



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**AT MOMBASA**

**CIVIL CASE NO. 276 OF 2008**

AWAL LTD.....PLAINTIFF

VERSUS

1. HUSSEIN DAIRY LTD

2. MAHMOOD K H MIYANJI

3. ESMAIL K H MIYANJI

4. MOOSA K H MIYANJI

5. ESSAK K H MIYANJI

6. JAFFER K H MINYANJI.....DEFENDANTS

**R U L I N G**

1. On 25/4/2017 the defendant through an oral application sought and was granted leave to amend the defence and counterclaim.

In that application, the defendant sought by saying:-

**“After reading the plaintiffs witness statement served on 27.2.2017, we intend to amend the counterclaim to abandon the over motor vehicles and claim damages. We seek leave to amend the plaintiff without the need to file a formal application”.**

2. Having heard the parties, including the plaintiff in opposition to the oral application, the court acceded to the application and said:-

**“I resort to the courts overriding objective and inherent powers to avoid abuse of court process and grant to the defendant leave to file an amended defence an counter-claim.**

**That amendment shall be filed and served before close of business on 28/4/2017”.**

3. Pursuant to the proceedings of that day, the defendant did on the 28/4/2017 file what he called defence and counter-claim. A reading of that document reveal that no part of the pleading was ever amended only prayer C was amended to seek the discharge of the encumbrance on the log books and the release of the logbooks to the defendant. The only other new thing on the document was the introduction a prayer for damages for conversion.

4. It is that amendment that has provoked the plaintiff’s application by way of notice of motion 15/5/2017 which seeks orders that the same be struck off and in the alternative that the order granting leave be reviewed and set aside.

5. The application is disclosed to be premised upon the provisions of order 51, 8(6), 8(7) & 45 Civil Procedure Rules as well as all enabling provisions of the law on the facts that, the reasons the defendant put forth in the application and the extent of the amendment sought was

limited to amendment to substitute the phrase 'return of log books' with the word 'damages' and that as amended, the amended defence and counter-claim did not abandon the prayer for log books but also introduced a new cause of action and prayer for damages for conversation. To the plaintiff the amendment contravenes order 8 Rule 7 Civil Procedure Rules hence prejudicial to the plaintiff in that it introduces a time barred cause of action and largely tailored to counter the evidence being tendered by the plaintiff.

6. The application was opposed by the defendant on the foot of the grounds of opposition dated 8/6/2017 and the Replying affidavit of MAHMOOD K.H. MIYANJI sworn on 7/6/2017. In the Grounds of Opposition the defendant faults the application on grounds among others that the contention of statute bar of the cause of action is misconceived as there is no new cause of action introduced to the action; that an amendment is allowable under Order 8 Rule 3(2) despite time bar; that Order 8 Rule 7 has been complied with to the letter; that the orders cannot be reviewed because the same have been lawfully executed and that to strike out the amended pleading will fall short of serving the overriding objective of the court in that the claim for conversion shall remain unresolved.

7. In the Replying Affidavit the facts in the Grounds of Opposition are reiterated with addition that the amendment was made in consonance with the orders of the court; that the plaintiff has conceded that having been given the log book to hold as security it did charge the same to a bank which has since collapsed, without the consent of the counter-claimants hence the tort of conversion and that the fact was only brought to the attention of the counterclaimant on 27/2/2017 and lastly that the amendment sought seeks to avoid prospects of multiplicity of suits between the parties.

8. Parties did fill written submissions and offered oral submissions to highlight the filed submissions. For the plaintiff/Applicant the submissions are dated 14/7/2017 and filed in court the same day while the defendant/respondent filed submissions 6/10/2017 on the same day.

### **Submissions by the Parties**

9. Mr. Taib for the plaintiff took the view that the only ground the defendant put forth in support of the oral application to amend was that it intended to abandon the claim for the log books and to substitute same with one for damages. However, he submitted, the amended pleadings filed did not accord to that reason in that the prayer for log books has been maintained and enhanced and a new prayer added for damages for conversion. To the counsel the Defendant/Respondent in seeking the orders to amend did deceive the court and on the authority of Fredrick Ondiek Aroko vs Moi University & Another<sup>[1]</sup> [2016] eKLR in which Uhuru Highway Developers Ltd vs Central Bank<sup>[2]</sup> was cited with approval that whenever a court discovers that it has been misled it disentitles the misleading party to the orders obtained by the act of misleading the court.

