



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 430 of 2011

GLOBAL PETROLEUM PRODUCTS KENYA LIMITED.....PLAINTIFF

VERSUS

SONAL HOLDINGS (K) LIMITED.....1ST DEFENDANT

PARESH KUMAR DODHIA.....2ND DEFENDANT

RULING

1. The Plaintiff's Chamber Summons application dated 24th August 2012 has been brought under the provisions of Order 8 Rules 3 & 8 of the Civil Procedure Rules and the Inherent Jurisdiction of this Honourable Court. It seeks the following orders:-

- a. THAT the application be certified as urgent.**
- b. THAT the Plaintiff's suit be amended as per the Annexed draft Amended Plaintiff.**
- c. THAT the hearing of the suit be stayed, pending hearing and determination of this application.**
- d. THAT costs be in the cause.**

2. The grounds on which the Plaintiff has relied on in support of its application are as follows:-

- a. THAT the said application was dismissed on 31st January 2011 for non- attendance by the Applicant's counsel.**
- b. THAT the non- attendance was due to a mistake on the part of the Applicant's counsel who failed to diarise the said date and thereupon attend court.**
- c. THAT the advocate's mistake of not attending court on 31st January 2012 is highly regretted and should not be visited upon the innocent client.**
- d. THAT it is in the interests of justice and fairness that the Applicant be granted an opportunity to ventilate its case in court.**

e. THAT this application has been timeously filed without undue delay.

f. THAT the Respondent will suffer no prejudice by the reinstatement as all parties had already filed comprehensive written submissions.

3. The Plaintiff's application was supported by the Affidavit of James Gitau Singh advocate sworn on 24th August 2012.

4. In the said affidavit, Mr Singh stated that the firm of M/S LJA Associates came on record on behalf of the Plaintiff in place of M/S Ochieng, Onyango, Kibet & Ohaga Advocates on 11th June 2011.

5. He added that at the time of preparing for trial, he found certain information and evidence that, in his view, necessitated the amendment of the Plant herein so that the matter could be litigated and determined on merit.

6. He also contended that the Defendant would not suffer any prejudice if the said Plaintiff was amended as per the annexed draft Amended Plaintiff.

7. In opposing the said application, the Defendants filed their Grounds of Opposition dated 24th September 2012 on 26th September 2012 stating inter alia

a. THAT the Plaintiff's application as drawn is incurably defective and bad in law for the reasons that :-

i. The Application as drawn offends the mandatory provisions of Order 51 Rule 1 of the Civil Procedure Rules 2010.

ii. The Affidavit in support of the Application is incompetent as it is sworn by an Advocate who swears to very contested issues and matters of facts and who further fails to disclose the source and nature of information he claims to have come across.

b. THAT the suggested amendments amount to nothing but bare-faced allegations of fraud whose particulars have not been rendered or at all.

c. THAT the proposed amendments are merely meant to vex and embarrass the Defendants. They have no basis in law or fact.

d. THAT the proposed amendments should not only be refused but also expunged from the record because they are scandalous to the Defendants.

e. THAT the proposed amendments do not in any way add value to the Plaintiff's case, neither are they necessary for proper and just determination of the issues in controversy and the same ought to be struck out with costs.

8. On their part, the Defendants filed their written submissions and List of Authorities dated 23rd October 2012 on the same date. Paresh Kumar Dodhia swore the Replying Affidavit on behalf of the Plaintiffs on 24th September 2012.

9. The Plaintiff filed its written submissions and List of Authorities dated 24th October 2012 on the same date.

10. When the matter came up for highlighting of the written submissions on 13th December 2012, both Mr Masaviru and Mr Amoko, counsel for the Plaintiff and the Defendants respectively requested that the court proceeds to give its ruling based on the said submissions without hearing any oral submissions on their part. Counsel for both parties relied on Order 51 Rule 16 of the Civil Procedure Rules Cap 21 (of

the laws of Kenya) which provides as follows:-

“ The Court may, in its discretion, limit the time for oral submissions by the parties or their advocates or allow written submissions.”

11. The court allowed the counsels’ application that the court may proceed on the basis of written submissions in the court file.

12. In the Defendants’ Replying Affidavit, the deponent reiterated the Ground of Opposition cited hereinabove. In addition, he stated that the proposed amendments would greatly evolve and/or substantially alter the instant cause of action which in itself would form the basis of another suit.

13. It was the Defendants’ contention that that the proposed particulars revealed no particulars of the fraud alluded to and that in the circumstances the proposed amendments, if allowed, would be irrelevant to the instant suit.

