



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 249 OF 2013**

**FREDRICK MWANGI NYAGA ..... PLAINTIFF**

**VERSUS**

**GARAM INVESTMENTS ..... 1<sup>ST</sup> DEFENDANT**

**HOUSING FINANCE LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. When counsel for the parties appeared before Court on 23rd September 2013 for the hearing of the Plaintiff's Application dated 14th June 2013, it was pointed out to the learned counsel for the Plaintiff that, as drawn, interim orders of injunction were sought pending (only) the hearing and determination of the said Application. Counsel for the Plaintiff intimated that he wished to amend prayer 2 of the said Application so as to seek a restraining Order pending not only the hearing of the Application but also of the suit. That oral application was strenuously opposed by both counsel for the first and second Defendants. Indeed, the Court itself was of the opinion that the application should be formally made in view of the objection of counsel for the Defendants. Mr. Ngigi, learned counsel for the Plaintiff was quick to say that he would come up with the law that allowed the Court to amend the Application and asked that the same be adjourned so that he could put his house in order. As a result, the Plaintiff has now filed a Notice of Motion dated 30th September 2013 which seeks Orders that the Plaintiff/Applicant should be granted leave to amend his Notice of Motion dated 14th June 2013.
2. The said Notice of Motion is brought under the provisions of **Order 8 Rules 5 (i), 7 and 8** of the *Civil Procedure Rules* as well as **sections 3, 3A and 100** of the *Civil Procedure Act*. The Grounds upon which it is based include that the amendment sought will be for the purposes of correcting an inadvertent defect in the Applicant's said Application dated 14th of June 2013. The Plaintiff maintains that the amendment sought will help in determining the real question in controversy between the parties. He maintains that there will be no prejudice to the Defendants and that this Court has general power to allow an amendment to any document presented before it. The Application is supported by the Affidavit of the Plaintiff sworn on 30th September 2013 to which he has annexed a draft Amended Notice of Motion which he claims at paragraph 5 of the Supporting Affidavit is marked "A". The deponent goes on to say that an inadvertent mistake of his advocate should not be vested upon him, the client. He also maintains that the amendment sought will help in determining the real question in controversy as between the parties herein.
3. The Notice of Motion dated 30th September 2013 is opposed firstly by the 1st Defendant who has filed Grounds of Opposition together with a list of Authorities both dated 3rd October 2013. The

2nd Defendant has filed a Replying Affidavit sworn by its General Manager, Credit, one **Geoffrey Kimaita** also dated 3rd October 2013. The 1st Defendant's Grounds of Opposition read as follows:

- “1. THAT the Notice of Motion application dated 30<sup>th</sup> September 2013 is fatally defective and incompetent.**
  - 2. THAT the said application is misconceived, unsupported, unmeritorious, frivolous and vexatious.**
  - 3. THAT according to Section 2 of the Civil Procedure Act a Notice of Motion is not a pleading before the eye of the law and it is therefore not capable of being amended.**
  - 4. THAT the application is defective in form and substance for failure to comply with the provisions of Law.**
  - 5. THAT the annexure referred to in the affidavit does not comply with Rules 9 of the Oath and Statutory Declaration Rules made under rule 6 of the Act in that it is not properly sealed and stamped.**
  - 6. THAT the affidavit in support of the application does not comply with the mandatory provisions of Section 5 of the Oaths and Statutory Declaration Rules which clearly states that the Commissioner of Oaths shall truly state in a jurat or attestation at what place and what date the oath of affidavit was taken or made.**
  - 7. THAT the Plaintiff/Applicant should withdraw the Notice of Motion Application in its entirety and file a fresh one.**
  - 8. THAT the said Application is without merit.**
  - 9. THAT the said application should be dismissed with costs”.**
4. The said Affidavit of Geoffrey Kimaita urged the Court to dismiss the Notice of Motion dated 30th September 2013 for a number of reasons. He had been advised by Mr. Karungo, his advocate, that the Notice of Motion dated 14th June 2013 could not be amended because it was not a pleading in the suit. Further, the amendment sought did not determine the real question in controversy between the parties nor did it correct any defect or error in the proceedings. In the deponent's opinion, the Plaintiff's advocate had not made any mistake and, as such, there was nothing to be corrected. As it was drawn, the proposed amended Notice of Motion annexed to the Affidavit in support of the Application would have the effect of negating and/or lifting the current interim Orders of stay pending the determination of the said Application of 14th June 2013. The deponent maintained that the amendment sought would severely prejudice the 2nd Defendant in that neither the Court nor the 2nd Defendant could and should not be held to ransom by the Plaintiff as he deliberated on how he should frame his Court papers while enjoying interim Orders at the same time. The deponent also noted that, as at 11th July 2013, the Plaintiff was indebted to the 2nd Defendant to the tune of Shs. 50,820,523.60 as had been brought to the attention of this Court in the Replying Affidavit filed herein on 11th July 2013.
  5. Mr. Ngigi opened his submissions before Court by saying that taking into account the Court's earlier observations that perhaps such an application as that of the Plaintiff dated 14th June 2013 could not be amended, he referred to section 2 of the Civil Procedure Act. He maintained that the section only detailed what a pleading includes; it does not detail what a pleading is. However, **Order 8** of the *Civil Procedure Rules, 2010* deals with amendment of pleadings and counsel drew the attention of this Court initially **Rule 4** which provided for the amendment of an originating process before Court. He maintained that if it is possible for the Court to allow an amendment of originating process documentation, then it may allow the amendment of a Notice of Motion. Counsel then went on to refer to **section 100** of the *Civil Procedure Act* which detailed the Court's

