[VASSILIADES, P., TRIANTAFYLLIDES, JOSEPHIDES, JJ.]

HOMEROS TH. COURTIS AND OTHERS,

Appellants-Plaintiffs,

v.

PANOS K. IASONIDES,

Respondent-Defendant.

(*Civil Appeal Nos.* 4825 and 4843).

Practice—Pleadings—Amendment of—Amendment of pleadings after close of case and some time after judgment had been reserved—Such amendment should be avoided unless it is unavoidable in the circumstances of the particular case, in order to finalize litigation in the interests of justice—An amendment should not have been allowed in the circumstances of the instant case—Civil Procedure Rules Order 25.

Practice—Witness—Refusal to allow recalling of a witness after allowing amendment of defendant's pleading—Prejudicial to the case of the plaintiffs and may have affected outcome of action.

Pleadings—Amendment of—See supra.

Witness—Recalling witness—Refusal to allow recalling of witness after allowing amendment of defendant's pleading—Such refusal was wrong—See also supra.

Cases referred to :

Pourikkos v. *Fevzi* (1963) 2 C.L.R. 24.

The facts of the case sufficiently appear in the judgment of the Supreme Court allowing this appeal by the plaintiff.

Appeals.

Appeals by plaintiff against two rulings and a judgment of the District Court of Famagusta (Georghiou, P.D.C. and Pikis, D.J.) given on the 27th May, 1969, 1st July 1969 and 18th July 1969, respectively, (Action No. 2201/67) whereby defendant's application for leave to amend his pleading was granted, plaintiff's application for leave to recall a witness was refused and his claim for a declaration

that a contract between the parties dated 5th May, 1967 is invalid and devoid of any legal consequence was dismissed.

L. Clerides for appellant.

M. Montanios for the respondent.

The following judgment was delivered by :—

VASSILIADES, P.: These two appeals (Nos. 4825 and 4843) were heard together. They arise in the same case and, in the circumstances, they shall be treated for the purpose of this judgment, as consolidated.

In this very strongly contested litigation, with personal ill-feeling running high between the principal parties and with a bulky record, the respondent (defendant in the action) filed after the closing of the case and sometime after the Court had reserved their judgment, an application to amend his pleading. The application was opposed by the other side on the ground that the amendment sought was material and should not be allowed at that late stage in the proceedings. In any case, it was bound to prejudice the case of the appellants (plaintiffs in the action). The application for amendment was made on February 19, 1969, more than five weeks after the closing of the case on January 10, 1969 ; and pending the reserved judgment.

After hearing the parties exhaustively, the trial Court ruled on the 27th May, 1969—more than four months after the closing of the case—that the amendment should be allowed subject to certain directions which appear at the end of the Court's long ruling. One of those directions was that the plaintiffs were at liberty to call witnesses on the issue raised by the amendment. The appellants applied for leave to recall one of the main witnesses, whose evidence had apparently impressed the Court very favourably. This application was strongly opposed on behalf of the respondent. with the result that the Court refused the application for leave to have the witness in question (D.W.2, Ioannis Marangos) recalled. Both these rulings are challenged in these appeals by the appellants.

In the meantime the trial Court delivered their judgment on the substance of the claim, on July 18, 1969. After dealing in great detail with the different aspects of the case and the evidence before them, the Court decided in favour the respondent, dismissing the action of the appellants with costs. Against this judgment the appellants have appealed, too, by the second appeal before us, No. 4843.

The matter for decision, on which the fate of both appeals turns, is whether the two rulings of the trial Court—the first allowing the amendment of respondent's pleading at that late stage in the proceedings and the second whereby the Court refused leave to the appellants to recall witness Marangos (D.W.2) on issues arising from the amendment in question—were right or otherwise.

It is the case of the appellants that the amendment was a material one and having been allowed at that late stage, it prejudiced the case of the appellants to the extent of vitiating the trial Court's judgment in the action. The case for the respondent, on the other hand, is that the amendment was rather formal than material ; and that it was found to be necessary in order to bring the pleadings more in line with the evidence as it stood at that late stage before the Court. In any event, counsel for the respondent contended, the amendment did not affect the result of the case.

