



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 342 OF 2007

PRECISION BELTING (PTY) LIMITED.....PLAINTIFF

- VERSUS -

BELTPRO (K) LIMITED.....DEFENDANT

RULING

1. The application before me is for leave to amend the Plaint. The only proposed amendment is the change in the name of the plaintiff, from **PRECISION BELTING (PTY) LIMITED** to **CHIORINO SOUTH AFRICA (PTY) LIMITED**.
2. The change apparently took place in the year 2008, after the company passed a special resolution on 24th October 2008.
3. However, it was not until the plaintiff's witness, **GARRETH JONES**, was testifying on 25th September 2012, that he disclosed to the court and to the defendant that the company's name had changed.
4. A Certificate of Change of Name dated 24th October 2008 was exhibited by the plaintiff, to demonstrate that the said change had been effected in the Register of Companies in Pretoria, South Africa.
5. Therefore, there is no doubt at all that the name of the company was lawfully changed. The defendant, **BELTPRO (K) LIMTIED**, has not taken issue with the fact that there has been a change in the name of the plaintiff.
6. The defendant's main concerns are two-fold;
7. First, the plaintiff is said to have failed to explain the flagrant and inordinate delay in seeking leave to amend the plaint.
8. Secondly, apart from the literal delay, the plaintiff had closed its case before seeking leave to amend the Plaint.
9. Citing the words of Sir Kenneth O'Connor P., when the learned President of the Court of Appeal sat

with Gould JA and Sir Owen Corrie Ag JA in **EASTERN BAKERY Vs CASTELINO [1959] E.A 461**, the defendant pointed out that;

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

10. In contrast, the plaintiff was seeking to amend the plaint after it had closed its case. Therefore, the defendant described that exercise as an abuse of the court process.

11. By dint of the provisions of Order 8 Rule 3 (1) of the Civil Procedure Rules;

“Subject to Order 1, rules 9 and 10, Order 24, rules 3,4,5 and 6 and the following provisions of this rule, 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 the pleadings?.

-The emphasis is mine.

12. In effect, the court may allow any party to amend his pleadings at any stage of the proceedings. Therefore, even though the plaintiff has sought leave to effect an amendment after the plaintiff’s case was closed, that action cannot be construed as an abuse of the process of the court.

13. Order 8 Rule 3 (3) provides as follows;

“An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued?.

14. In this case the defendant says that there was no genuine mistake as the plaintiff was well aware, over the last 4 years, about the material facts.

15. Having known about the change of name 4 years ago, the plaintiff is faulted for having an ulterior motive by seeking to amend the plaint after closing its case.

16. The defendant described the proposed amendment as an attempt by the plaintiff, to resile from its position, and thus undermine the trial process.

17. If the amendment was allowed at this stage, the defendant says that there would a delay in the trial because the process of discovery would have to re-open.

18. It was the defendant’s submission that the plaintiff ought to have demonstrated that despite due diligence, it could not have raised the issue before the commencement of the trial.

19. To support that contention, the defendant relied upon the decision in **AJENDRAPRASADJI N. PANDEY & ANOTHER Vs SWAMI KESHVPRAKESHIDASJI N. & OTHERS [2006] 12 SCCI**: In that case the court said;

“...no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence, the matter could not be raised before the commencement of the trial?.

20. That Ruling appears to be wholly inconsistent with the provisions of Order 8 Rule 3 (1) of our Civil Procedure Rules, which expressly stipulates that pleadings may be amended at any stage of the proceedings.

21. In any event, the change of name did not take place before the suit was instituted. Therefore, the

amendment to reflect the change of name could not have taken place before the plaintiff filed the plaint.

22. But it cannot be overlooked that the plaintiff's name was changed about 4 years ago.

23. Has the plaintiff provided any explanation for the delay in seeking to amend the plaint?

24. It is common ground that the plaintiff's witness, **GARRETH JONES** was cross-examined by the defendant on 25th September 2012. During the said cross-examination the witness made it clear that the name of the company had changed from **PRECISION BELTING (PTY) LIMITED to CHIORINO SOUTH AFRICA (PTY) LIMITED.**

25. In effect, that was the first time when the fact that the name of the plaintiff had changed, became an issue.

26. The plaintiff has described the proposed amendment as something which cannot affect any vested interests or any accrued legal rights. Therefore, it was the opinion of the plaintiff that the amendment would not cause any prejudice or injustice to the defendant.

27. In response, the defendant reiterated the importance of courts insisting that parties should prosecute their cases expeditiously.

28. The defendant cited the following words of the Court of Appeal, in **MUNICIPAL COUNCIL of THIKA & ANOTHER Vs. LOCAL GOVERNMENT WORKERS UNION (THIKA BRANCH) CIVIL APPEAL No. NAI.41 of 2001;**

“We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing amendment at a very late stage of the proceedings?.

29. Where an advocate is shown to have been negligent, as said by the court, it may sometimes be better, in the interests of justice, to allow the advocate be held to account by his client.

30. In the case before me there has not been any suggestion of negligence on the part of the advocates for the plaintiff.

31. In the case of **HARRISON C. KARIUKI Vs BLUE SHIELD INSURANCE COMPANY LIMITED Hccc No. 2205 of 2000** Waweru J. noted as follows when delivering a Ruling on an application for leave to amend the plaint;

“The deficiencies in the plaintiff's case became apparent when he was being cross-examined. Why did he not apply to amend at that stage? In this application he has blamed his previous counsel. Assuming that that blame is merited, is it a sufficient reason to allow the amendments sought at this late stage??

32. It was in those circumstances that the learned Judge decided that there would be instances when an advocate must be left to bear the consequences of this negligence.

33. But in arriving at that decision, the learned Judge asked why there had been no application to amend the plaint when it had become apparent that such a step was necessary.

34. In the case before me, the plaintiff made the application on 19th October 2012, which was less than one month after the court session when the issue regarding the change of name was first raised. The plaintiff's advocate cannot be said to have been negligent.

35. Meanwhile, in the case of **MECHANISED SYSTEMS LIMITED Vs GUARDIAN BANK**

LIMITED Hccc No. 2 of 2005, L. Njagi J. said;

“It seems, however, that even delay, per se, may not deny an applicant the opportunity to amend if the other side can be compensated by costs. Thus, in CLARAPEDE Vs. COMMERCIAL UNION ASSOCIATION [1883] 32 WR 262, Brett M.R said at page 263;

“However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs?.

36. Considering that that citation was from a decision relied upon by the defendant, I think that the defendant ought to have already seen for itself, that delay alone is not a ground for rejecting an application to amend a pleading.

37. I also find no mala fides at all on the plaintiff’s part because the plaintiff’s action was prompted by the questions asked by the defendant. In other words, the plaintiff only sought to place before the court, material which enabled the court to know that it had had a change of name. I find that the defendant failed to demonstrate how it would be prejudiced by the amendment which only served to reveal the plaintiff’s current name.

38. If the defendant should need to seek further discovery, there would be no bar to the court giving due consideration to such a request. Of course, any such action may result in the defendant incurring further costs. If such costs were to be borne by the plaintiff, the defendant would not have suffered any injustice.

39. In the result, I grant to the plaintiff leave to amend the Plaint, to reflect its change of name. The plaintiff has 7 days to file and serve the Amended Plaint.

40. However, the plaintiff will pay to the defendant the costs of the application dated 19th October 2015, in any event.

DATED, SIGNED and DELIVERED at NAIROBI this 15th day of February 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Mbogua for Rimui for the Plaintiff

Gichamba for the Defendant

Collins Odhiambo – Court clerk.