



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 47 OF 2011**

**CONSOLIDATED WITH**

**CIVIL CASE NO. 48 AND 49 OF 2011**

**DHL GLOBAL FORWARDING (K) LIMITED.....PLAINTIFF**

**VERSUS**

**P. J. DAVE (EPZ) LIMITED.....DEFENDANT**

**R U L I N G**

**INTRODUCTION**

1. Before the Court is the **Notice of Motion** dated **10th June 2013** filed by the Plaintiff. The application seeks the leave of the court to amend the **Plaint** dated **16th February 2011** in terms of the Draft Amended Pliant annexed to the Supporting Affidavit. The Applicant also seeks further orders as the court may deem fit as well as a direction on costs.
2. The application which is supported by affidavit of **Stephen Wanyama** dated **19th June 2013**, is premised on the grounds set out therein, mainly that the application has become necessary in order to enable the court demine the real questions in controversy between the parties, and that the rules of procedure require the issues sought to be introduced by the amendment to be specifically pleaded and prayed for and the leave of the court sought apriori, and finally that the issues intended to be raised by the Plaintiff are pertinent and are intended to assist the court in reaching a fair and just determination of the dispute.
3. The application is opposed by the Defendant vide **Grounds of Opposition** filed in court on **26th September 2013**, in which the Respondent states that there has been unreasonable delay in making this application. The Ruling which according to the Applicant has necessitated this application was delivered as far back as 12th October 2011 and this application is filed one year and eight months later without stating any reason for this long delay. The Respondent states that the application states on the face of it that it is supported by the affidavit of one Michael Munene whereas in fact the supporting affidavit sworn by one **Stephen Wanyama**. In any case the supporting affidavit of the said Stephen Wanyama is defective in that he only states that he is an officer of the Plaintiff without specifying the office he holds in the company and how long he has been employed by the company and further he does not state which parts of the said affidavit are within his own personal knowledge and which parts thereof are based on information received and form whom such information was received.

## SUBMISSIONS

4. Parties with the leave of the court filed written submission to the application.
5. The Plaintiff/Applicant submitted that facts surrounding the dispute between the parties herein are well set out in the Supporting Affidavit sworn by Mr. Stephen Wanyama on 10<sup>th</sup> June 2013 and of importance to note is that , the parties herein were also involved in **Milimani Winding Up Causes Numbers 14, 15 & 16 of 2011** which arose from the same set of facts, and wherein, following applications by the Defendant herein, the court held among other things that the amounts claimed by the Petitioner (the Plaintiff herein) were disputed and consequently the dispute between the parties could not be determined in a winding up court necessitating the amendments sought. (*see the ruling of Honourable Justice Mabeya delivered on 12<sup>th</sup> October 2011, annexed to the supporting affidavit and marked SW3*)

It is on the basis of the ruling delivered by Justice Mabeya on 12<sup>th</sup> October 2011, that the Plaintiff made the instant application seeking leave to amend the Plaint as opposed to filing fresh suits and thereby avoiding a multiplicity of suits between the parties arising from the same set of facts. The Plaintiff's submits that it has become necessary to amend the plaint in order to enable the court determine the real questions in controversy between the parties. Further the rules of procedure require the issues sought to be introduced by the amendment to be specifically pleaded and prayed for and that leave of this Court be sought before the proposed amendments can be made. The issues intended to be raised by the Plaintiff are pertinent and are intended to assist the court in reaching a fair and just determination of the dispute herein. The Plaintiff cited Section 100 of the Civil Procedure Act (Cap 21) which provides broad criteria which should guide the Court in such an Application. This provision states that:

*“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue . . .”*

The Plaintiff also cited the decision of the Court of Appeal in the case of **Central Kenya Limited v Trust Bank Limited [2000] 2 EA 365**, where the learned Judges held as follows:

*“The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendment of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (i) there had been no undue delay, (ii) no new or inconsistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected, and (iv) the amendment could be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs. Neither the length of the proposed amendment nor the mere delays were sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs.”*

In bringing this application now, the Plaintiff submits that there has been no delay as would prejudice the Defendant, and the Defendant would not be prejudiced if the Plaintiff is granted leave to amend its Plaint.

6. The Plaintiff also cited the case of **Nationwide Finance Company Limited v J. H. A Luies & another (2006) eKLR** while quoting the decision in **Central Kenya Limited v Trust Bank Limited (supra)**, where the court indicated that the delay should not be a bar to an order granting leave. The Plaintiff avered that it is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in

applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in any prejudice or injustice to the other party which cannot be properly compensated for in costs. The suits in the present case have not been set down for hearing, pre-trial directions have not been given and therefore, the Plaintiff submits that considering the circumstances surrounding this suits, the application for amendment if allowed will not occasion any prejudice to the defendant. In addition, The Constitution under Article 159 provides that justice should be administered to all without undue regard to procedural technicalities. The Court should give regard to the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of the dispute herein. In allowing the Plaintiff's application, this Court will be preventing a multiplicity of suits between the parties herein.

