

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 4231 OF 1992

MERCEDES SANCHEZ RAU TUSSEL ----- PLAINTIFF

VERSUS

SAMKEN LIMITED ----- 1ST DEFENDANT

ABERCOMBIE & KEN LIMITED ----- 2ND DEFENDANT

MOHAMMED OSMAN MAALIM ----- 3RD DEFENDANT

R U L I N G

At the commencement of this trial Counsel for the Plaintiffs made two applications. First, that as the Court file in HCCC No. 4233 is not available at the registry, he be permitted to produce and rely on photocopies of pleadings thereon from his own record.

This application is not opposed by the Defendant or the third party and is hereby allowed. Secondly, Counsel seeks leave to amend the plaint to include as part of the special damages the cost of Plaintiff's flight from Madrid to Nairobi for purposes of this hearing and also medical and other expenses which came to Counsel's knowledge after filing of suit and a short while before the commencement of the trial.

This application is opposed by Counsel for the defendant and Counsel for the third party who contend that the plaintiff's Counsel has been in possession of that information at least since 17.5.95 and should have made a formal application to amend. They also contend that they would be prejudiced by amendment of plaint at this stage since limitation period has expired and they are not even in possession of the details sought to be introduced. Plaintiff's reply is that he could not have known of the cost of travel before it was incurred and that the details he seeks to aver are contained in the letter of 17.5.95 which was sent to the Advocate of the defendant and the third party and was expressed to be notice of intention to amend. It is also said that Plaintiff's claim sounds in both tort and contract and in so far as it arises from contract it is within time. In so far as it sounds in tort, the expenses sought to be averred arise from an existing cause of action. Plaintiffs do not seek to introduce a new course of action.

All the above submissions must be considered in light of the general principle governing applications for leave to amend pleadings. That principle is that leave to amend pleadings ought to be granted unless it can be demonstrated that it would be unjust to do so. And it would be unjust where the Respondent can show that he would be prejudiced beyond what can be compensated by an award of costs.

Now, in the present case, I am unpersuaded that the defendant or the third party would be prejudiced beyond what costs can compensate if I allowed the Plaintiff to make the proposed amendments. On the contrary, they have known since 17.5.95 what those amendments were likely to entail and should be prepared to cross examine the Plaintiffs on those averments. And needless to state, the cost of travel could not have been known before it was incurred in these times of a fluctuating currency. I am also alive to the fact that if I be wrong on what I understand the relationship between amendments and the limitation period to be (which is that amendments can be made even after the expiry of the limitation period if they do not seek to introduce a new cause of action) my decision is appealable. In the premises, I am inclined to allow the plaintiff to make the amendments to the plaint which he make proposes. I order that the same be typed out and served on respondent's Counsels.

The Court should also be furnished with a copy before a formal order for amendment can be made.

The defendant and the third party will have costs of and incidental to this application for amendment.

Dated and delivered at Nairobi this 5 th day of July, 1995

A.G RINGERA

JUDGE