REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 762 OF 1976

BAYUSUF BROTHERS LTD.....PLAINTIFF

VERSUS

I. SYLVESTER MARTIN KYALO

2. RAJENOR KUMAR MAGNLAL PANCHMATA.....DEFENDANT

RULING

On September 25, by summons in chambers under Section 3 A of the Civil Procedure Act and Order VI rule 13(c) and rule 13(d) and rule 6(1) and Order VIA rule 1(2), rule 2 and 4.8, the plaintiff asked for orders that the amended defence filed by the first and second defendants in this suit on August 18, 1977 be disallowed and the costs of the application be provided for.

On November 7, 1980 by summons in Chambers under Order XLIX rule 5, the first and second defendants asked for orders extending the time for the filing and service of their amended defence to the amended plaint in the action be extended up to and including August 18, 1980 and for an appropriate order for the costs of this manoeuvre which the first and second defendants submit should be costs in the cause.

These summons were heard together. The material on which they are based is as follows.

A plaint was filed on December 11, 1976 and served on the defendants almost immediately. On February 23, 1977 the defendants filed their written statement of defence. On March 24 the same year an amended plaint was filed and served and then on August 18 an amended defence was filed by the first and second defendants. It is this amended defence that the plaintiff urges this court to disallow because it is out of time. Furthermore, the plaintiff claims that the amended defence of the first two defendants has been slipped onto the file merely to prejudice the plaintiff by delaying the fair trial of the action. It is in itself, it is said, an abuse of the process of the court. It adds an allegation of fact which is inconsistent with the previous pleading of the first and second defendants in the same suit. All that is to be found in the affidavit in support of the summons of the plaintiff sworn to by its learned advocate on September 9 this year.

On November 8, 1980 the learned advocate for the first and second defendants deponed to these facts. They filed their first defence on February 23, 1977 and they could have filed an amended defence without leave within fourteen days of the service of the amended plaint. The written statement of defence was very much a homemade one and now that they have put the matter in the hands of their present advocate they have all discovered that they did not set up the real and substantial point of defence. Indeed, their advocate found the do it yourself defence which they had manufactured was meaningless. He prepared one that reflected the substance and effect of their defence correctly and asked the advocate for the

plaintiff if he could file it out of time by consent without the bother and expense of coming to the court for leave to do this. This was ignored. So the amended defence was filed and it was proposed to ask in court later, informally, if leave to file it might be given. This was knocked on the head, however, because the plaintiff brought this summons in chambers asking for all this to be disallowed. Nevertheless, the first and second defendant reminded the court, the defendants should not be barred from setting out the real defence which they had and that the suit should go for trial on the merits. It was not possible to say that setting up a real and substantial defence could possibly delay or prejudice a fair trial of the action. Nor was this an abuse of the process of the court. Any inconsistency between the written statement of the defence and the amended one was of no consequence, especially as it had not been specified and the learned advocate for the defendants states he is unable to discover any such inconsistency and, if he were able to do so, it could not be material. He then roundly declares, in his rather chatty affidavit, that if the first and second defendants were not allowed to have this amended defence left on the file it would amount to a denial of justice and an abuse of process of the court and so forth.

The time has come to look briefly at the pleadings and see what they are all about. The plaint sets out that the plaintiff is a limited liability company incorporated in this country, the first and second defendants are said to carry on business in something known as a co-partnership and they call this the Buret Hauliers. The third one is employed by them, or so it is now said, to have been employed by them on July 26, 1975.

On that date, at 10 o'clock in the morning, the plaintiff's motor vehicle was being driven by its servant, Mr Jamal Salim, in the right lane nearest to the center island in the causeway along Jomo Kenyatta Avenue, when a vehicle, KPR 481, driven by the third defendant as the servant or agent of the first two defendants, in the adjacent left hand lane in the same direction collided with the vehicle of the plaintiff and caused it much damage. The plaintiff says this was due to the negligence of the third defendant and therefore of the first two as well. Four detailed allegations of negligence are neatly set out.

So, the plaintiff company asked for judgment for Kshs 53,697, being the costs of repairing the vehicle driven by Mr Jamal Salim which it owned and also, I think, though it is not completely clear, general damages.

Now, comes the written statement of defence of February 20, 1977 filed on February 23 that year which is called a memorandum of defence. It is said to have been drawn and filed by Rajandra Kumar Maganlal Panchmatia, who describes himself as a partner of the above firm and that is Burete Hauliers, and an employer of the above named driver, which would be Kipruto Arap Solian, whom Mr Panchmatia describes as an employee of the firm.

Mr Panchmatia says the plaintiff did not fulfill its duty of writing to the first and second defendant or speaking to them about this accident though the plaintiff knew they had an office in Mombasa. An established office, he calls it. The accident was not reported to their manager in Mombasa. It was necessary to obtain the authority of the first and second defendants before the plaintiff's vehicle was repaired. The amount claimed by the plaintiff was probably more than the purchase price of its vehicle. He had not seen an assessor's report. He had not seen any damage to the lorry of the first and second defendant and he was sure that if there had been such a severe accident, their lorry could not have escaped unscathed. Had they had any report about this, they would have asked their insurance company to deal with it. Their lorry was fully and comprehensively insured at the time. They had asked the police for a report. They could not find the third defendant driver who was no longer working for them. They had not been able to go to the scene because they were not told about it. They had asked the police to look for the driver. They wanted six to eight weeks to make their enquiries and may be file a supplementary defence after they had seen the insurance company. So, there on February 23, 1977 is the defence of the first and second and third defendants.

The amended plaint is March 23, 1977 and there appears a claim for loss of use of the vehicle while it was being repaired over a period of seventy six days at the rate of Kshs 750 a day which brings the total claim up to Kshs 88,297.

