



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 758 OF 2012

PRATHAP INDUSTRIESPLAINTIFF

VERSUS

UNITECH INDUSTRIAL AGENCIES LIMITED.....DEFENDANT

RULING

1. The plaintiff has asked the court for leave to amend the plaint. The proposed amendments would, if granted, result in the substitution of the plaintiff (**PRATHAP INDUSTRIES**) with the names of the eleven (11) persons who are the partners in the firm named Prathap Industries.
2. It was the contention of the plaintiff that there had been a misdescription in the plaint.
3. In this case, the partners in the firm named Prathap Industries have each agreed to become plaintiffs, if the court allowed them to be enjoined into the suit, in place of the partnership in its own name.
4. The plaintiff's submission was that the proposed amendment would not be prejudicial to the Defendant, as the said Defendant would have occasion to file its Defence.
5. Miss Ndegwa, the learned advocate for the plaintiff, submitted that a party to civil suit was entitled to seek leave to amend his pleadings more than once, if it became necessary to do so. Therefore, the fact there had been a previous occasion when the court had granted leave to the plaintiff to amend the plaintiff was said not to constitute a bar to the present application.
6. In answer to the application, Miss Karanja, the learned advocate for the defendant, submitted that the plaintiff was guilty of inordinate delay. That submission is based upon the fact that as long ago as 19th December 2012, the Defence had raised an issue which touched on the name of the plaintiff.
7. A perusal of the court file revealed that the Defence was filed in court on 19th February 2013.
8. Therefore, it is not clear why the advocate for the defendant suggested that the defence had been filed on 19th December 2012.
9. However, I hasten to add that that error is not of any significance in the determination of the application before me.
10. At paragraph 2 of the Defence, the following statement was made;

“The Defendant contents (sic!) that the plaintiff's suit is fatally defective as the parties indicated therein are not legal entities capable of suing and being sued and shall crave the leave of the court at the earliest opportunity to apply to have the entire suit dismissed with costs”

11. Thereafter, at paragraph 12 of the Defence, the defendants re-emphasized its position, in the

following words;

“The Defendant hereby serves a notice of intention to raise a preliminary objection to the effect that the plaintiff is described as partnership firm has no capacity to sue, and the plaintiff’s suit should have been commenced by the parties trading as such and not itself”.

12. In the case of **DIAMOND TRUST BANK VS TCHUI DATA LIMITED & 3 OTHERS, HCCC NO. 684 OF 2000**, I quoted with approval, the following words of BRETT M.R in the case of Clarapede Vs. Commercial Union Association [1883] 32 W.R. 262;

“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 prejudice to the other side”.

13. In that case, I went on to say that delay per se, was not a ground enough to deny a party leave to amend his pleadings.

14. I reiterate that position. By so doing, I am not suggesting that parties should disregard the need to act with due diligence when seeking leave to amend their pleadings. Of course, parties should be encouraged to take steps timorously.

15. But it is also to be appreciated that the law allows parties to seek leave to amend pleadings at any stage of the proceedings. That therefore means that even when a party has sought to amend his pleading late in the day, the court ought not to deny him leave simply because the application was brought late.

16. The most important consideration when a court was called upon to exercise its discretion in determining whether or not a pleading should be amended, is the question concerning the possible prejudice that will be occasioned upon the other party or parties.

17. In **NATIONAL CEREALS & PRODUCE BOARD VS. DUBAI BANK KENYA LIMITED, HCCC NO. 32 OF 2005**, Emukule J. said;

“The Defendant’s counsel says that the plaintiff’s amendment should not be allowed because it would prejudice the defendant whose defence was predicated upon that omission. I do not think so. Firstly, the Defendant has an opportunity to amend his defence, because that would be his vested right once an order is made following the amendment of the Plaintiff”.

18. I do agree entirely with my learned brother on that issue.

19. It is to be noted that the defence had given notice of the defendant’s intention to apply to the court, for the striking out of the plaintiff, on the grounds that the partnership firm had no capacity to sue in its own name.

20. However, by the time the plaintiff sought leave to correct the error which the defendant had drawn its attention to, the defendant had not yet applied to the court to strike out the plaintiff.

21. The plaintiff has taken steps to cure the defect, before the defendant had moved the court to strike out the plaintiff.

22. In my considered view the application for an amendment is well merited. It does not prejudice the defendant, as the said defendant will still have an opportunity to file a defence to the Amended Plaintiff.

23. I do therefore grant leave to the plaintiff to amend the plaintiff in the manner appearing in the Draft Further Amended Plaintiff.

24. The Further Amended Plaintiff should be filed within the next 10 days from today.

25. As the defendant was not in any way blameworthy for the error which the plaintiff now seeks to remedy, I order that the costs of the application be borne by the plaintiff in any event.

DATED, SIGNED and DELIVERED at NAIROBI this 6th day of November 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the Plaintiff

.....for the Defendant.

Mr. C. Odhiambo, Court clerk.