general power to amend. He pointed to the fact that the section covered “a proceeding” and as a consequence if a Notice of Motion was not a pleading then **section 100** would apply as such must necessarily be considered “a proceeding”. Mr. Ngigi then drew the Court’s attention to **Order 8 Rule 5 (1)** which, he maintained, repeated the general power to amend as referred to in **section 100** as above. He noted that the power to amend was for the purposes of determining the real question of controversy between the parties. What could not be amended, under that particular Rule, were Court Orders and Judgements. **Order 8 Rule 7** provided for the mode of amendment. The Rule distinguished between a pleading and other documents for which leave had been given to amend under **Rule 5**. He concluded that, in his opinion, the Notice of Motion dated 14th June 2013 contained a curable defect. Counsel relied upon the inherent power of the Court under **section 3A** of the *Civil Procedure Act*. What the Plaintiff sought was a minor amendment and counsel requested the Court to allow the same.

6. Miss Githii, on behalf of the 1st Defendant, relied upon the Grounds of Opposition as filed on 3rd October 2013. She referred the Court to the 1st Defendant’s list of authorities more particularly the case of **Jecinta Muiruri v Jane Mwangi & Anor. (2006) e KLR** in which the Court of Appeal had detailed that a Chamber Summons was not a manner prescribed for instituting suits and could not therefore be a pleading within the meaning of that term as used in the *Civil Procedure Act and Rules* made thereunder. The Court had added that a defective amended Chamber Summons cannot be cured. The only option open to the respondent in that suit was to withdraw the Chamber Summons in its entirety and file a fresh one. Counsel maintained that that a Notice of Motion, as well as a Chamber Summons, was not a pleading as per the *Civil Procedure Act*. Secondly, counsel detailed that the Application before Court did not comply with the provisions of the law. She referred to the Court to the Annexure attached to the Application before Court. In the body of the Affidavit in support of the Application, it referred to the Annexure as being marked “A”. In fact, counsel pointed out, the Annexure was not marked at all and consequently offended **Rule 9** of the *Oaths and Statutory Declarations Rules* which clearly detailed that Annexures to Affidavits should be sealed and stamped. Rule 9 reads:

**“All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification.”**

7. In this regard, Miss. Githii referred to the case of **Abraham Mwangi v S. O. Omboo & Ors HCCC No. 1511 of 2002** as per the Ruling of **Hayanga J.** (as he then was) who had found that the exhibit itself must be marked and went on to quote **Order 41** of the *Rules of the Supreme Court of England* that dealt with forms of affidavits and exhibits. That Order divided exhibits into documents and non-documents. The Judge maintained that fly papers are misleading and fraught with uncertainty. He held:

**“Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear Exhibit marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That makes the affidavit incomplete hence also rejected. That being the case the application fails and is dismissed.”**

It was counsel’s view that the Affidavit of **Zachariah Nganga** dated 30th September 2013, not being marked, was defective and should be rejected by Court. Thereafter, Miss. Githii also pointed out that the Application of the Plaintiff was defective as it did not comply with **section 5** of the *Oaths and Statutory Declarations Act* as the Supporting Affidavit to the same was not dated. She pointed to the finding of **Mutungi J.** in this connection in the case of **Mulusiah Land Consultants & Anor. v Industrial Development Bank Ltd & 2 Ors (2005) eKLR**. However, the Court pointed out that its copy of the said Supporting Affidavit was dated and, as a consequence, it did not feel that counsel could rely upon this ground to oppose the Plaintiff’s said Application.