7. On its part the Defendant opposed the application through Grounds of Opposition dated 26th September 2013 filed in court on the same day. The Defendant submitted that the suit was filed by the Plaintiff over 3 years ago. The application is fatally flawed/defective and cannot be allowed for the reason while the Notice of Motion filed by the Plaintiff/Applicant seeking leave of this court to amend its Pliant states that the said application is based on the supporting affidavit of one Michael Munene, the supporting affidavit is actually sworn by a completely different person by the name of John Wanyama. The deponent to the supporting affidavit simply describes himself as an "officer of the Plaintiff Defendant" without providing any description whatsoever of the alleged office/position he claims to hold in the Plaintiff company. The Defendant cited the case of **Lucy Njoki Waithaka - Vs - Industrial and Commercial Development Corporation [2001] LLR 996** where the court held that:

***"an affidavit sworn on behalf of a corporation by a person who does not disclose his position in the corporation violates the provisions of order XIII Rule 3 (1) of the Civil Procedure Rules and is therefore unacceptable and worthless and is to be disregarded."***

The Defendant also cited the case of **Eastern and Southern African Development Bank – Vs – African Greenfields Ltd. & ORS Nairobi (Milimani) High Court Civil Case No. 11189 of 2000** where the court held *inter-a-alia* that:-

***"affidavits cannot be amended."***

Furthermore the supporting affidavit ends by the deponent stating that the contents of the affidavit ***'are true to the best of my knowledge information and belief such knowledge having been derived from the Plaintiff's records and sources referred to herein above'***, but the deponent does not disclose which injunction are within his knowledge, and which injunction are from other sources. Further, those sources are not disclosed. That being so, the Defendant submitted that the supporting affidavit does not comply with the provisions of Order 19 of the Civil Procedure Rules and is therefore defective and inadmissible.

### **CONSIDERATION AN AND DISPOSITION**

8. I have considered the application and the submissions by the parties. The opposition to the application is mainly premised on delay and an alleged defective affidavit. However, the issue for consideration is whether despite the above shortcomings this court can still allow the application.
9. It was alleged that the supporting affidavit to the application is alleged to have been sworn by Stephen Wanyama while in actual fact it is executed by Mr. Michael Munene. Mr. Njeru for the Applicant explained that the apparent mix-up was caused by typographical error caused by the inserting of the name Michael Wanyama instead of Stephen Wanyama due to various files in their office in which affidavits are invariably executed by either of the above people for matters concerning the Plaintiff. This explanation was accepted by court on 26th February 2015 when the Plaintiff's counsel orally successfully sought to amend the said affidavit.
10. The Respondent has also submitted that the supporting affidavit is defective as the deponent has failed to state his position in the Plaintiff Company. Further, the deponent has failed to state whether the information deponed to were in his personal knowledge or he was informed, and if so,

has failed to disclose the sources of his information. These are valid concerns. The Respondent cited many authorities which declared such affidavits defective. I have considered these authorities. While it remains the law of the affidavits that those who depone to the same should state clearly the position they hold in the offices, and to state firmly the sources of their information, or if the same is personal to them. I also note that such requirement must now also be tampered with the constitutional provisions under Article 159 (2) (d) which demands of this court not to stake the outcome of legal disputes purely on procedural technicalities. This does not mean that a particular procedure provided for in law has now been rendered nugatory. No. It simply means that the court will have a discretion to determine, in each particular case, where, for the sake of justice, substantive issues in question will be given priority as against issues of technological procedures.

11. Applying the above principle to this matter, It is clear that the Respondent has not mounted any serious challenges to the application outside those technicalities of procedure. The Respondent has not stated, for instance how the grant of the leave to amend the Plaintiff will prejudice the Defendant, and if so how that kind of prejudice cannot be remedied. The position in law is that a court can at any time and on such terms as to costs or otherwise as it deems fit amend any defect in proceedings in a suit. This is a discretion given to the court to allow the court to exercise fluidity when it becomes necessary for a party to amend pleadings. The only limitation to this discretion is that it shall be exercised judiciously and so that substantive justice may be dispensed. It also allows the court to determine all other issues in a single matter, which if the pleadings were not amended, would force a party to file another suit. In essence, allowing an amendment where appropriate saves the judicial time and satisfies the overriding objectives stated in Sections 1A, 1B and 3A of the Civil Procedure Act.
12. The Respondent also raised the issue of delay in bringing the current application. I have considered that issue. However, it is not the kind of delay which would stop this court from exercising its discretion to allow an amendment.
13. For the foregoing reasons I make the following orders:-
  - a. ***The Notice of Motion application before the court is allowed.***
  - b. ***The Applicant shall serve the amended Plaintiff within 7 days and the Defendant shall have 10 days to file an amended defence is need be.***
  - c. ***Costs herein are given to the Defendant/Respondent.***

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI**

**THIS 15TH DAY OF MAY 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Njeru for the Plaintiff

Mr. Nagpal for the Defendant

Teresia – Court Clerk