IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Law V-P, Mustafa & Musoke JJ A)

CIVIL APPEAL NO 39 OF 1975

PEMCLOTH ENTERPRISES LTD ……..… APPELLANT

VERSUS

ISHWARBHAI NARANBHAI PATEL

RAJNIKANT ISHWARBHAI PATEL

PURSHOTTAMBHAI ISHWARBHAI PATEL

VINUBHAI ISHWARBHAI PATEL ……..… RESPONDENTS

JUDGMENT

The respondents to this appeal were the plaintiffs in a suit filed in the High Court, in which they claimed from the appellant the sum of Shs 29,400 being arrears of site value tax allegedly payable by the appellant as its share of that tax on a shop leased by the appellant from the respondents. The appellant's liability to pay tax was, according to the plaint, based on an oral agreement made "during the year 1969". The appellant by its defence pleaded, *inter alia*, that it was for the respondents to pay the tax claimed, and that the appellant could not be made liable for it save under a written agreement. This defence was based on item (IX) of the "Terms and Conditions to be Implied in Tenancies" in the schedule to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. Item (IX) reads as follows: "The lessor shall pay all rates, taxes, and similar outgoings unless the lessee is responsible therefore under any written agreement."

The respondents were put on their guard by this defence, and filed an amended plaint, as they were entitled to do under order VIA, rule 1, of the Civil Procedure Rules. By this amended plaint, the claim that the appellant was liable under an oral agreement was abandoned. Instead, it was pleaded that the appellant was liable under a written agreement contained in the tenancy agreement itself. The filing of the amended plaint entitled the appellant to file an amended defence, under order VIA, rule 1(2) (a). Instead, he filed a new defence to the amended plaint. The effect, however, is much the same as if an amended defence had been filed. At the same time as the new defence was filed, the appellant filed an application by way of chamber summons, stated to be made under "inherent jurisdiction: order VI, rule 3(1): other rules applicable". The reference to "order VI, rule 3(1)" was a mistake, as Mr Khanna who appeared for the appellant on this appeal readily conceded; the reference should have been to "order VIA, rule 2(1)", but this error could not prejudice the application, see order L, rule 12.

The body of the application claimed an order in the following terms: that the [respondents] be ordered to pay to the [appellant] its costs of the action down to the time of amendment of the plaint herein and of this application and that this action be stayed until such costs have been paid.

There was no claim that the amended plaint be disallowed, although order VIA, rule 2(1), states that: Within 14 days after the service on a party of a pleading amended under rule 1(1) that party may apply to the Court to disallow the amendment.

For some reason the appellant's application did not include a prayer to disallow the amended plaint. Sachdeva Ag J who heard the application did, however, consider whether the amended plaint raised a new cause of action, and whether, if it did, the appellant should be awarded the costs of the action down to the time of the filing of the amended plaint. The judge held that the cause of action in both plaints was a claim for contribution towards site value, and that the shift from an oral to a written agreement as the basis for the claim in the amended plaint was no more than an elaboration of the original plaint. He refused to award costs to the appellant, as prayed in the application, and left the question of costs occasioned by the filing of the amended plaint for decision at the conclusion of the trial. He dismissed the application with costs.

From this decision the appellant now appeals. Mr Khanna for the appellant has submitted that the amended plaint in fact substituted a new cause of action and constituted an abandonment of the original cause of action and that, in the circumstances, the appellant was entitled to the costs of the abandoned action, including an instruction fee. Mr Khanna relied on *Blackmore v Edwards* [1879] WN 175 and *Kernot v Critchley* (1867) 17 LT 134 as establishing the principle that where a plaintiff could not have succeeded on his original plaint, as was the case here, the defendant is entitled to all costs down to the filing of the amended plaint. Mr Gautama, for the respondents, countered by citing *Bourne v Coulter* (1884) 50 LT 321, in which the earlier authorities relied on by Mr Khanna were considered but not followed.