8. In his turn, Mr. Karungo for the 2nd Defendant informed the Court that he was relying upon the Replying Affidavit of **Geoffrey Kimaita** as above. As regards **Order 8 Rule 5** of the *Civil Procedure Rules, 2010*, counsel pointed to the condition that amendments would be allowed

where such was put before court for the purpose of determining the real question in controversy between the parties. In his opinion, the Application did not qualify as it did not, even after amendment, clarify any issue as between the parties. He remarked that paragraph 4 of the Supporting Affidavit detailed the Plaintiff's intention to apply for an injunction pending the determination of the suit. This could be contrasted with the Plaintiff's Supporting Affidavit in relation to the Application dated 14th June 2013 which had been attached to the Affidavit in support of the current Application before Court. Paragraph 11 of that Affidavit detailed the real intention of the Plaintiff which was detailed as "Orders of injunction to issue pending the hearing and determination of the Application, not the suit". Counsel went on to say that without any doubt, the Orders sought would seriously prejudice the 2nd Defendant as a result of the interim Orders being in place. He pointed to the Replying Affidavit in which the deponent had detailed that the debt now stood in excess of Shs. 50 million and there had been no attempt by the Plaintiff to repay any sum whatsoever. Counsel also pointed out that, with regard to the proposed Amended Notice of Motion, there was no prayer as regards the present interim Orders in place. Should the Court give leave to amend the Notice of Motion, the interim Orders currently in place should be lifted straight away.

9. In a short reply to the Defendants' submissions, Mr. Ngigi continued to submit that the Application before Court was meritorious. The authorities placed before the Court, were merely persuasive as they were findings delivered by this Court's colleagues. He referred to the **Jacinta Muiruri** case (supra) more particularly the finding of the Court of Appeal referred to therein in terms of the **Echaria v Echaria Civil Appeal No. 247 of 1997 (unreported)** in which the Court had said:

**"We agree that the Notice of Motion is defective, that the defect is curable for that reason, and Ms Karua having applied for leave to amend the Notice of Motion, we grant leave for the respondent to amend the Notice of Motion so as to comply with the requirements of Rule 42 (1) of the Rules of the Court."**

It was Mr. Ngigi's view that the matter before this Court was a Notice of Motion which was a "more powerful" application than a Chamber Summons as Motions were used in bringing protection even under Judicial Review. As the Court of Appeal in the **Echaria** case had allowed the amendments to the Notice of Motion, so could this Court. Similarly, the rule in regard to Affidavits as pointed out by counsel for the 1st Defendant could also be the subject of amendment. As regards the interim Orders made by this Court to date, counsel detailed that they were just that – interim Orders that could be changed at any time. Finally, Mr. Ngigi referred the Court to the provisions of *Article 159 (2)* of the Constitution as regards courts not dwelling on technicalities.

10. In that regard, the Court would wish to refer to the case of **Abdul Aziz Juma v Nikisuhu Investment & 2 Ors ELC Suit No. 291 of 2013** as per **Mutungi J.** The finding of the learned Judge was as follows:

**"Article 159 of the Constitution was never intended to override clear provisions of statute unless such revisions of the statute had been found and held to be unconstitutional. Acts of Parliament.... make provision for the application of the law and the Constitution demands of the courts to protect the Constitution, the law and the Acts enacted by Parliament. In my view, Article 159 of the Constitution cannot be resorted to where there are clear and express provisions of the law."**

I have no hesitation in adopting the finding of my learned brother **Mutungi J.** as regards the matter before me. Rules are rules and must be followed otherwise we can only expect anarchy and chaos in our Courts.