14. The Defendants further averred that if allowed, the proposed amendment would operate to their prejudice, it was not necessary to determine the real issues in contention in the suit, it purported to introduce and subsequently impute improper motive on undisclosed third parties who were not parties to the suit and that it would amount to replacing the original suit.

15. In addition, the Defendants submitted that the Supporting Affidavit as deposed by the advocate was incompetent as the same deposed matters of fact and contested issues which he did not disclose the source of his information. The Defendants relied on the case of **Gerphas Alphonse Odhiambo vs Felix Adiego [2006] eKLR** in which the court of Appeal stated :-

“Ordinarily an Affidavit should not be sworn by an advocate on behalf of his client or clerk when those persons are available to swear and prove the facts of their own knowledge, in appropriate cases such Affidavits may be struck out or given little or no weight at all.”

16. On the issue as to whether the Defendant was unable to pay the loan amount, the Defendants submitted that that was a matter between them and their bank and any negative imputation by the Plaintiff’s counsel was merely speculative and of little or no significance at all to the processes of this honourable court.

17. The Defendants therefore prayed for the dismissal of the Plaintiff’s application with costs to them.

18. In its submissions, the Plaintiff contended that the Plaintiff’s application was not incurably defective or bad in law and that the same had been brought under Order 8 Rule 3(1) which provides that:-

“ ... the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend its pleadings.”

19. The Plaintiff also averred that its application could not be deemed as incurably defective by virtue of offending the mandatory provisions of Order 51 Rule 10 (1) and (2) of the Civil Procedure Rules which provide as follows:-

(1)“ Every order, rule or other statutory provision under or by virtue of which any application shall be refused merely by reason of a failure to comply with this rule”

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

20. In addition, the Plaintiff cited Article 159 (2) (d) of the Constitution providing that:-

“ In exercising judicial authority, the courts and tribunals shall be guided by the following

principles..

(d) justice shall be administered without undue regard to procedural technicalities.”

21. In response to the ground of the incompetence of the Supporting Affidavit, the Plaintiff submitted that it was in order for its advocate to have signed the same on its behalf. This is because it was its advocate's view that the proposed amendment was necessary.

22. The Plaintiff relied on HCCC No 496 of 1995 Peter Onyango Onyiego vs Kenya Ports Authority where Maraga J stated thus:

“Other than verifying affidavits which he stated in the ruling must be sworn by the Plaintiffs themselves or their authorised agents all other affidavits filed and used in courts are not amongst the acts covered by Order III Rule 1-5 of the Civil Procedure Rules. All other affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of facts and or information that the depones on, that n the rules of evidence, would be admissible.”

23. The Plaintiff also argued that it had enumerated the elements of misrepresentation as required by the law and the 2nd Defendant was at liberty to challenge the veracity of the same during trial.

24. It was the Plaintiff's submission that the amendment should be allowed as this court had unfettered and wide discretionary powers to allow amendments so as to bring out the real issues to be determined. To buttress this point, the Plaintiff cited the case of **Eastern Bakery vs Catelino E.A. (1958)** in which Sir Kenneth O'Connor noted that that :

”Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side...”

25. The Plaintiff also relied on **Cropper vs Smith Chd (1884)** and **HCCC No 200 of 2004 Cheruiyot Chelule Arap & Anor vs Regional Centre for Service in Surveying, Mapping and Remote Sensing** which reiterated the same views as in the **Eastern Bakery Case**.

26. Having looked at the parties' submissions and case law through their respective counsel, it is clear that the Plaintiff is calling upon this court to exercise its discretion by allowing the Plaintiff to amend its Plaintiff dated 29th September 2011 while the Defendants are arguing that this is not a proper case where such discretion should be exercised in favour of the Plaintiff herein.

27. It is trite law that a party must be given a fair and reasonable opportunity to present its case. This includes the right to present its case in whatever form. It is up to the Plaintiff to decide what case to bring or not to bring to court. I would therefore reject the Defendants' Ground of Opposition to the extent that the proposed amendments do not add value to the Plaintiff's case.

28. A party should also not be penalised for the omissions or commissions of its legal representative when drafting pleadings. In allowing a party to ventilate its case which has been negatively compromised due to its legal representative's omissions or commission, a court must consider what prejudice the other party would suffer if it exercised its discretion in favour of an applying party.

29. I have considered submissions by both parties and do not find that any prejudice will be suffered by the Defendants. I, on the other hand, find that it is the Plaintiff that would be prejudiced if I do not allow the application.

30. That notwithstanding, the court's discretion is not an absolute one. Even where an applying party would suffer prejudice, the court must exercise the discretion judiciously upon being satisfied that the application has basis on facts and legal principles.

