



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 430 of 2008**

**FIROZ NURALI HIRJI .....1<sup>ST</sup> PLAINTIFF**

**SHAROK KHER MOHAMED ALI.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**MARCELLUS LAZIMA CHEGGE.....DEFENDANT**

**RULING**

The Plaintiffs on 12<sup>th</sup> September, 2012 filed a Notice of Motion Application dated 12<sup>th</sup> September 2012 expressed to be brought under Order 8 Rules 3, 5, 7 and 8 of the Civil Procedure Rules seeking the following orders:

1. That the Honourable Court be pleased to grant leave to the Plaintiffs to amend their plaint in the manner shown in the proposed amended plaint annexed to the affidavit in support of the application.
2. That the proposed amended plaint be adopted as a properly filed amended plaint in this suit.
3. That the Defendant do file his amended reply to defence, if any, within 15 days from the date of the court order granting the plaintiffs leave to amend their plaint.
4. That the costs of the application be provided for.

The application is founded on the grounds that the amendment is necessary for the purpose of determining the real question in controversy between the parties and on the further ground that the amendment is necessary for the purpose of correcting a defect or error in the proceedings. The application is further supported by the grounds set forth in the affidavit and further affidavit sworn in support by TAIB ALI TAIB Advocate for the Plaintiffs.

The defendant has sworn a replying affidavit dated 16<sup>th</sup> November, 2012 in opposition to the plaintiffs said application.

Briefly the plaintiffs in support of their application contend under paragraph 4 of their advocates affidavit sworn on 12<sup>th</sup> September, 2012, that it is necessary for the plaint to be amended in order that the real questions in controversy between the parties may be determined and stated in the pleadings and be justly dealt with and adjudicated upon by the court effectively and completely for the proper determination of the real matters in dispute.

The defendant in his replying affidavit contends that the plaintiff's application is fatally defective and is

an abuse of the court process. The Defendant further under paragraphs 11, 12 and 13 of the replying affidavit contends that the plaintiffs intended amended plaint introduces new alleged facts and particulars different from those contained in the pleadings filed on 9<sup>th</sup> September 2008 and 22<sup>nd</sup> September 2008. The Defendant further alleges that the amended plaint clearly raises new grounds of claim and is inconsistent with the pleading filed earlier and if allowed would raise a completely new cause of action against the Defendant to the prejudice of the Defendant and will embarrass the defendant and delay the fair trial of the claim.

The plaintiff obtained leave and filed a supplementary affidavit in response to the replying affidavit through their advocate. In the further affidavit sworn on 9<sup>th</sup> January 2013, TAIB ALI TAIB Advocate for the plaintiff contends that it was necessary to amend the plaint to clarify the earlier pleadings and specifically to clarify and refine the reliefs sought by the plaintiffs. He denies the amendment would introduce new causes of action as alleged by the Defendant. He stated the amendment was necessary to properly place the plaintiffs' claims before the court for effective and appropriate adjudication.

When the parties counsels appeared before the Deputy Registrar on 22<sup>nd</sup> November 2012 they agreed to file written submissions. On 16<sup>th</sup> January, 2013 when the matter came up for hearing before me only the plaintiffs had filed their submissions and upon hearing the plaintiffs' counsel in the absence of the counsel for the Defendant I reserved the ruling for delivery on 6<sup>th</sup> February 2013.

I have considered the Notice of Motion application, the grounds and the affidavits sworn in support thereof and the Defendant's affidavit in reply in opposition to the application and now turn to the applicable law. The plaintiffs' application is brought under Order 8 Rules 3, 5, 7 and 8 of the civil Procedure Rules. The pertinent provisions are Rules 3(1) and Rule 5 of Order 8 which I set out hereunder for ease of reference.

Rule 3(1) provides as follows:

*“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 his pleadings”*

Rule 5(1) provides as follows:

*“For the purposes of determining the real question in controversy between the parties or correcting any defect or error in any proceedings the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just”*

Having regard to the foregoing legal provisions the court has unfettered discretion to allow applications for leave to amend pleadings provided the applications are well intended and where granting them would not occasion injustice to any party. Indeed the legal provisions on amendment of pleadings are intended to enable parties to be able to amend their pleadings whenever the situation so demands to enable a party to place before a court of law the real issues or matters in controversy as between the parties to enable the court to determine such issues finally. Courts will freely allow applications for amendment of pleadings sought before the hearing provided they can be made without injustice to the other side. Usually an award of damages is sufficient to compensate the opposing side although there is normally a delay that results but that also is compensated for by having all the real issues appropriately framed and finally adjudicated upon.

In the case of **EASTERN BAKERY VS. CASTELINO CIVIL APPEAL No. 30 OF 1958 [1958 EA 461]**. The court of appeal for Eastern Africa upheld the principle that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side.

The principle was applied in the case of **PHYLIS WANGECHI GITONGA VS. CHARTERHOUSE**

**BANK LTD HCC No. 705 OF 2003** where Hon. Justice Azangala Ag. Judge as he then was stated:

*“It is now settled that amendments may be allowed at any time before judgment provided that damage which may arise as a result of the amendment can be cured by way of costs. The Defendant has not shown that if leave to amend is granted, it will cause injustice, to the defendant or it will be injurious to it or that any injury or damage will not be cured by an award of costs”.*

Equally in the case of **UGMA ENGINEERING COPR LTD VS. TRANSAMI (UGANDA) LTD & ANOTHER [2005]** eKLR Hon. Lady Justice Khaminwa in applying the general principle in regard to the application for amendment of pleadings referred to the case of **BRITISH INDIA GENERAL INSURANCE CO. LTD VS. G.M. PARMER & CO.** Where it was held that the general principle in amendments is that the courts will freely allow an amendment of pleadings before hearing of it can be done without injustice to the other party where the application was made bona fide and could cause no injustice to the other side.

In the instant case the amendment sought by the 2<sup>nd</sup> Plaintiff is to clarify aspects of the pleadings and refine the reliefs sought for clarity. From the proposed amended plaint, annexed to the supporting affidavit it is apparent no new cause of action is being introduced and the matters and issues alluded to relate to the same transaction. I cannot see that any injustice will be visited upon the Defendant in the event the plaintiff’s application to amend the plaint is allowed. In case, any new issue/matter is introduced by the amendment the Defendant will have an opportunity to equally amend his defence to respond to any such new issue or matter.

In the premises I allow the Notice of Motion application by the 2<sup>nd</sup> Plaintiff to amend the plaint and direct that the 2<sup>nd</sup> Plaintiff do file and serve the amended plaint within 10 days of the date hereof and the Defendant do have liberty to file an amended defence if necessary within 14 days of being served with the amended plaint.

The costs of this application are awarded to the Defendant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> Plaintiff

..... for the 2<sup>nd</sup> Plaintiff

..... for the Defendant