REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 127 of 1996

PERAS LIMITED……..…….....……...APPELLANT

AND

ESSO KENYA LIMITED…….....……...RESPONDENT

(Appeal from the decree of the High Court of Kenya at Nairobi (Githinji J) dated 15th December, 1994

IN

H.C.C.C. NO 655 OF 1988)

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JUDGEMENT OF THE COURT

Much as we sympathise with Mr. Sheth's position, we do nor think that there is any basis upon which we can interfere with the learned Judge's (Githinji J) order striking out the plaint filed by the appellant in the High Court. Like the learned judge it is obvious to us that the agreement in dispute in this matter was between the respondent , Esso Kenya Limited and one Janu Govindji Chottalal or Janu Chottal Govindji; it was certainly not between the respondent and the appellant Peras limited. The letter of offer at page 38 of the record and which was in answer to applications made by him in his personal capacity to the respondent, was specifically addressed to: -

"Dear Mr. Janu"

and not to Peras Limited. At the end of the letter Mr. Janu was specifically asked that: -

"If the above conditions are agreeable to you please sign the attached copy of this letter and return it to me plus the operator's Agreement duly signed".

There was no evidence before the learned Judge that it was Peras Limited who signed the copy of the letter or the agreement. Had the appellant signed the copy of the letter and the Operator's Agreement, it is inconceivable to us that the appellant would not have raised that matte before the Judge. True, the appellant paid for the goods supplied but like the Judge of the High Court, we do not think that it could possibly make the appellant a party to the agreement between the respondent and the appellant. There is no reason for us to make inference while there are specific issues between the parties as contained in the respondent's letter of offer. That trade licences and things of that sort were taken out in the name of the appellant, could not carry the matter any further. Those licences were taken out by the appellant itself and the respondent had nothing to do with them. Nor can the fact that the respondent addressed its invoices to Langata Service Station be of any assistance to the appellant. Had the invoices been addressed to the

appellant, the position might have been different but the invoices were addressed to Langata Service Station. There was no evidence that Langata Service Station was the same entity as Peras Limited.

The only substantial point argued by Mr. Sheth for the appellant is that the learned Judge should have allowed the appellant to amend its plaint and bring in Janu as the plaintiff. We agree that a trial judge has a discretion to allow an amendment at any stage, even after a party has closed its case – see GENERAL MANAGER, E.A.R. & H.A VS THIERSTEIN [1968] EA 354 – but in deciding whether or not to allow an amendment a Judge is undoubtedly exercising a discretion and unless it can be shown that the discretion was wrongly exercised, this court would not be entitled to interfere. In the present appeal, the plaint was filed on 17th January, 1988. The defence was filed on the 21st March, 1988 and the defence specifically raised the issue of private of contract between the appellant and the respondent.

The appellant did nothing about the matter until the case came up for hearing on the 28th November, 1994, some two years after Mr. Sheth came on the record for the appellant. In these circumstances, we think Githinji, J was perfectly entitled to take the view that the appellant had been aware since 1988 that the issue of privity of contract was in issue and the appellant could have applied earlier to amend the plaint. We do not see any reason to make us come to the conclusion that in holding that it was too late for the appellant to seek to amend its plaint, particularly in view of the fact that such an amendment would have deprived the respondent of its possible defence of limitation in respect of any claim by Janu. The exercise of discretion by the learned Judge appears to us to be perfectly justified and we see no reason to warrant any intervention by us. That being our view of the matter, this appeal fails and we order that it be and is hereby dismissed with costs.

Dated and delivered this 10th day of November, 1997.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OFAPPEAL

G.S.PALL

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR