REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 633 of 2007

KING WOOLLEN MILLS LIMITED....….....…….PLAINTIFF

- VERSUS –

A. D. GREGORY……..……..……1ST DEFENDANT

KPMG PEAT MARWICK…….....……..2ND DEFENDANT

R U L I N G

Before me are two applications. The first application was filed by the defendants under the provisions of **Order VI Rule 13(1)(c)** and **Order VII Rule 1(1)(e)** and **10** of the **Civil Procedure Rules**. The defendants seek the striking out of the Plaint with costs to the them on the grounds that the plaint did not contain a mandatory averment as required by **Order VII Rule 1(e)** of the **Civil Procedure Rules,** in that the plaintiff failed to disclose the existence of other proceedings between the same parties over the same subject matter. The application is supported by the annexed affidavit of Andrew Douglas Gregory, the 1st Defendant. The application is opposed. Meshack Odero, the advocate for the plaintiff swore a replying affidavit in opposition to the application. The second application was filed by the plaintiff. The plaintiff sought leave of this court to enable it amend its plaint as provided by **Order VIA Rules 3, 5** and **8** of the **Civil Procedure Rules**. The plaintiff proposes to amend its plaint so as to comply with the provisions of **Order VII Rule 1(e)** of the **Civil Procedure Rules** that requires an averment to be made in the plaint that states that there exists no suit pending nor had there been any previous suit in any court between the plaintiff and the defendant in respect of the same subject matter. The plaintiff contends that the omission was as a result of inadvertence, error and oversight on its part. The application is supported by the annexed affidavit of Meshack Odero. The application is opposed. The defendants filed grounds in opposition to the application. The defendants stated that since the requirements of **Order VII Rule 1(1)(e)** of the **Civil Procedure Rules** were mandatory, the plaint filed by the Plaintiff was void *ab initio* and could not therefore be saved by amendment. In any event, the defendants argued that there was unreasonable delay before the plaintiff made the application to amend its plaint. The defendants were of the view that the proposed amendments would prejudice them.

At the hearing of the applications, the court allowed Mr. Nagpal for the plaintiff and Mr. Fraser for the defendants to argue both applications at the same time. This ruling is therefore in respect of both applications. There are two competing issues that have been presented to the court for determination. The first issue is whether a plaint filed contrary to the provisions of **Order VII Rule 1(1)(e)** of the **Civil Procedure Rules** that required an averment to be made "***that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter***" is fatally detective and therefore ought to be struck out. The other issue for determination is whether such as plaint which has been filed with no such averment as envisaged by **Order VII rule 1(1)(e)** of the **Civil Procedure Rules** can be amended so as to have it comply with the said rule.

According to Mr. Fraser, the Plaint filed by the plaintiff was fatally defective and therefore ought to be struck out since it contained no averment as envisaged by the mandatory requirements of **Order VII 1(1)(e)** of the **Civil Procedure Rules**. He relied on the case of **Kitur –vs- Standard Chartered Bank & 2 Others [2002] 1 KLR 630** at page 636-637. Mr. Fraser submitted that rules of procedure have to be complied with and where there was breach of such mandatory provisions of the rules, the courts should act accordingly and strike out the plaint. Mr. Nagpal for the plaintiff was of a contrary view. He submitted that the court should refrain from taking such draconian act of striking out the plaint on account of an infringement that could be cured by amendment. Mr. Nagpal argued that **Order VII Rule 1(3)** of the **Civil Procedure Rules** did not make it mandatory for the court to strike out a plaint which did not comply with the requirements of **Order VII Rule 1(1)(e)** of the **Civil Procedure rules**. He submitted that the said rule provided that

the court "*may*" strike out the plaint.

Mr. Nagpal relied on the decision in **D.T. Dobie & Co (K) Ltd –vs- Muchina [1982] KLR 1** to support his proposition that the court should only strike out pleadings which are so defective that they could not possibly be cured by amendment. He reiterated that since the plaintiff had made an application to amend its plaint to enable it include the averment in question, it was only just that the plaintiff be granted leave to amend its plaint. Mr. Fraser opposed the plaintiff's application for leave to amend its plaint. He submitted that the plaintiff had deliberately filed the plaint without the averment in issue. He reiterated that Meshack Odero, the advocate for the plaintiff had sworn two contradictory affidavits in the two applications. Mr. Fraser explained that there had been unexplained delay by the plaintiff in bringing the application to amend the plaint. He relied on the cases of **Kassam –vs- Bank of Baroda (K) Ltd [2002] 1 KLR 294** and **African Banking Corporation Ltd –vs- Mavji Construction Ltd [2004] 2 E.A 1** for the proposition that the court has discretion to disallow an application for amendment where no sufficient reasons have been placed before it to explain the delay. He urged the court to disallow the application for amendment and strike out the plaint.

