



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 160 OF 2011

KYEVALUKI SERVICES LIMITED.....PLAINTIFF

-Vs-

TOTAL KENYA LIMITED.....DEFENDANT

RULING

1. The application before the court is a Notice of Motion dated 6th June 2014 filed by the Plaintiff under Order 8, Rule 3 of the Civil Procedure Rules 2010. The application seeks one substantive prayer that the Plaint dated 27th April 2011 be amended in terms of the Draft Amended Plaint attached thereto.
2. The application is premised on grounds stated therein and is supported by the Affidavit of **BENSON KANUI dated 6th June 2014**.
3. In an attempt to oppose the application the Defendant filed a Replying Affidavit sworn by **BONIFACE ABALA on 22nd July 2014**. However, during the hearing of the application Mr. Sirima for the Applicant drew the court's attention to Order (b) in the ruling of this court dated 6th February 2013 in which this court directed and ordered that the Defendant shall not continue to participate in the proceedings before the court until the Defendant purges the said contempt from record. Mr. Sirima submitted that the Defendant had not purged the said contempt and therefore they could not participate herein.
4. M/s. Kingwa for the Defendant submitted that she was not on record for the Defendant when the said barring Order was made.
5. I then ruled that the Defendant could proceed in this matter in light of my Orders dated 6th February 2013 especially Order (b) thereof which had not been complied with. This ruling paved the way for the Applicant herein to proceed ex-parte and so, this application is not opposed.
6. It is submitted for the applicant that the suit herein was instituted in terms of the plaint dated 27th April 2011 seeking specific performance of the contract dated 17th January 2008 between the Plaintiff and the Defendant renewed on 1st November 2010. The Defendant terminated the contract subsequent to the institution of the suit inspite of a court Order barring the termination of the contract. The Plaintiff now seeks the leave to amend the Plaint to plead Special damages suffered as a result of the Defendant's termination of the contract.

7. I have carefully considered the application. The brief history of the application is that the Defendant purported to terminate the contract between itself and the Plaintiff despite the existence of a court Order outlawing the same. This state of affairs led to the initiation of contempt proceedings by the Plaintiff at the end of which 3 officers of the Defendant were held in contempt, and were fined for the same, which fine they paid. However, the court ordered that the Defendant purges the contempt, and without doing the same, the Defendant would not participate in future proceedings in this matter. To purge the said contempt, the Defendant would have to reinstate the contract which it had terminated. It appears the Defendant is not prepared to do that, and it proceeded without the leave of this court to file a Statement of Defence dated 21st February, 2013.

8. The current application by the Plaintiff substantially changes the issue as to purging of the said contempt. The Plaintiff, by seeking to amend the plaint, is now moving from the prayer of the specific performance of the contract, to that of damages for breach of contract. If this court allows the Plaintiff's application, then it also follows that the Defendant is free to participate in these proceedings the moment the plaint is amended to claim damages for breach of contract.

9. In my view the application to amend the plaint arises from the fact that the Defendant refused to reinstate the contract. Prime facie that application is merited and I allow it.

10. Since the prayers in the plaint have now shifted to damages for breach of contract instead of specific performance of the same, the Defendant now needs not purge the contempt. I now validate the Defence filed herein and the Defendant is free to amend its Defence in light of the amended plaint.

11. The upshot of the above is that Orders shall ensure as follows:

- a. The plaintiff's Notice of Motion dated 6th June 2014 is allowed with costs.**
- b. The Defendant shall have the liberty to amend its defence within seven (7) days of being served with the filed amended plaint and a copy of this ruling, by the Plaintiff.**
- c. There shall be no Orders on costs.**

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 3rd Day of October 2014.

E.K.O OGOLA

JUDGE

Present-:

M/S. Ng'ania for Plaintiff/Applicant

M/S. Kinyua holding brief M/S. Kariuki for Defendant/Respondent

Teresia - Court clerk