



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 302 OF 2014

HASHIM MOHAMED KHER.....1ST PLAINTIFF

AL HEELAM HOLDINGS LIMITED.....1ST PLAINTIFF

VERSUS -

GULF AFRICAN BANK LILIMITEDDEFENDANT

RULING

1. The plaint in this case was filed on 14th July 2014.
2. Upon being served, the Defendant entered appearance through the firm of Wamae & Allen Advocates. The Memorandum of Appearance was filed in court on 31st July 2014.
3. Thereafter, the plaintiffs filed an Amended Plaint on 4th September 2014.
4. Simultaneously with the Amended Plaint, the plaintiff's filed an application for an interlocutory injunction to restrain the Defendant from interfering with or from frustrating the business relationship between the plaintiffs and the National Bank Limited.
5. The application also sought a Mandatory Injunction to compel **GULF AFRICAN BANK LIMITED** (the Defendant) to reverse the charges which it had unilaterally imposed on the account of **HASHIM MOHAMED KHER** (the 1st plaintiff).
6. In the face of the application the Defendant lodged a Notice of Preliminary Objection dated 18th September 2014.
7. The objection is to the effect that the Amended Plaint was filed without the leave of the court, and that it ought therefore to be struck out.
8. To the extent that the plaintiffs' application dated 4th September 2014 was premised on the Amended Plaint, the defendant requested the court to strike it out too.
9. Mr. Gichuhi, the learned advocate for the defendant, submitted that pursuant to the provisions of Order 7 Rule 17 (2) of the Civil Procedure Rules, any pleadings which are filed after the Reply can only be so filed with leave of the court.
10. In this case, the Reply to Defence was said to have been filed on 22nd August 2014. Therefore, the defendant holds the view that if the Plaintiffs wished to file any pleadings after 22nd August 2014, then they should first have sought leave of the court to do so. But no such leave was sought.
11. Indeed, pointed out the defendant, the failure by the plaintiffs, to indicate on the face of the Amended Plaint, the authority pursuant to which the plaint was amended, is indication enough that the plaintiffs acted without leave.

12. Mr. Saende, the learned advocate for the plaintiffs, holds a contrary view. His position was that pursuant to the provisions of Order 8 Rule 1 of the Civil Procedure Rules, each party was permitted to amend his pleading once, provided that that be done before the close of pleadings.
13. In effect, the plaintiffs appear to agree with the defendant, that when a party wishes to amend his pleadings after the close of pleadings, that party must seek and obtain the leave of the court to do so.
14. Order 8 Rule 1 (1) stipulates as follows;

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

15. Therefore if the pleadings had not yet closed by the time the plaintiffs amended their plaint, the plaintiffs would have been perfectly entitled to amend the plaint, without leave of the court.
16. By necessary implication, the plaintiffs must be deemed to acknowledge that if the pleadings had been closed they would have had to obtain the leave of the court before amending the plaint. But whether or not they did so acknowledge, that is the correct position in law.
17. This application must fail or succeed depending on when the pleadings closed.
18. According to the defendant, pleadings closed when the Reply to Defence was filed.
19. However, the plaintiffs hold a contrary view; they say that pleadings do not close until after the lapse of 14 days after the Reply to Defence is served.
20. The answer is to be found at Order 2 Rule 13 of the Civil Procedure Rules, which stipulates as follows;

“The pleadings in a suit shall be closed fourteen days after the 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”.

21. By my calculations, the Amended plaint was filed before the lapse of 14 days from the date of service of the Reply to Defence. It therefore follows that by the date when the Amended plaint was filed, the pleadings has not closed.
22. For that reason, the plaintiffs’ did not need the leave of the court to file the Amended Plaint.
23. In the circumstances, the Preliminary Objection is without merit. It is therefore overruled. I order the defendant to pay to the plaintiffs the costs of the Notice of Preliminary Objection.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of November 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the 1st Plaintiff

.....for the 2nd Plaintiff

.....for the 2nd Defendant.

Mr. C. Odhiambo, Court clerk.