



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 101 OF 2009

NOORLANDS LIMITED.....PLAINTIFF
-VERSUS-

1. CHARLES KABAYA

2. KAHINDI WANJE

3. ZIRO WANJE

4. DZINE PALA

5. CHARLES RUWA

6. KARISA NZAI MNYIKA..... DEFENDANTS

RULING

The plaint when it was filed on 3rd April, 2009 described the plaintiff as a limited liability company incorporated under the laws of Kenya. The plaint was supported by a verifying affidavit sworn by Mohammed FakiMwinyihajiKhatib. Khatib stated in that affidavit that he was the appointed attorney of the plaintiff. The plaint was amended to include extra defendants by an order of the court of 21st August, 2009. Plaintiff by a Chamber Summons dated 7th

May, 2010 and brought under Order VIA Rule 3 of the now amended Civil Procedure Rules and sections 1A, 3A of the civil Procedure Act Cap 21 seeks to further amend the plaint. The amendment which is sought is with regard to the description of the plaintiff. It is sought to show that the plaintiff was incorporated in the Republic of Tanzania and not as described in the original plaint as incorporated under the laws of Kenya. That application to amend the plaint is supported by the affidavit of Khatib. He stated that the amendment was necessitated by what he stated was 'oversight or miscommunication' between himself and the counsel on record for the plaintiff.

The defendant opposed the application on the ground that the proposed amendment would cause them prejudice; that the issues for determination in this case had already been drawn and documents had

already been exchanged. That there is no error in the plaintiff's claim on the face of the record and that the chamber summons is bad in law and an abuse of the court process. In opposing the defendant did concede that the general principle is that amendment of pleadings are allowed freely before the hearing of a case if no prejudice would be suffered by the opposing party. To support that principle the defendant cited the case **EASTERN BAKERY VS CASTELINO**[1958] E.A. One of the holdings of that case was in the following terms:

“(ii) amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs.

(iii) the principles applicable to amendments of plaints are equally applicable to amendments of statements of defence.”

Although the defendant relied on the case **ROBERT MBEVI MALUKI VS KENRUB INDUSTRIES LTD NRB CVL APPEAL. 235 OF 2003**, that case does not entirely support their opposition to the plaintiff's application. The case was an appeal against the magistrate's decision to strike out and verify affidavit for having been sworn on a date before the plaint. The learned judge in considering the appeal had this to say:

“In the case before me, I think the learned magistrate applied a heavy hand to the appellant. The appellant was shut out of the court because of a minor mistake. The only problem with this suit was that he swore the affidavit in verification of the plaint before the plaint was drawn. This would have been sorted out by giving him an opportunity to swear a fresh affidavit but to strike out the suit was too drastic.”

The defendant's main contention is that the amendment if allowed would be allowing a different plaintiff or would be substituting a plaintiff. To support that argument, the defendant relied on the power of attorney donated to Khatib which is also pleaded in the plaint. That power of attorney is amongst the documents filed by the plaintiff in this case. It states that the plaintiff's address is box no. 85012 Mombasa. The defendant submitted that the power of attorney was donated by a company incorporated in Kenya and not a company incorporated in the Republic of Tanzania. The plaintiff submitted that the amendment sought was to correct a mis-description of a party since the name of the plaintiff was not changing. Further that such amendment was not prejudicial to the defendant. The plaintiff submitted that even if the amendment had led into the introduction of a new party, Order VIA Rule 3 of the now amended Civil Procedure Rules was permissive to such an amendment. That order is in the following terms:

“An amendment to correct the name of a party may be allowed under sub rule (2) notwithstanding that it is alleged that the effect of the amendment would be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.”(Underlining mine)

I have considered the submissions of the parties. The defendants have failed to show what prejudice if any they will suffer if the amendment is allowed. The amendment sought as correctly submitted by the plaintiff is one which will correct the description of the plaintiff. The defendant also did not show that the plaintiff's application was made in bad faith. The discretionary power of the court to order the amendment of pleadings is exercised at any stage in the proceedings before judgment. Section 1A of Cap 21 requires the court to give effect to the overriding objective of the Civil Procedure Act by interpreting any provisions to facilitate the just expeditious proportionate and affordable resolution of civil dispute. In my view, the justice of this case will be served by allowing the plaintiff to correct its description and such an amendment will allow the expeditious proportionate and affordable resolution of this dispute. I say so because if the plaintiff is not granted leave as it seeks, it may have to withdraw this suit and file another one at a cost, which gives the correct description. The fact that the power of attorney talks of the plaintiff's address being in Mombasa can be the subject of cross-examination at the trial. It certainly is

not the basis of dis-allowing the plaintiff's application. I grant the following orders:

1. The plaintiff is granted leave to amend the plaint as sought in the chamber summons dated 7th May 2010. The plaintiff shall file such an amended plaint and serve within 14 days from today's date.

2. The defendants are granted leave to amend, file, and serve within 14 days their defence on being served with the amended plaint.

3. The plaintiff shall bear the costs of the chamber summons dated 7th May, 2010

DATED and DELIVERED at MOMBASA this 5th day of July, 2012.

Mary Kasango
JUDGE