The respondent's case before us, was mainly argued on the power of the Court to make the amendment complained of. Learned counsel referred to a number of cases to show that the trial Court had such power ; and submitted that the Court had properly used it. We find it unnecessary to deal with the different English cases to which counsel referred, because the power of the Court to permit or order an amendment of the pleadings is regulated by our Civil Procedure Rules (Or. 25) ; and was discussed in *Yiannakis Pourikkos* v. *Mehmet Fevzi* (1963) C.L.R., Part II p. 24, referred to during the argument. There can be no doubt that the Court has the power to allow amendment of a party's pleadings ; and that in certain circumstances, such power has also been used for correcting formal mistakes or omissions before judgment. I would say it has been used in a proper case. At the same time, the Courts in most of the English cases refered to, and this Court in the *Pourikkos* case, made it clear that the Court should be very slow and reluctant to order or allow amendments of the pleadings at a late stage in the proceedings ; and that in any case, such amendments should only be made if they are found necessary and as provided in the Rules.

The pleadings in an action are the foundations of the litigation ; they must be carefully prepared as the set of rails upon which the train of the case will run. The Civil Procedure Rules (Or. 19 r.4) are clear on the point ; and daily practice lays stress on the need to apply strictly this rule. A case is decided on its pleaded facts to which the

law must be applied. If in the course of the trial it appears that a party's pleading requires amendment, steps for that purpose must be taken as early as possible in order to give full opportunity to the parties affected by the amendment to meet the new situation ; to run their case, so to speak, on the new rails. An amendment of the pleadings after the closing of the case and for the purpose of the judgment, is a matter which in exceptional circumstances may have to be done ; but it should be avoided unless it is unavoidable in the circumstances of the particular case, in order to finalize litigation in the interests of justice. In the circumstances of this case, it is clear to us that the amendment in question should not have been allowed at that stage. It was contended on behalf of the respondent that the amendment made no difference to the outcome of the case. If that were so, it should have not been attempted. To us, it appears to have been a material amendment ; and we must treat it as such.

We now come to appellants' application for leave to have witness Marangos recalled. Here again there is no doubt that the witness has impressed the trial Court ; and that their assessment of the credibility of the principal parties to the action was influenced by the evidence of that witness. Certain parts of the judgment of the trial Court to which we have been referred during the argument, establish this position beyond all doubt.

We are clear on the point that after allowing the amendment of respondent's pleading, the refusal of the trial Court to have such an important witness recalled, prejudiced the case of the appellants ; and may well have affected the outcome of the action. In view of the result of the appeals before us, we wish to avoid going into the substance of the claim or dealing with the evidence or any other part of the case.

It seems to us that this litigation is the result of the misfortune which strained the personal relations between the parties ; and only as a piece of warning we think that we may add the hope that they may be able to find with the help of their advocates, the end of this litigation before they find the end of their resources. We do think that they should at least try to solve their financial disputes, if their personal relations have reached a state where they are beyond any mending. Having said this as a warning to the parties and in order to strengthen the hands of their lawyers in a new attempt to get their clients out of this ruinous

litigation, we think we should say nothing regarding their disputes. The bulky record of the proceedings, the lengthy sifting of the evidence and the detailed judgment of the trial Court may, perhaps, be a very useful material for the parties' lawyers to give to their clients appropriate advice.

The result of the appeals is that the judgment of the trial Court is fatally affected by the two rulings which cannot be sustained ; and it must be set aside. The case will have to be tried *de novo* before a new bench. There can be no doubt that it would be extremely difficult for the same bench to go again into this lengthy and passionate litigation ; and then to have to re-assess with a fresh mind the evidence of the principal witnesses in this case.

The amount of the costs incurred on both sides, is one of the matters to which we gave full consideration ; but we do not think that we can help the parties if they are not inclined to help themselves. Our order for costs is that the appellant who succeeds in both appeals, (which have been heard together) gets his costs in the appeal. The costs at the trial to be costs in cause ; and to be decided by the District Court at the end of the new trial.

We understand that there are other actions between the parties in the same Court ; and we understand further that one of these actions is connected with the subject-matter of the present action. It is for the advisers of the parties to see whether any expense can be saved by consolidating all or any of these actions.

In the result the appeal is allowed ; and the judgment is set aside with an order for new trial. Costs in the appeal for the appellant ; costs at the trial to be costs in cause.

Appeal allowed ; new trial ordered ; order for costs as above.