11. Turning now to the Plaintiff's counsel's submissions in relation to **Order 8** of the *Civil Procedure Rules, 2010*. First of all, let me state that I do not consider a Notice of Motion to be a pleading. As pointed out by Counsel, **section 2** of the *Civil Procedure Act* defines:

**“pleading” as including “a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”**

On my part, I consider this definition to be absolutely clear as to what amounts to a pleading and that is the process of instituting and defending a suit as provided for under the Rules. In my opinion, it does not include what may be termed interlocutory applications including Chamber Summonses and Notices of Motion. As a result, I do not consider that the Plaintiff herein can bring his Application for amendment of the Notice of Motion dated 14th June 2013 under **Order 8 rule 3** or indeed, **rule 4**. That leaves the general power to amend as envisaged not only in **section 100** of the *Civil Procedure Act* but also under **Order 8 Rule 5**. That Rule reads as follows:

**“5. (1) For the purpose of determining the real question in controversy between the parties, or of 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.**

**(2) This rule shall not have effect in relation to a judgement or order.”**

12. With respect, I do not consider that learned counsel for the 2nd Defendant has read the above provision entirely correctly. The second sentence after the word “or” allows the correction of any defect or error in any proceedings. In my view, a Notice of Motion is part of the proceedings of a suit. I do not consider that the power to amend a proceeding is confined solely for the purposes of determining the real question of controversy between parties. As a consequence, I agree with counsel for the Plaintiff when he says that this provision of **Order 8 Rule 5** allows this Court to consider an application for amendment to (in this case), the Plaintiff’s Notice of Motion dated 14th June 2013. I believe that the decision of the Court of Appeal in the **Echaria v Echaria** case (supra) is binding upon this Court with the slight reservation that the application to amend the Notice of Motion before that Court was brought under the *Court of Appeal Rules* and not the *Civil Procedure Rules*. However, I do not consider that the provision under which the Application is brought would make any difference to my finding as above.

13. Unfortunately, the difficulty that I have in allowing the Plaintiff’s said Application dated 14th June 2013 is twofold. I am of the belief that the learned counsel for the 1st Defendant has put forward a very good point before this Court as regards the provisions of **Rule 9** of the *Oaths and Statutory Declarations Rules* as set out above. I have perused the Supporting Affidavit of the Plaintiff sworn on 30th September 2013 and at paragraph 5 thereof, the Plaintiff considers it only fair and just that he be granted leave to amend his Notice of Motion as per the annexed draft Amended Notice of Motion marked “A”. Indeed, as pointed out by counsel for the 1st Defendant, the draft Amended Notice of Motion annexed to the Supporting Affidavit is not so marked “A”. In my opinion, the viewpoint of **Hayanga J.** in the **Abraham Mwangi** case is most persuasive in that the exhibit itself must be marked. As set out in **Hayanga J’s** Ruling at page 5, I am bound by the Court of Appeal’s decision in **Galaxy Paints Co. Ltd. v Falcon Guards Ltd Civil Appeal No. 219 of 1998** when the Court stated:

**“The Rules are designed to facilitate justice and further its ends. They are not things designed to trip people up. They are not too technical. The Law Society of Kenya is adequately represented in the Rules Committee. But due to rampant inefficiency, negligence, dishonesty and general disregard for professional ethics on the part of the majority of the advocates in the country, the Rules are abhorred.”**

As **Hayanga J.** commented:

**“They cannot be ignored as though they did not exist.”**

In my view, the Plaintiff herein has been too casual in his Application before Court and I cannot agree with his Counsel that the rules on Affidavits can be allowed to be amended just like that, or that interim Orders can simply be changed at any time. Of course, there is the further point as raised in the submissions by Mr. Karungo for the 2<sup>nd</sup> Defendant, being that if this Court was to allow the draft Amended Notice of Motion, the interim Orders made to date would necessarily need to be discharged as there is no prayer for them to have been granted or remain in the draft Amended Notice of Motion.

14. As a consequence of all the above, I find that although this Court has power to allow an amendment to the Plaintiff's said Notice of Motion dated 14th June 2013 under the provisions of **Order 8 Rule 5** as well as **section 100** of the *Civil Procedure Act*, the fact that the Plaintiff has breached **Rule 9** of the *Oaths and Statutory Declarations Rules* necessarily means that his Application to amend must fail. As I see it, his only option is to withdraw the same and file a fresh Application. Further, as I have refused the Plaintiff's Application to amend, I am of the opinion that the Application dated 14th June 2013, as currently drawn and presented to Court, does not support the interim Orders sought therein and the same are lifted accordingly. The Defendants will have the costs of the Plaintiff's Application dated 30th September 2013.

**DATED and delivered at Nairobi this 30<sup>th</sup> day of October, 2013.**

**J. B. HAVELOCK**

**JUDGE**