I do not think, with respect, that cases decided in England ninety or a hundred years ago are of much assistance in interpreting Kenya's Civil Procedure Act and Rules, especially detailed rules introduced in recent years, such as the ones with which we are concerned, although these old cases may have some persuasive authority which may be of assistance today as regards the principles to be applied in such interpretation.

I am, with respect, not sure that the judge was right in holding that the amended plaint did not introduce a new cause of action. It seems to me that a cause of action based on a written contract is not the same as a cause of action based on an oral agreement. However, it is clear from order VIA, rule 3(5), that an amended plaint will not be disallowed merely because it substitutes a new cause of action, if that new cause arises out of the same facts as the original cause of action, which in my view is the position here. In such a case, the court's power, under rule 2(2), to include in its order "such terms as to costs or otherwise as the Court thinks just" is not affected by the introduction of a new cause of action pleaded in an amended plaint filed as of right and based on the same facts as the original cause of action. Costs are primarily in the court's discretion, and I would not interfere with the judge's exercise of his discretion in refusing to award to the appellant the costs of the suit down to the filing of the amended plaint. It is, however, to my mind implicit from the fact that the judge left the question of costs occasioned by the amendment to the trial judge, that he considered the appellant entitled to some costs. In these circumstances, it cannot be said that the application should not have been made, and I agree with Mr Khanna that the judge should not have awarded the costs of the application to the respondents in any event. I would substitute an order that the costs of the application be costs in the cause. Save to this limited extent, I would dismiss this appeal and award the respondents three-quarters of the costs of this appeal. As the other members of the court agree, it is so ordered.

Mustafa JA: I agree with he judgment of Law V-P and with the order he proposes. Mr Khanna for the appellant had asked for costs of the action down to the time of the amendment of the plaint and of the application on the ground that, by amending the plaint, the respondents had substituted a new cause of action. The judge refused Mr Khanna's application for costs but reserved the question of costs occasioned

by the amendment until the conclusion of the trial.

In this case I think Mr Khanna had invoked the inherent powers of the court in asking for extra costs, over and above the costs occasioned by the amendment, as he was perhaps entitled to do. I do not think Mr Khanna was relying on order VIA, rule 2, of the Civil Procedure (Amendment) Rules 1975 as he should have done, (see 30 *Halsbury's Laws of England* (3rd Edn page 33), since he had not asked for the disallowance of the amendment. The judge, in the exercise of his discretion, refused such extra costs, although he reserved the costs occasioned by the amendment.

In *Bourne v Coulter* (1884) 50 LT 321, the kind of costs asked for by Mr Khanna had been described by Kay J as "further costs", over and above the costs occasioned by an amendment.

Mr Khanna has referred to two old English cases concerning the granting of costs of an action down to the time of an amendment when an amended plaint substituted a new cause of action; however, I do not read those cases as restricting the overriding discretion vested in a judge in granting or refusing such costs, especially in the exercise of his inherent jurisdiction. In this case the judge duly exercised his discretion after a careful consideration of the matters urged before him, and I can see no reason to interfere.

The fact that the judge might have been wrong in holding that there was no total abandonment of the original cause of action by virtue of the amendment does not, in my opinion, affect the validity of his order refusing costs. In any case, I do not think that the judge made the order he did merely because of his view that there was no total abandonment of the original cause of action. He specifically referred to his powers to make such orders as to costs as he thought just and to the discretion vested in him. I do not think that a case has been sufficiently made out for us to interfere with the judge's although as he reserved the question of costs occasioned by the amendment, it cannot be said that the application failed, and I agree that the costs of the application should have been costs in the cause.

Musoke JA: I agree with the judgments of Law V-P and Mustafa JA and have nothing useful to add.

Order accordingly.

Dated at Nairobi this 19th day of March 1976

E.J.E LAW

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VICE -PRESIDENT

A. MUSTAFA

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JUDGE OF APPEAL

J.S. MUSOKE

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JUDGE OF APPEAL