I have carefully considered the rival arguments ably presented to me by Mr. Fraser and by Mr. Nagpal. As regard the application to strike out the plaint, this court has in mind of the dictum by Madan, JA in **D.T. Dobie & Co. (Ltd) –vs- Muchina [1982] KLR 1** at Page 9 where he stated that:

"*No suit ought to be summarily dismissed unless it appears to hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."*

There is no dispute that the plaint filed on behalf of the plaintiff does not contain an averment as envisaged by **Order VII Rule 1 (1)(e)** of the **Civil Procedure rules**. The plaintiff admits that it did not make such an averment and has in fact sought the leave of this court to amend its plaint to enable it comply with the requirements of the said rule. I do recognize the fact that there are conflicting decisions by the High Court regarding whether such a plaint should be struck out once it is brought to its attention that the plaintiff failed to comply with the mandatory provisions of **Order VII Rule 1 (1) (e)** of the **Civil Procedure rules**. However, I think there is now consensus that the court should be reluctant to strike out pleadings on the basis that a litigant breached a procedural rule regarding the manner of filing or defending his suit.

In the present application, it is clear that the plaintiff was labouring under misapprehension that it was not required to make such an averment as required by **Order VII Rule 1(1)(e)** of the **Civil Procedure Rules.** The plaintiff later saw the light and did the right thing by making an appropriate application to amend its plaint. It is apparent that the plaintiff filed the application to amend its plaint after it was confronted with the application filed by the defendants seeking the striking out of the plaintiff's suit.

Although Mr. Fraser took issue with the timing of the filing of the application by the plaintiff in seeking leave to amend its plaint to enable it comply with the requirements of **Order VII Rule 1(1)(e)** of the **Civil Procedure rules**, it is trite law that the courts will freely allow a party to amend his pleadings provided that such leave to amend does not cause prejudice to the opposing party. In **Kassam –vs- Bank of Baroda (Kenya) Ltd [2002] 1 KLR 294** at Page 301, Kuloba, J summarized the principles to be applied by the court when considering an application for leave to amend pleadings. He had this to say:

" ……*as a general rule, leave to amend pleadings ought not to be refused unless the court is satisfied that the party applying is acting* ***mala fides*** *or that his blunder has caused some injury to the other side which cannot be compensated by the payment of costs or otherwise****: McCoy –vs- Allibhai [1938] 5 EACA 70****; that rules of the court should be observed, and a party should be fined for his mistake, but the fine should be measured by the loss to the other side, and not by the importance of the stake between the parties: Bramwell LJ in the off-quoted case of* ***Tildesley –vs- Harper [1878] 10 Ch D 393*** *at Page 397 adopted in* ***Khan –vs- Roshan****, supra; that applications for leave to amend, even if necessitated by negligence or carelessness will be granted so as to enable the right question to go to trial unless the party applying was acing* ***mala fides*** *or by his blunder he has done some injury to his opponent which cannot be compensated by costs or otherwise:* ***Patel –vs– Joshi [1952] 19 EACA 42****; …..…"*

In the present application, the plaintiff admitted that it made an error when it filed its plaint without complying with the mandatory requirements of **Order VII Rule 1 (1) (e)** of the **Civil Procedure rules**. The plaintiff craves the leave of this court to be allowed to amend its plaint to enable it comply with the said mandatory requirements of the rules. The defendants are however, of the contrary view. It was their submission that the delay by the plaintiff in making the appropriate application to amend the plaint, disentitled it to be granted the leave of this court. The defendants prayed that the plaint be struck out with costs for failure to comply with the mandatory provisions of the Law.

Having considered the rival arguments made, I am of the view that the plaintiff be granted leave to amend the plaint to enable it comply with the requirements of **Order VII Rule 1(1)(e)** of the **Civil Procedure Rule**. I decline to take the drastic course proposed by the defendants in their application to strike out the plaint. I am inclined to allow the plaintiff to rectify its mistake so that the real questions in controversy may be placed before the court for determination. The defendants will adequately be compensated by an award of costs.

The upshot of the above reasons is that the defendants' application dated 15th March 2005 is hereby dismissed. The plaintiff's application dated 23rd January 2006 is allowed. The plaintiff is granted leave to amend its plaint in accordance with the draft amended plaint annexed to the application. The said amended plaint shall be filed and served within fourteen *(14)* days of today's date. The defendants shall be at liberty to file a response, if any, within fourteen *(14)* days after service.

Since it was the plaintiff's negligence that occasioned the filing of both applications, I hereby award the costs of both applications to the defendants. The said costs are assessed at Kshs.20,000/=. The said costs shall be paid within fourteen *(14)* days of today's date or in default thereof the orders granted in favour of the plaintiff shall automatically lapse.

DATED at NAIROBI this 8th day of OCTOBER, 2008.

L. KIMARU

JUDGE