of Appeal, was that:

“Applications for amendment of pleadings should only be allowed if they are brought within reasonable time because to allow a late amendment would amount to an abuse of the court process.”

In the second case, Kuloba J. emphasised:

“Late amendments may be done, but the applicant must show why the application is made late and must satisfy the court that the delay is not deliberate.”

In the last case, Bosire J. (as he then was) detailed:

“In law, a litigant who brings an application for leave at a late stage, has a duty to the Court to show that the Court should exercise its discretion in his favour notwithstanding the delay. The applicants in this case did not offer any explanation as to the reasons for the delay in presenting the application they could not therefore expect the indulgence of the Court.”

8. Against the above, there were the Plaintiff’s cited authorities to consider and the Court has already referred to the Eastern Bakery case (supra). I have also taken cognizance of the holding of Sheridan J. in Waljee’s case in which he stated:

“... That the circumstances in which amended pleadings may be admitted are well defined by the authorities and leave to amend was granted. In *Steward v North Metropolitan Tramways Co. (1886) 16 Q. B. D. 556, at p. 558 LORD ESHER quoted from an earlier case in which he said ‘the rule of conduct of the court in such a case is that 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 made without injustice to the other side. There is no injustice if the other side can be compensated by costs but if the amendment will put them in such a position that they must be injured, it ought not to be made.’*”

The two further cases quoted by the Plaintiff being Epaineto v Uganda Commercial Bank (1971) EA 185 and the Barclays Bank DCO case (supra) involved an amendment of pleadings after the expiry of a limitation period. I did not understand learned counsel for the Defendant to make any reference as regards to his client been prejudiced in that the amendments sought by the Plaintiff would have the effect of defeating a defence of limitation. As a result, I do not consider that the findings in both the above two cases are pertinent to the Application before me. The Alpha Knits case involved the amendment of a defence (as distinct from the Plaintiff’s Application before Court) and I took comfort from the general view of amendments of pleadings as taken by my learned brother Azangalala J. when he detailed:

“In my view if the third party is of the view that the proposed amendments will improve its case leave cannot be refused merely because the defendant is of a contrary view. At this

stage it is immaterial that the defendant may have a watertight answer to the proposed amendments. That is not a consideration at this stage. I therefore refrain from considering whether or not the proposed amendments will raise matters that are *res judicata* or that have been compromised in a previous consent. I do so because arguments on the same matters may still be raised if the defendant be so minded in its response once leave is granted. As it is now, and applying the principle stated in the Eastern Bakery – vs - Castelino case (Supra) the third-party was entitled to seek the leave of the court to amend its defence and the court will grant leave to amend if the same will not prejudice the defendant beyond what is compensable in costs.”

9. I have considered the draft Amended Plaintiff annexed to the Supporting Affidavit of the Plaintiff dated 3rd April 2014 more particularly paragraphs 7, 7A and 7B of the same. There has undoubtedly been an increase in the sums claimed as by the Plaintiff against the Defendant in paragraph 7. In my view, paragraph 7A and 7B only clarify how those sums are made up. I can see no possible prejudice to the Defendant in that regard and agree with the Plaintiff’s counsel that they improve the pleading before Court. Similarly for the proposed paragraph 11A, I consider that it details how the Plaintiff’s claim of Shs. 384,804.00 is made up with reference to that figure in paragraph 11. I have had more difficulty with the proposed paragraph 11B, as I was of the view that it came close to introducing a new cause of action herein. However, I note that prayer (b) (i) in the Plaintiff dated 18th December 2007 seeks a figure of Shs. 36,354,630.00 for “Installed Sims”. The proposed paragraph 11B provides the explanation as to how this figure is arrived at and here again I can see no possible prejudice to the Defendant.
10. In all the circumstances and in conclusion, I see no good reason why the Plaintiff’s Notice of Motion dated 3rd April 2014 should not be allowed. Although the Plaintiff’s Application comes late in the day, I accept his counsel’s explanation in that regard. The Plaintiff will now file an Amended Plaintiff within 14 days of the date hereof and serve the same upon the Defendant who shall have 14 days from the date of service upon it, to file and serve its Amended Defence. The Plaintiff will also be at liberty to file and serve, within 14 days of the date hereof, any necessary amendment to its Further Witness Statement dated 8th November 2013 as well as leave to file and serve a Supplementary List and Bundle of Documents, again within 14 days from the date hereof. In my view, the Defendant should and will have the costs of the Application.

DATED and delivered at Nairobi this 16th day of July, 2014.

J. B. HAVELOCK

JUDGE