On February 8, 1978, before the late Mr Justice Sheridan, the plaintiff and Mr Panchmatia were

represented by two of Mombasa's learned advocates. The one for Mr Panchmatia asked, for this action to be stood over generally and it was hoped that an early date in April or May would be obtained in the registry because Mr Panchmatia was abroad but would be back sometime in March 1978 and it was hoped that by April or May a third party notice would have been served. The plaintiff's advocate agreed to this aid so the matter was stood over generally with the costs of the adjournment together with witnesses allowance having to be paid by the second defendant to the plaintiff in any event. They then went on, however, to file by consent In court, the traffic Police accident report and police file together with the evidence of Constable Ezekiel Njeru who produced the file and a sketch plan which he made, a statement he took from both the drivers and from a witness. She recalled that the third defendant, Kipruto Arap Solian, was charged but failed to attend court and a warrant of arrest had gone out for him.

On August 18, 1980 a different advocate appeared for the first and second defendants and thereafter in early October and the middle of November these summons were stood over from time to time because the court could not reach them or the advocates were engaged elsewhere.

On November 17 this year, the submissions on behalf of each party to these summons were recorded. The advocate for the plaintiff said he was asked three and a half years after the original written statement of defence was filed if he could bring himself to allow this amended defence at variance with the first one to be put in. He confessed that he did not reply to this astonishing request. There had been no application for leave to file it. There was no application to amend the original one. This is required under Order VIA rule 3. The application of the first two defendants was under Order XLIX rule 5 which applied to extending the time for the filing of the document where the time had expired and not for the filing of an amended document where no leave to amend it had been asked for or obtained. It was, continued the advocate for the plaintiff, in any event, impossible to understand how an admission made quite clearly by a partner in the defendant firm in February 1977 was now reversed in the amended written statement of defence.

So it is now important to see what that amended defence is.

It began by saying that Kipruto Arap Solian was not employed by the first two defendants at the material date. It then goes on to say KPR 481 was not the property of these two defendants on July 26, 1975 and nor did it become their property until sometime in December of that year. It was owned in July 1975 by something called Buret Road Transporters and was duly insured in that name. Therefore, they were not liable for the damage caused to this vehicle or the negligence of somebody they did not employ. They also denied, in the alternative, there was any collision at all. Altogether, then, it is a completely different amended written statement of defence from the original one which Mrs Panchmatia typed out and filed in this suit asking for six to eight weeks in which to embroil the insurance company and visit the scene and seek out the driver and find out what it was all about.

The plaintiff's advocate said this was a U-turn if ever there were one. The error was said to be due to the ignorance or inexperience of the men who devised the defence, namely, Mr Panchmatia. The defendants must, however, have known if KPR 481 belonged to them in July 1975. They must have known if they employed Kipruto Arap Solian. The first advocate was prepared to proceed on their homemade defence.

They had not made any affidavit in the matter but left it to their advocate. There was no good ground to support the application to amend it.

There were decisions of the late Mr. Justice Sheridan, who allowed an application on July 15, 1974 in *Bindera w/o Said Molo v Salim Said Bajoh and Omar Sheikh Said* in Mombasa HCCC 461 of 1973, three years after the time for filing an amended defence had expired and even though it contradicted the previous defence statement and one of Mr Justice Harris which was not, in fact, cited in full, who disallowed one when it was six years after the event and introduced a new cause of action because it was going to be difficult if not impossible, to discover any evidence to support or refute the new cause. The decision of Mr Justice Harris was, according to the advocate for the plaintiff, very much in point because, after all these years, the plaintiff in this suit would have to look for the real owner of the vehicle and this might be impossible and was, therefore, prejudicial to the plaintiff and could not be compensated for by costs.

So there it is, then, the new defence, the amended one, is a claim that in July 1975 this vehicle was not owned by the first and second defendant trading as Buret Hauliers but by then when they called themselves Buret Road Transporters. The advocate for these two first defendants explains that Mr Panchmatia was in Burundi and that is why he had not supported the application with an affidavit from Mr Panchmatia. He hoped that the court would not be bound by orders and rules in the matter but would come straight to the point and allow the real issue to be decided by dealing with it under the umbrella of its inherent jurisdiction. He had been at pains to explain to the other side that he had only come into the picture three years after all this had begun and he had only found out the difference in the ownership of the vehicle when he had consulted the records of the Registrar of Motor vehicles. It was claimed that Buret Hauliers and Buret Road Transporters were different firms and that this was the nub of the defence. There was a letter from the Registrar of Motor vehicle but the plaintiff's advocate pointed out it was not mentioned in the affidavits and could not be produced as evidence at this stage.

The file produced by the police constable includes the statements of the drivers of each vehicle. One is from the third defendant Kipruto Arap Soilan, who quite clearly states that he was employed by the defendants and drove this very vehicle KPR 481 on the day of the accident and that he and that vehicle were involved in this collision. The first defence is, of course, along the same lines.

This is a matter for the discretion of the court and it appears that on the facts behind these applications and on the submissions that have been urged before the court, the defence which has been taken on the file should be disallowed and the costs of both applications should be paid for by the first and second defendants in any event and if they are not agreed they must be taxed. The summons in chambers of the first and second defendant asking for time to file and serve what they call the amended defence should be dismissed and, as I have said, they must pay the costs of that summons in the chambers.

The application is late and the second defence is a contradiction of the first (it is not in the alternative) and the reasons advanced for taking such a different stand have not been persuasive. These are the reasons why the court has exercised its discretion in these matters in the way that I have set out before.

Orders accordingly.

Dated and Delivered at Mombasa this 19th day of December 1980.

A.A.KNELLER

JUDGE