



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 452 of 2011**

**RAMASALT AGENCIES LTD. ::: PLAINTIFF**

**- VERSUS -**

**AIRTEL NETWORKS KENYA LTD. ::: DEFENDANT**

**RULING**

1. The application before the court is a **Notice of Motion** dated **28<sup>th</sup> May 2012**. It seeks as the main prayer an order that the court be pleased to grant leave to the Plaintiff to amend the Plaintiff in the manner shown in the attached draft amended Plaintiff. The grounds in support of the application are set out therein.
2. The application is supported by affidavit sworn by **HASSAN NOOR MAALIM** dated **28<sup>th</sup> May 2012** with annexures which expounds the grounds of the application. The application is however, opposed vide an affidavit in reply sworn by **LINDA KAAI KIRIKO** dated **18<sup>th</sup> September 2012** with annexures.
3. The brief history of the application as alleged by the Applicant is that the suit herein was filed by the Plaintiff seeking *inter-a-alia* prohibitory injunctions to prevent the Defendant from calling in two Bank Guarantees given by the Plaintiff's Bankers – Diamond Trust Bank Limited – for **Kshs.21,000,000/=** and **Kshs.20,000,000/=** respectively.

However, despite the presence of a Court Order barring the Defendant from calling in the aforesaid Guarantees, the Defendant proceeded to call in the same and, at the Defendant's instance, the Honourable Court issued an Order on **11<sup>th</sup> January 2012** calling in the Guarantee referenced as **CORP/005/MJ/SV/sl/2011** pursuant to which the court instructed Diamond Trust Bank Kenya Limited to deposit in court a sum of **Kshs.21,000,000/=** to be held jointly by the Registrar of the Court and the firm of Mohamed Madhani & Company Advocates.

In order to make the aforesaid deposit, Diamond Trust Bank Kenya Limited deposited the Plaintiff's current account with the aforesaid sum of **Kshs.21,000,000/=**. However, as the Plaintiff's account did not have sufficient funds to cater for the same, the debit herein increased the overdrawn amount in the Plaintiff's account to **Kshs.23,373,411/01**.

The Plaintiff's bank only authorized the Plaintiff to withdraw up to a maximum of

**Kshs.2,000,000/=**. Accordingly, as the debit balance in the Plaintiff's account exceeded the said sum, the Plaintiff's bank charged default interest on the overdrawn amount and on **31<sup>st</sup> January 2012** and **29<sup>th</sup> February 2012** debited from the Plaintiff's said account an aggregate sum of **Kshs.905,174/06** as interest for the overdrawn amounts.

4. These facts have cumulatively allegedly caused the Plaintiff to suffer losses in terms of interests and penalties, and other damages which the Plaintiff now appears to want to recover by amending the Plaintiff.

5. Mr. Rimiyu for the Plaintiff/Applicant submitted that the Plaintiff's bank called upon the Plaintiff's Directors – Hassan Maalim and Ilyasa Ali Dugane –to repay the overdrawn amounts personally in view of the fact that the Plaintiff's Directors had guaranteed all financial facilities availed to the Plaintiff and created a Charge over their property known as House No. 5 erected on L.R. No. 27626 Nairobi to secure the same.

Due to the high rate of interest being levied on the overdrawn amounts by the Plaintiff's Bank, the Plaintiff's Directors were constrained to sell their aforesaid house for **Kshs.40,000,000/=** which sale is currently in the process of being finalized. However, the sale price for the house was a depressed sum occasioned by poor market conditions prevailing at the time of the sale, noting that the house had a forced sale value of **Kshs.62,000,000/=**.

In the meantime, it was submitted, the Plaintiff was constrained to obtain a Short Term loan of **Kshs.21,000,000/=** from Diamond Trust Bank to enable it regularize its account and improve its cash flow, with the loan being fully repaid upon receipt of the proceeds that will be received from the sale of the aforesaid house.

Further, the Plaintiff had to expend a sum of **Kshs.115,000/=** in appraisal fees when obtaining the said loan which continues to accrue interest at the rate of **24% per annum** until payment in full.

6. The counsel further submitted that in the circumstances, it is only just and fair that the Plaintiff herein be amended so as to enable the Plaintiff obtain relief for the direct pecuniary damage suffered by it when the Defendant caused the aforesaid Guarantee to be called in.

Further, there have also been subsequent changes that have occurred since the filing of the suit herein which need to be reflected in the pleadings, particularly with regard to the fact that:-

(i) The bank Guarantee as **COPR/005/MJ/SV/sl/2011** for **Kshs.21,000,000/=** dated **12<sup>th</sup> January 2011** is no longer in force, the sums guaranteed thereunder having been called in and deposited in court;

(ii) The bank guarantee referenced as **CORP/649/MK/AV/sl/2011** for **Kshs.20,000,000/=** dated **2<sup>nd</sup> April 2011** has expired and has not be renewed in accordance with the directions issued by the court on **28<sup>th</sup> March 2012**; and

(iii) The acknowledged outstanding debt of **Kshs.9,038,740/=** due and owing from the Plaintiff to the Defendant at the time of filing suit has been fully repaid and as such there is no need for taking of accounts.

