



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 163 OF 2004

KABUR MBOKE MUTINDA PLAINTIFF

-VERSUS

COOPERATIVE BANK (K) LIMITED DEFENDANT

RULING

The suit herein was set down for hearing on 13th April 2005. According to the court record, the hearing date was taken in the court registry by Messrs. Nyaundi Tuiyott and Company Advocates for the defendants.

When the matter was mentioned in court, Mr. Nyaundi for the defendants informed the court that he had preliminary points to raise before the suit could be heard. He submitted that it should go on record that there was a representative from his client the defendant, by the name of Debrah Ambale in court and the plaintiff was also present in court.

The issues he wanted to raise were that following an application dated 15th July 2004 by the plaintiff to amend the plaint, a consent order was recorded by the parties in court on 6th October 2004. In the consent order the plaintiff was granted leave to amend the plaint in accordance with the draft amended plaint. The plaintiff was to amend, file and serve the plaint within 14 days. The defendants were also granted leave in the same consent order to amend their defence, if need be, within 14 days after service. He submitted that no amended plaint had as yet been filed and served. However, on 19th October 2004 they were served with an amended plaint which had not been filed. Secondly, the document that was served on them was radically different from the draft amended plaint that was allowed by the consent order, which was adopted by the court. The prayers in the document that was served on them were different from those of the draft amended plaint. That was also another non-compliance with the consent order. Consequently the defendant did not file an amended defence in response thereto. He therefore submitted that the purported amended plaint should not form part of the court record and should be struck out, and that the case should proceed on the basis of the original plaint in the case.

Mr. Machio on the other hand opposed the objection to the amended plaint. He submitted that the application dated 15th July 2004 sought to amend the plaint "appropriately". It was consented to by the parties and adopted by the court. The consent did not state that the amended plaint should be in accordance with the draft amended plaint. He submitted that the amended plaint was filed on 19th October 2004, which was within 14 days from 6th October 2004. It was also served on the same day on Messrs. Nyaundi Tuiyott and Company Advocates. Instead of the counsel for the defendant filing an amended defence, they sent a letter dated 21st October 2004 that there had been no compliance with

the court's order. They wrote another letter dated 16th November 2004 and Messrs. Machio and Company Advocates responded and suggested to Messrs. Nyaundi Tuiyott and Company Advocates that they should apply for extension of time to file an amended defence. Mr. Machio insisted that they complied with the consent order. The way I understand the arguments herein is that the parties are agreed that the amended plaint that was served on Messrs. Nyaundi Tuiyott and Company Advocates is not exactly in the same wording as the draft amended plaint that was attached to the application for amendment to the plaint dated 15th July 2004. Having perused the draft amended plaint attached to the application and the amended plaint that is dated and filed on 19th October 2004, the difference of substance is in the prayers sought. In the draft amended plaint there is a prayer (aa) which is missing from the prayers in the amended plaint dated 19th October 2004. That prayer reads as follows –

“(aa) A declaration that the charges are null and void and unenforceable.”

Now, was the plaintiff's counsel in compliance with the consent order when he purported to change the prayers sought in the draft amended plaint that was annexed to the application for amendment of plaint" Mr. Nyaundi argues that it was wrong, while Mr. Machio contends that the application was to amend the plaint "appropriately" and the consent order also did not restrict the amendments to the contents of the draft amended plaint. No authority was cited to me by either of the parties' counsel for their arguments. Mr. Nyaundi however referred me to paragraph 4 of the supporting affidavit to the application. That paragraph states as follows: - "4. THAT in the circumstances it is necessary to amend the plaint in order to address the aforesaid matters and others as shown in the draft annexed hereto." The consent order that was adopted by the court on 6th October 2004 reads as follows: -

“By consent the application dated 15/7/2004 is allowed with costs to the defendant. The amended plaint to be filed within 14 days. Defendant be at liberty to file an amended defence within 14 days of service of amended plaint.”

I have tried to do research to find authority on whether a draft amended pleading should be in the same words as the one to be filed and served. I have not found a case authority on the same, and as I have said, no case authority has been cited to me. The application for leave to amend the plaint was brought under Order 6A rule 3, 5 and 8 of the Civil Procedure Rules. Rule 5 provides as follows –

“5 (1) For the purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgement or order.”

The court allowed the amendment of the plaint as per the consent order. The draft amended plaint was annexed to the application. In my view, there is a reason why the draft amended pleading was annexed

to the application. It would allow any of the parties or the court to decide on whether there was justification for granting leave for the amendments sought. It would allow the other party, if it deems so, to object to the proposed amendments. Therefore, in my view, the amendment should follow the draft amendment that was annexed to the application. In this particular case the amended plaintiff that was filed omitted one of the prayers sought in the draft amended plaintiff. In those circumstances I find no prejudice caused to the defendant by the omission of prayer "aa" in the proposed amended plaintiff. I would have found otherwise if additional prayers were sought. I therefore find that, though the amended plaintiff omitted one of the prayers in the intended amended plaintiff, it is not a ground for this court to interfere with the amended plaintiff, as it has not caused any prejudice to the defendant.

On whether the defendant was served with a filed amended plaintiff, the parties' counsel agree that there were correspondences between them on the subject. None of those correspondences have been filed in court. The defendants' counsel states that the amended plaintiff that was served was not filed, and that it was different from the draft amended plaintiff. Therefore the defendant did not file an amended defence. These matters were raised before me by counsel for the defendants when the case was actually fixed for substantive hearing before me by the same counsel. It is my view that the parties had not sorted out preliminary issues between them before fixing the case for hearing, which they should have done.

Perusing through the documents that were filed and are on record, though Mr. Nyaundi argues that no amended plaintiff was filed, it is clear that such an amended plaintiff was filed and paid for on 19th October 2004. Also Messrs. Nyaundi Tuiyott and Company Advocates filed a letter dated 22nd November 2004 on 24th November 2004 asking the Deputy Registrar to place the file before Justice Gacheche for directions. The letter does not state what kind of directions were to be given. No such directions were actually given. www.kenyalawreports.or.ke Kabur Mboke Mutinda v Cooperative Bank (K) Ltd [[222000000555]] e eKLLRR 6 given before the matter was set down for hearing by the same firm of advocates on 3rd December 2004.

In my view, it would have been fairly easy for Messrs. Nyaundi Tuiyott and Company advocates to find out from the court record, whether an amended plaintiff was filed, and file their appropriate amended defence if any to that amended plaintiff, including the issues that they are now raising from the bar. I am mindful that as of now they have not filed an amended defence because they contend that they were served with an unfiled amended plaintiff, which differs from the draft amended plaintiff that was annexed to the application for amendment of plaintiff. Parties have to be given a chance to be heard in their cause.

In view of the above situation and in the interest of justice, and considering the provisions of section 3A of the Civil Procedure Act (Cap.21), I find and order as follows: -

- 1. That an amended plaintiff was filed on 19th October 2004.**
- 2. That the plaintiff should serve a filed copy of the amended plaintiff on counsel for the defendants within four (4) days from today's date.**
- 3. That the defendants should file an amended defence to the amended plaintiff within fourteen (14) days from the date of service, if they deem it fit to do so.**
- 4. The matter is marked as SOG.**
- 5. Costs will be in the cause.**

Dated and Delivered at Eldoret this 9th Day of May 2005

George Dulu

Ag. Judge

In the Presence of:



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