10. It is further submitted that the amendment introduces a cause of action which is statute barred which has the effect of prejudice upon the plaintiff and that it is a sufficient cause to review or just set aside the orders granting leave to amend.

11. For the Defendant respondent, Mr. Sitonik took the position that limitation of actions regulate facts founding causes of action and not the prayers and that the claim for conversion is inextricably intertwined with the prayer for the return of the motor vehicles and is not a new cause of action having been pleaded in the initial plaint neither can it be considered statute barred as the same had been pleaded at paragraph 6, 7, 8 & 17 of the Defence and Counter-claim. It is then reiterated as in the grounds of opposition that striking out the pleading will leave the allegation of conversion unresolved. On prayer for review the Defendant takes the stand that no proper or good ground has been laid to merit grant of the prayer for review.

### **Issues, analysis and determination**

12. Whichever way looked at, whether to review or to set aside the orders granting leave to amend or just striking out the amended pleading, the complaint by the plaintiff is that the filed amendment is not in line with the reasons advanced while seeking leave and therefore it would matter not whether the court grants an order for setting aside or review. The result would be that a grant of any of the two orders would result in the amended pleading being knocked out of the court record. Accordingly, the question the court has to pose for itself and answer is whether there is a reason good enough to disallow the orders of 25/4/2017 granting to the defendant leave to amend.

13. The starting point is that orders for amendments should be given freely provided it seeks to determine all the issues in controversy and it is not detrimental to the opposite side by divesting an accrued right. Those words suggest and do say that a party ought to be given all the opportunity to present its case without restraint provided he does not prejudice the opposite party. Those are the principles the court had in mind when it issued its orders of 27/4/2017. However Order 8 Rule 2(1) permit the court to revisit such orders once issued, large to check on the propriety of the amendment effected.

14. But, in granting those orders the court had been told that the reason informing the need for amendment was that the defendant/counter-claimant intended to abandon claim for the motor vehicles and seek damages instead. That position is common ground to both parties that there was never a basis to amend other than to allow the defendant abandon its counter-claim for the motor vehicles and instead seek damages.

15. In all fairness, a party and counsel acting for such a party are expected to exercise full and absolute candor towards the court and to disclose all material facts and never to withhold material facts or present immaterial or inaccurate facts so as to obtain court orders where and when a court of law comes to the realization that it has been misled, it reserves the right to send a word that such is not expected of the litigants and counsel and it is open to court to deprive the litigant of the benefits thereby obtained.

16. In this case Mr. Sitonik obtained the orders of leave to amend on grounds that have turned out to be untrue looking at the amendment

filed. Untrue because the prayer and claim on the motor vehicles remain intact and enhanced over and above the newly introduced prayer for damages for conversion.

17. That situation is comparable to what the court of Appeal observed in Uhuru Highway Developers Ltd vs Central Bank of Kenya<sup>[3]</sup> where the court said:-

**“The courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be, and whatever the merits of the case may be. A man who is prepared to deceive a court in granting him an Order cannot validly claim that he has a meritorious case and would have been entitled to the orders anyway. If a case is meritorious, there can be no reason for the concealing some of them from court”.**

18. I cannot put it any better than adopt these very well-chosen words. It has come to my realization that I was misled to believe that the amendment was to allow abandonment of claim on the motor vehicles and introduce a claim in damages instead. With that misleading I now say the defendant has disintitiled itself from being seen in goodlight by the court as far as the resultant amendment is concerned. It would matter little to me that there could be some merit in the case sought to be urged by the amendment.

19. For that reason, I hold and find that the amendment for which the leave was sought has not been effected and what has been filed was filed without the requisite leave. I therefore accede to the plaintiffs’ prayer in terms of prayer 2 in the application on dated 15/5/2017 in that I set aside the orders issued on 27/4/2017. Having so set it aside, it follows that the defence and amended counterclaim amended on the 27/4/2017 was filed without leave and must be struck out. It is struck out with costs to the plaintiffs.

**Dated and delivered at Mombasa this 14<sup>th</sup> day of December 2017.**

**P.J.O. OTIENO**

**JUDGE**

---

[\[1\] \[2016\] eKLR](#)

[\[2\] \[1996\] eKLR](#)

[\[3\] Ibid](#)