REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 159 OF 1981

PATEL.....APPELLANT

VERSUS

Dr. J. S. AMIN.....RESPONDENT

RULING

July 31, 1985 **Tanui J** delivered the following Ruling.

This is an application by the defendant in this case for an order to strike out both the plaint and an application filed by the plaintiff on 12th September, 1985, for leave to amend the said plaint. The application is supported by an affidavit of Dr J. S. Amin the defendant/applicant sworn on 22nd June, 1988. Neither a statement of the grounds of opposition nor a replying affidavit was filed in reply or objection to this application by the plaintiff/respondent but during the hearing of the application Mr. Hira appeared for the plaintiff respondent.

Dr J. S. Amin, the defendant/applicant stated in his affidavit of 22nd June, 1988, that this suit was filed on 19th January, 1981, and that the subject to the suit was by 31st July, 1985, satisfied as the possession had been delivered up and the mesne profits to that date had also been paid. The defendant/applicant also stated that the standard rent at the date of filing the suit was Shs 1,250/= as assessed by the Rent Restriction Tribunal on 7th September, 1981 and confirmed by this court. The defendant/applicant went on to claim that the application to amend the plaint was made well after the suit had been satisfied and that there were no new matters which had arisen since the filing of the suit to warrant the application. It was the view of the defendant /applicant that this should have been filed at Rent Restriction Tribunal and not at this court.

This application is stated to be brought under Order VI rule 13 (1) (b) (c) and (d) and Order II rule 1 (2) of the Civil Procedure Rules. As the application concerns both the suit and the application for leave to amend the plaint, I intend to consider in the first place that part of the application affecting the suit itself. As to the claim by the defendant /applicant that this suit should have been filed at the Rent Restriction Tribunal and not at this court, I note that when this case was filed in January, 1981, ceiling for the standard rent for controlled tenancies was Shs 800/= per month.

Any tenancy in which the rent was above that figure was not controlled tenancy within the meaning of the Rent Restriction Tribunal. This ceiling was raised as from 3rd July, 1981, when the standard rent became shs 2,500/= per month. It follows therefore that at the time this suit was filed the tenancy was not controlled and it could not have been filed at the Rent Restriction Tribunal as that body had no jurisdiction. This ground does not therefore have any merits.

The main ground advanced by the defendant/applicant in support of this application is that the subject

matter of the suit was satisfied when he paid the mesne profits for occupation of the suit premises from December 1980 to 31st July, 1985, and when he gave possession of the same to the plaintiff/respondent. In order to appreciate the implication of this contention it is necessary to examine the original plaint. Paragraphs 3,4, 5 and 6 read as follows:

> "3. The plaintiff is the owner and is entitled to the possession of the premises situate on land Reference No 209/90/9, Nairobi.
>
> 4. The defendant is in possession of Flat No 3 situated in the said premises as tenant from month to month at a rent of shs 2,000 per month as a dwelling house.
>
> 5. By a notice dated 30th October, 1980, and sent to the defendant by registered post on the same day, the plaintiff duly terminated the said tenancy with effect from 30th November, 1980.
>
> 6. The said tenancy was determined on 30th November, 1980, yet the defendant has thereafter remained and now remains in occupation of the said premises as a trespasser therein."

The main reliefs the plaintiff/respondent was seeking from the court were spelt out in prayers (a) and (b) of the plaint which read:

> "(a) vacant possession of the premises described in paragraphs 3 and 4.
>
> (b) mesne profits at the rate of shs 2,000/= per month with effect from 1st December, 1980 until vacant possession is delivered up."

It is patently clear from the above extracts of the plaint filed on 19th January, 1981 , and the prayers stated therein that all that the plaintiff/respondent was seeking when he filed the case was for vacant possession of his dwelling house and mesne profits for the months the defendants/applicant remained in occupation from 1st December, 1980. The rate of the mesne profits was given in the plaint as Shs 2,000 per month. It would appear to me that when the defendant /applicant decided to give up vacant possession of the suit premises and to pay a sum of Shs 114,000/= as mesne profits for his occupation of the same to 31st July, 1985, the claim in the suit with exception of costs, was satisfactorily fulfilled.

