



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 414 OF 1975**

**KENYA COLD STORAGE (1964) LTD .....PLAINTIFF**

**VERSUS**

**OVERSEAS FOOD SERVICES (AFRICA) LTD.....DEFENDANT**

**RULING**

This is an application by the defendant to amend its defence which was filed on September 5, 1975 “to the extent that the amount admitted be reduced to Nil”. The application was filed in Court on April 21, 1976 and was supported by the affidavit of the General Manager of the defendant, Mr Alunde. However, the proposed amended defence was not filed in Court until October 13, 1976 and it has raised a number of issues other than merely reducing the amount admitted to nil. Be that as it may, Mr Esmail for the plaintiff does not object to the proposed amendments in paragraphs 2 and 7 of the defence.

Briefly, in paragraph 2 of the defence, the defendant denies owing any sum at all to the plaintiff. It may be added here that the defendant has already, by consent, submitted to judgment in the sum of Kshs 85,541.60 against itself out of the plaintiff’s claim, and admits that this sum was still due and owing by it to the plaintiff when this action was instituted. The 7th paragraph of the proposed amended defence is to the effect that it was an agreed term of the contract between the parties that each original and duplicate of delivery note or invoice would be signed by the defendant’s representative as proof of delivery and that invoices amounting to Kshs 48,381.50 had not in fact been so signed, and, consequently, the defendant denied receipt of those goods worth Kshs 48,381.50.

If I understand Mr Mureithi for the defendant correctly, he contends that the defendant admitted owing the sum of Kshs 85,541.15 due to a mistake in checking its account, and that in fact, the sum admitted should have been Kshs 85,541.60; and that when copies of invoices, etc were supplied by the plaintiff, the defendant was able to ascertain that some of the goods claimed to have been supplied were in fact not delivered; and since this was a mistake of fact, the defendant should have leave to amend so that the real issues in dispute between the parties may be resolved at the hearing of the suit.

Mr Esmail for the plaintiff opposed the amendments to paragraph 3 and 7, and submitted that their implication was that a sum of Kshs 48,381.50 which would previously be considered as admitted would now be denied, that a party could not be allowed to retract an admission unless it was made under a genuine mistake of fact and that the application was made *mala fides* in an attempt by the defendant to evade payment. He referred to the three affidavits filed on behalf of the defendant (and the previous defendant) and one on behalf of the plaintiff and argued that those showed that the defendant was not acting in good faith in seeking the proposed amendments and nor had it shown that there had been a genuine mistake of fact on its part.

It is not my function at this stage to decide upon the truthfulness or otherwise of the various affidavits

which are now before me, but upon a careful perusal of them, I do not consider that they show on their face that the defendant has been motivated by *mala fides* in bringing this application. Mr Baker's explanation in his affidavit filed on October 7, 1976 that his earlier statement (in his affidavit filed on May 27, 1975) was made in order to point out that the Kentucky Fried Chicken (Kenya) Ltd had nothing to do with the suit could reasonably be true. So could his allegation that the copies of delivery notes subsequently "produced and alleged to have been signed by a person authorized on behalf of the defendant did not correspond with the originals which bear no signature whatsoever".

Under the provision of Order VIA rule 3 of the Civil Procedure Rules, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just allow each party to amend his pleadings notwithstanding that such an application is made after the expiry of a period of limitation upon which the other party might be entitled to rely, or substitute a party, or alter the capacity in which a party sues or even add or substitute a new cause of action.

In a commentary on a similar Indian provision in Mulla: Code of Civil Procedure, 13th edition, volume 1, at page 726, it is observed:

"As a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party except such as can be sufficiently compensated for by costs or other terms to be imposed by the order. It does not matter whether the original omission arose from negligence or carelessness ...

Broadly stating it, there is no injustice in granting the amendment if the opposite side can be compensated in costs. It is only when costs would not be adequate compensation that amendment will be refused. It is immaterial whether the error sought to be amended was accidental or not. There is no rule limiting amendments to accidental errors ...

The court can allow the plaintiff to amend the plaint by permitting him to substitute one ground or exemption from limitation for another. There is no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct if it can be done without injustice to the other party. Thus, a plaintiff, in a suit for debt, may be allowed to amend the plaint by setting out an acknowledgement, but is not good ground for refusing the application. Even an admission made by mistake may be allowed to be withdrawn, and the pleading amended accordingly. (see *Hollis v Burton* (1982) 8 Ch 226, 236) ..."

Mr Esmail has referred me to the decision of the Court of Appeal for East Africa in the *International Life Insurance Co (UK) Ltd v Chimambhai Jethabhai Amin*, Civil Application No NBI 12 of 1968 (unreported) where Law J A (as he then was) stated:

"A party will not normally be allowed to retract a pleaded admission unless it was made under a genuine mistake of fact, and then leave will normally only be granted on terms (*Hollis v Burton* [1892] 3 Ch 226) ..."

In the afore-quoted case, leave to amend to withdraw the admission had been received from the London head office of the applicant. In the instant case, I think it can safely be concluded that the admission was made under a genuine mistake of facts although perhaps carelessly.

In all the circumstances of the case, I have come to the conclusion that I should allow the defence to be amended in all particulars as applied for and I grant leave to the defendant/applicant to do so. Mr Mureithi agrees that the defendant must pay the costs of this application to the plaintiff and I order that such costs to be taxed and payable forthwith. I also consider that it is a fit and proper case in which I should order the defendant to deposit in court the amount represented by the retracted admission. Mr Mureithi contends that this sum is Kshs 12,310.55 only while Mr Esmail submits that it amounts to exactly Kshs 48,381.50. I agree with Mr Esmail. The defendant had originally averred that it had paid to the plaintiff the sum of Kshs 30,000.00 since commencement of this suit which averment has now been withdrawn. It

had also alleged that the extra amount charged was Kshs 47,000.00 which is now reduced to Kshs 40,929.05, a difference of Kshs 6,070.95. The total of Kshs 12,310.55, Kshs 30,000 and Kshs 6,070.95 comes to Kshs 48,381.50.

I direct the defendant to deposit the sum of Kshs 48,381.50 in court within 60 days of today and upon doing so the amended defence will be taken to have been duly filed, whereupon the defendant must serve a copy of it upon the plaintiff who will, of course, have the right to serve an amended reply on the defendant within 14 days after the service on it of the amended defence by virtue of rule 1(3)(a) of Order VIA of the Civil Procedure Rules.

I might clarify that the order as to the deposit of Kshs 48,381.50 in court does not affect the plaintiff's right to have his bill of cost in respect of this application taxed and payable forthwith.

**Dated and delivered at Nairobi this 14th day of February, 1977.**

**S.K SACHDEVA**

**JUDGE**