**Mbori and another v Sanghani and others**

**Division:** Milimani Commercial Court of Kenya at Nairobi

**Date of judgment:** 26 September 2006

**Case Number:** 614/04

**Before:** Ochieng J

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Civil practice and procedure – Amendment of an application – Time when the application to amend*

*and application should be made – Factors for the court to consider.*

*[2] Civil practice and procedure, dismissal of suit – Effect of application to dismiss suit after issues*

*agreed on – Delay in filing application – Factors for court to consider.*

**Editor’s Summary**

The defendant filed an application under Order VI, rule 13(1)(*b*) or (*c*) or (*d*) and Order XVI, rule 5 of the Civil Procedure Rules seeking the suit’s dismissal. At the hearing of this application the applicants also sought leave to amend the application so that the prayer would be for the striking out of the suit, rather than its dismissal. Counsel for the plaintiff strongly opposed the application for leave to amend the application stating that the proposed amendment would make a world of difference. It is noteworthy that on 2 April 2003, all the parties to the suit signed and filed a Statement of Agreed Issues. Thereafter, the suit had been set down for trial on 12 July 2005. From the court records, the reason for the trial not proceeding as scheduled was that the applicant’s advocate was engaged in another case at the High Court in Kisumu.

**Held** – Any party who seeks to amend his application should do so at the earliest possible opportunity. Indeed, the most ideal time to seek leave to make an amendment is before delving into the substance of the application itself. And after putting forward its case for the proposed amendment, the applicant should await the court’s decision thereon, as it would enable all the parties to know whether or not the court has granted leave. The court’s decision on that issue would then inform the course of action to be undertaken by the parties. The manner in which the applicant sought leave to amend the application was most inappropriate. Having not passed a verdict on the said application, one wonders whether the applicants based their submissions on the application as worded, or whether they assumed that leave to amend was granted, so that the application was prosecuted on that understanding. It must also be appreciated that a party who was a respondent to an application is entitled to sufficient notice of that which he is to face. It is only when he is given adequate notice that the respondent can properly prepare for the application. Therefore when an applicant serves an application on the other party, then makes submissions thereon, it is not fair on the respondent to allow the applicant leave to amend the application so late in the day, if the proposed amendment would significantly alter the application. However, if the applicant were to make out a convincing case to justify his belated application for leave to amend the application, the court should be willing to accord the respondent more time, if the same is sought by the said respondent. The only change that the applicants wished to introduce was to the effect that the substantive prayer in the application should be for the striking out instead of the dismissal of the suit. Under Order VI, rule 13(1) of the Civil Procedure Rules, the court may order to be struck out or amended any pleading and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be. Therefore if the court were to ultimately grant an order to strike out the suit as against the applicants, it could then proceed to have the suit dismissed. In the circumstances, the respondents would not be prejudiced by the amendment in the manner proposed. In any event, if the respondents had felt they needed more time to reconsider their response to the applicants’ submissions, they only needed to have sought an adjournment. Accordingly the applicants are granted leave to amend the application so that it seeks the striking out of the suit instead of dismissal thereof. Whereas it appears that the applicants have a strong legal contention founded on the apparent lack of privity of contract as between the plaintiff, on the one hand, and the applicants on the other, all the parties signed and filed a Statement of Agreed Issues. Out of the eight issues listed, the first two appear to address the concerns which the applicants raised during the hearing of the application. Having been signatories to the Statement of Issues, through which all the parties had decided on the matters which were to be placed before the trial court for determination, the applicants have not explained to the court why they have now decided that the same issues ought to be now determined summarily. The unexplained change of heart on the part of the applicants was even more perplexing as they had also filed their lists of documents to be adduced at the trial. There is no time limit within which an application to strike out pleadings must be made and the court may order to be struck out any pleading at any stage of the proceedings. However, when there is a delay in bringing an application to strike out pleadings, such delay may nonetheless work against the applicant. (*Sabayaga Farmers Co-operative Society Limited v Mwita* [1969] EA 38 distinguished). Once the parties to the suit had themselves formulated a list of eight issues which were to be placed before the trial court, it is hard to say that the plaintiffs have no case at all. If it had been so clear and beyond doubt that the plaintiffs did not have any case at all, the parties would have no reason to formulate the eight issues. (*DT Dobie and Company (Kenya) Limited v Muchina and another* [1978] LLR 9 (CAK); *Kellaway v Bury* [1892] 66 LT 599; *Wenlock v Maloney and others* [1965] 1 WLR 1238 applied). The plaintiffs in the suit alleged that there was fraud perpetrated by the defendants. If the applicants were directors of the fourth defendants, and if the fourth defendants were ultimately held to be liable for selling and transferring the suit property to third parties fraudulently, it was possible that the applicants or any of them who may have been carrying out the actions on behalf of the fourth defendant could also be personally liable. (*Standard Chartered Bank v Pakistan National Shipping Corp and others* (number 2) [2002] 2 All ER 931 applied).

Application dismissed.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*DT Dobie and Company (Kenya) Limited v Muchina and another* [1978] LLR 9 (CAK) – **AP**

*Sabayaga Farmers Co-operative Society Limited v Mwita* [1969] EA 38 – **D**

***Others***

*Kellaway v Bury* [1892] 66 LT 599 – **AP**

*Standard Chartered Bank v Pakistan National Shipping Corp and others* (number 2) [2002] 2 All ER 931

– **AP**

*Wenlock v Maloney and others* [1965] 1 WLR 1238 – **AP**