



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 513 OF 2012

A. Z. SHAH (t/a FASHION SPOT).....PLAINTIFF

VERSUS

JANMOHAMED INVESTMENTS LTD.....DEFENDANT

RULING

1. The Plaintiff's main claim against the Defendant is a liquidated demand for the sum of KShs 2,018,362/10 on account of overpayment of rents. There is no longer any landlord and tenant relationship between the parties.
2. The Defendant entered appearance and filed defence denying the Plaintiff's claim.
3. The Plaintiff then filed notice of motion dated 12th February 2013 seeking an order to strike out the Defendant's defence dated 21st December 2012 upon the ground that the same is scandalous, frivolous, vexatious and meant to delay the fair trial of the action.
4. In its turn the Plaintiff filed **notice of motion dated 30th May 2013** seeking leave to amend its defence. That application is the subject of this ruling. It is brought under **Order 8, Rules 1 and 3(1)** of the **Civil Procedure Rules, 2010** (the **Rules**). The main grounds for the application are –
 - (i) That the amendment sought is necessary in order for the Defendant to better plead that it paid the amount claimed by the Plaintiff.
 - (ii) That the Plaintiff will not be prejudiced by such amendment.
 - (iii) That it will be in the interests of justice to grant the order sought.
5. There is a supporting affidavit sworn by one **Firdosh Ebrahim Jamal**, the Defendant's advocate. To it is annexed a draft amended defence.
6. The Plaintiff has opposed the application by **grounds of opposition dated 12th July 2013**. The points of objection taken include –
 - (i) That the application is an abuse of the process of the court in that it has been filed "with the sole intention of defeating the Plaintiff's application (to strike out the defence)".

(ii) That the supporting affidavit is incompetent and should be struck out for having been sworn by the Defendant's advocate.

(iii) That the application in any event has no merit.

7. I have considered the submissions of the learned counsels appearing. No authorities were cited.

8. The guiding principle in applications to amend pleadings is now well-established. It is that amendments ought to be liberally allowed for the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings. This principle is codified in **Rule 5** of Order 8 aforesaid.

9. It is apparent that the intended amendments are to enable the Defendant to better plead the defence of **set-off**. It is to be remembered that in the defence sought to be amended the Defendant has already pleaded that defence; it is only seeking to make that defence clearer.

10. In the circumstances of this case I find nothing wrong with the Defendant reacting to the Plaintiff's application to strike out the defence by filing the present application for leave to amend.

11. I am also satisfied that the amendment sought will enable the court to determine the real question in controversy between the parties. There is also nothing wrong in counsel swearing an affidavit in support of an application to amend a pleading.

12. In the circumstances I will allow the application in prayer 1. The Defendant may file and serve amended defence within fourteen (14) days of delivery of this ruling. The Plaintiff may file reply to such amended defence within a similar period after service. I will award costs of this application to the Plaintiff. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF OCTOBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER 2013