It is submitted that it is therefore only just and fair that the amendments sought be allowed as prayed so that the Plaintiff's case can be heard on its full merits.

7. In reply to these submissions Mr. Karungo for the Defendant/Respondent submitted that the recall of the guarantees, and the court order under which **Kshs.21 million** was deposited in court are legal, and that the Plaintiff has not appealed against the said order, and that in fact the Plaintiff complied with the said order. Mr. Karungo submitted that on account of the said facts there is no basis for the Plaintiff to seek to amend its Plaintiff to claim any amount from the Defendant, and that it is indeed absurd that the Plaintiff is seeking interest from the Respondent on the amount of **Kshs.21 million** which is held in court pursuant to

its orders. It was further submitted for the Respondent that the consequential loss arising from the failure by the Plaintiff to place sufficient security with its Bankers, Diamond Trust Bank, cannot be visited on the Respondent. It is submitted that this application to amend the Plaintiff's pleadings and claim damages for anything done in pursuit of valid court orders is a backdoor attempt by the Plaintiff to have this court vary or set aside the above earlier orders.

**8.** I have carefully considered the application and the opposing submissions of counsel. **Order 8 Rule 3 (1)** of the **Civil Procedure Rules** allows this court a wide discretion on application to amend pleadings. The power under that order is discretionary. The court, in the exercise of that power must be satisfied that:-

- a) The amendment sought is necessary for the purpose of determining the real question in controversy between the parties;
- b) That there is an error or defect in the proceedings which need to be corrected by the amendment;
- c) The court has a duty to ensure that the pleadings identify the real matters in controversy and to ensure that substantial justice is done;
- d) It does not allow amendments to the prejudice of the opposite party;
- e) An application brought late in the day must be justified before the court can exercise its wide discretion in favour of the Applicant.

**9.** Using the above measures as guiding principles under the said Order, I am now able to determine this application. The application has been filed after one of the Plaintiff's witnesses has already given evidence. The Applicant has justified this fact by the claim that the reasons leading to this application occurred after the evidence was given, and that the application, in that regard is not delayed. I agree with this submission, as the recall of the aforesaid guarantees took place a few months before this application was filed.

What I need to address, however, is whether or not the amendments sought are necessary for the purpose of determining the real controversy between the parties. In my view the real issue of controversy between the parties was always contained in the original Plaintiff's pleadings which is sought to be amended. The current application is an afterthought and mainly arises out of the Plaintiff's dissatisfaction with the aforesaid orders of the court under which it was ordered to deposit Ksh.21 million. This application, in my view, seeks to amend the said court orders. The Applicant now by this application wants to blame the Defendant for all and every consequences of the said court orders. By seeking to do just that, the Applicant is now blurring the real controversy between the parties by creating sideshows which are, and indeed cannot be, part of the suit.

**10.** I have looked at the proposed amended Plaintiff's pleadings. To say the least, it has totally changed the meaning and content of the original Plaintiff's pleadings. The amendments sought are massive both in terms of the content and value of the Plaintiff's pleadings. It has very little resemblance with the original Plaintiff's pleadings, such that the Applicant were better off just bringing a fresh suit on those alleged issues. Although the real issues in controversy are identifiable from the purported amendment, these issues are brought in bad faith and for wrong motive, and if allowed would not only cause confusion but also unnecessarily delay these proceedings. However, my greatest disapproval is that the application if allowed would visit a great deal of prejudice upon the Respondent. It is the duty of this court to guard against such occurrences.

As observed earlier a causal look at the proposed amended Plaintiff's pleadings has little connection with the original Plaintiff's pleadings. Contrary to the submissions by Mr. Rimiyu for the Applicant, there will be prejudice to the Defendant if this application is allowed.

**11.** Finally, it was submitted that the Defendant will have a chance to amend its defence accordingly if the application is allowed. That is correct. However, I must note that I do not find it fashionable just to

allow an application for amendment simply for the sake of it.

**12.** A court in the proper exercise of its discretion under **Order 8** must also look at the entire circumstances of the application, its history, intent, and whether it can, even if remote, add value to the existing proceedings. In my view the current application is an afterthought, conceived out of apparent anger against a court order, is meant to castigate or prejudice those court orders, is founded on bad faith and is unlikely to achieve the objectives of fair trial, is an abuse of the process of this court and must be dismissed.

**13.** In the case of **MOWA PUBLISHERS LTD. & ANOTHER – VS ATTORNEY GENERAL & ANOTHER, CIVIL SUIT NO. 886 OF 1990**, the court had this to say:-

**“The circumstances under which amendments are allowed are numerous and valid. Therefore, each case must be considered upon its peculiar circumstances including the conduct of the Applicant and the stage of the proceedings at the time of making the application.”**

**14.** In my Ruling I have considered all the above issues and circumstances of the case. I dismiss the **Notice of Motion** application dated **28<sup>th</sup> May 2012** with costs to the Respondent.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 6<sup>TH</sup> DAY OF FEBRUARY 2013**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Kuria for the Plaintiff  
Karanja for the Defendant  
Teresia – Court Clerk