On 12th September, 1985, the plaintiff/respondent filed an application for leave to amend the plaint filed on 19th January, 1981. The application was supported by an affidavit of the plaintiff /respondent and a draft, amended plaint was enclosed. The defendant/applicant has also attacked this application and has sought either to be struck out or dismissed. It was submitted that there was an inordinate delay in bringing the application and also in prosecuting it; that the plaintiff/applicant having omitted to sue in respect of portion of his claim he could not be allowed to sue for such claim; that the plaintiff/respondent intended to abandon his claim for possession of the premises and for mesne profits and to introduce a new suit with different cause of action which did not exist at the time of filing the suit and that the character of the suit would be completely changed.

As to the contention of the defendant/applicant that there was an unexplained and inordinate delay in making this application it was submitted for the plaintiff/respondent that as an appeal was pending the application could be brought and that it was filed after the said appeal had been dismissed on 31st May, 1985. That appeal was HCCC Appeal No. 301 of 1981 brought against the decision of the Rent Restriction Tribunal in the R.R. (assessment) Case No 242 of 1979. In their ruling the Rent Restriction Tribunal refused to interfere with the consent of the parties which fixed the rent at Shs 1,250/= as that had taken the premises from the jurisdiction of the Tribunal. That appeal in my view had nothing to do with the delay in making this application for leave to amend the plaint especially when the plaintiff/respondent had alleged that the parties had agreed on a rent of shs 2,500/= per month. The interest now claimed in the amended plaint was not affected by the appeal. I do not think the plaintiff/respondent gave satisfactory explanation for the delay.

In the case of *Chelea Coffee v Mehlsen* [1966] E.A 203 Spry JA said at page 208.

> "There is no question that the court has power under O VI rule 18 of the Civil Procedure (Revised) Rules 1948 to allow the amendment if the interest of justice so required. An application for amendment should however, be made at the earliest possible moment."

In my view, the fact that this application was made nearly five years since the main suit was filed and the plaintiff/respondent has not given a satisfactory reason for the delay, makes it difficult not to agree with the defendant/applicant in his claim that the application is an after though brought about to harass and embarrass him.

It was further submitted for the defendant/applicant that the plaintiff/respondent having omitted in his plaint to state that the rent as from 1st January, 1981, was Shs 2,500/= and also having omitted to claim interest on the mesne profits now sought in the draft amended plaint he was deemed to have abandoned these claims and the leave sought to introduce them should be refused. I entirely agree with this assertion and I am fortified by the provision of Order II rule 1 (2) of the Civil Procedure Rules which provides:

> " (2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished."

This subrule appears to me to be mandatory as it employs "shall not afterwards sue.." The application for leave to amend the plaint to introduce a claim for mesne profits at Shs 2,500/= having claimed it at Shs 2000/= and for the interest thereon is misconceived on the part of the plaintiff/respondent and if the application goes to hearing it may not succeed.

There also appear to be contradiction in respect to the claim for mesne profits at Shs 2,500/=. The plaintiff/respondent had earlier on in paragraph 5 of the plaint claimed that the tenancy under which the defendant/applicant occupied his premises had been terminated on 30th November, 1980 and that he was a trespasser. It appears to me that the liability of the defendant/applicant for his continued occupation of the said premises was mesne profits but the rate would be what the defendant/applicant was paying before the tenancy was terminated. Such mesne profits could not be subject to some consent dealings as all these came to nought on termination of the tenancy.

As stated above the other ground advanced on behalf of the defendant/applicant was that the application for leave to amend the plaint sought, in accordance with the draft amended plaint, would introduce a new suit of a different character based on different claims with different cause of action which did not exist at the time the suit was filed. Under paragraph 10 of the draft amended plaint and in prayer amend (a) the plaintif/ respondent introduced a new claim which was of different character from the original claim. This was a claim for special damages assessed at Shs 15,650/=. As rightly stated by the defendant/applicant this claim did not exist on 19th January, 1981, when this suit was filed. I find support in the holding in the case of *Eshelby v Federated European Bank Ltd.* [1932] 1 KB 254 in which Swift J after reviewing authorities within his jurisdiction on the matter held that a plaint (writ) cannot be amended so as to introduce a new cause of action which was not in existence at the time the suit was filed.

Taking into consideration all the various issues and points raised, and considered above together with all the circumstances of this case, I find that these proceedings are but an abuse of court process and accordingly I exercise my discretion to strike out the plaint and the application for leave to amend it. The defendant/applicant will have the costs of this application.

The plaintiff/respondent is entitled to the costs of the suit to 31st July, 1985. Orders accordingly.

Date and delivered at Nairobi this 31st day of July , 1985.

B.K TANUI

JUDGE