31. The basis of the proposed amendment by the Plaintiff is that it wishes to particularise the details of

misrepresentation by the 2nd Defendant. Order 2 Rule 10(1) of the Civil Procedure Rules, 2010 provides inter alia that :-

(1)(a) “ Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing... particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies...”

32. I am not persuaded by the Defendants’ submissions that the Plaintiff’s proposed amendments amount to nothing but allegations of fraud whose particulars have not been rendered, that they are meant to vex and embarrass the Defendants or that they should be expunged from the record because they are scandalous to the Defendants.

33. As has rightly been pointed out by the Plaintiff’s counsel, these are issues that should and can be canvassed during the trial.

34. For that reason, I reject the Defendants’ legal assertions that this court should expunge from the record the proposed amendments as they are scandalous to them.

35. Having found that the Plaintiff is entitled under the Civil Procedure Rules, 2010 to amend its Complaint, I now turn to the issue as to whether the application is properly before the court and/or whether it is incurably defective.

36. I do not find any statement in the said Supporting Affidavit that the advocate could not have deponed to and which would have necessitated disclosure of the source of his information.

37. I concur with the Plaintiff’s counsel’s submissions that he was quite in order when he swore the Supporting Affidavit. This is because he could depone to the facts himself from his own knowledge and observations gained at the time of preparing the Plaintiff’s case.

38. I would therefore agree with the observations of Maraga J in **Re: Peter Onyango Onyiego case** cited hereinabove in this regard as this case is distinguishable from the facts in **Re: Gerphas Alphonse Odhiambo** case relied upon by the Defendants herein.

39. It is for that reason that I hereby reject the Defendants’ assertions that the Supporting Affidavit were hotly contested and ought not to have found way in the said Affidavit.

40. On the issue of whether the application was incurably defective, I uphold the Plaintiff’s submissions that the Civil Procedure Rules, 2010 and the Constitution of Kenya are clear that justice shall be administered without due regard to technicalities and that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

41. Save for citing that the Plaintiff’s application as drawn offended the mandatory provisions of Order 51 Rule 1 of the Civil Procedure Rules, 2010, the Defendants did not articulate their arguments and it is difficult to know how the application herein offended the said Order.

42. I accordingly reject the Defendants’ arguments that the Plaintiff’s application was incompetent or incurably defective and uphold the Plaintiff’s arguments that no application shall be refused merely by a reason of a failure to comply with the said Rule.

43. The court must be very cautious while denying a party an opportunity to ventilate its case sought to be achieved through amendment of pleadings. A court should only deny a party leave to amend its pleadings as a last resort and with good or sufficient cause. This is where the other party will suffer great prejudice which cannot be compensated by way of costs or otherwise as may be just.

44. This is a position that has been well laid out in several cases. In **Joseph Ochieng & 2 others t/a**

Aquiline Agencies vs First National Bank of Chicago Civil Appeal No 149 of 1991 cited in **David Jonathan Grantham & Another vs National Social Security Fund**, Shah J.A. (as he then was) stated thus:-

“...amendments should be timeously applied for...that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side...”

45. I have noted the Plaintiff’s counsel brought this application soon after its firm came on record in this matter. I am satisfied that there was no inordinate delay in the bringing of the Plaintiff’s application to court. The amendments sought appear to assist the Plaintiff is fully ventilating its case by following the requirements of proving misrepresentation and fraud as provided for in Order 2 Rule 10 (1) of the Civil Procedure Rules, 2010.

46. Bearing in mind the foregoing, I am satisfied that this is a case which merits the exercise of my discretion in favour of the Plaintiff herein and agree with the findings of Sir Kenneth O’Connor, Bowen L.J and Azangalala J in the cases cited by the Plaintiff in support of their case.

47. Whereas a party applying to amend its pleadings could be condemned to pay costs to the other party, I note that this is a fairly new matter and the Defendants have not convinced me that they have suffered or will suffer any prejudice if I allow the Plaintiff’s application. I do not find the Defendants to have demonstrated this as being a good case in which I would have ordered the Plaintiff to compensated them with costs in the event that I deemed it fit to grant leave to the Plaintiff to amend the Plaintiff. I will therefore not order for payment of the same.

48. Accordingly, the upshot of my ruling is that prayer No 2 of the Plaintiff’s Chamber Summons application dated 24th August 2012 is not merited and is hereby allowed as prayed subject to the filing of an Amended Plaintiff within fourteen (14) days from today. Both parties to file the subsequent pleadings within the period stipulated under the Civil Procedure Rules. Costs in the cause.

49. Orders accordingly.

DATED and DELIVERED at NAIROBI this 28th day of February 2013

J. KAMAU

JUDGE