



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 91 OF 2011**

**KAKAMEGA PAPER CONVERTORS LIMITED ..... PLAINTIFF**

**VERSUS**

**MOHANLAL ARORA ..... 1<sup>ST</sup> DEFENDANT**

**SUSHILA MOHANLAL ARORA ..... 2<sup>ND</sup> DEFENDANT**

**PASPULATI JAYASURYA SUNIL RAJ ..... 3<sup>RD</sup> DEFENDANT**

**EAST AFRICA PAPER CONVERTORS LTD. .... 4<sup>TH</sup> DEFENDANT**

**BANK OF BARODA ..... 5<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. The Application before this Court is that of the first and second Defendants dated 1st November 2013. The same is a Notice of Motion brought under the provisions of **Section 1A, 1B, 89 and 100** of the *Civil Procedure Act* as well as **Order 8 rules 3 and 5, Order 51 rules 1 and 10** of the *Civil Procedure Rules, 2010*. The prayers sought are that this Court be pleased to grant leave to the applicant to amend its Notice of Motion dated 18th September 2013 and that the Amended Notice of Motion be deemed as duly filed and served. The Application is based on the following grounds:

**“1. THAT although the application dated 18<sup>th</sup> September, 2013 generally addressed the right of the applicants to retrieve their passports; it did not address the real question of controversy between the parties.**

**2. THAT the Plaintiff in its application dated 8<sup>th</sup> April 2011 had not sought the deposit of the Applicants’ passports as security.**

**3. THAT the Applicants were not fully conversant with the terms of the consent order leading to the deposit of the passports before it was served in the Plaintiff’s Replying Affidavit sworn by Dipak Panachand shah on 30<sup>th</sup> September, 2013.**

**4. THAT it was upon receipt of a copy of the consent order, that the**

**applicants realized that the passports were by consent deposited pending the hearing of the application dated 8<sup>th</sup> April, 2011 aforesaid.**

**5. THAT the application for release of the of the passport pending the hearing of the Plaintiff's application was spent as at the date the Learned Judge heard the Plaintiff's application dated 8<sup>th</sup> April, 2011.**

**6. THAT the real issue in controversy is whether the Ruling dated 16<sup>th</sup> February, 2012 ought to be reviewed for error apparent on the face of the record or for any other sufficient reason".**

2. The first and second Defendants' said Application was supported by the Affidavit of the advocate **Awele Jackson Onyango** sworn on 1st November 2013. The deponent recorded how he had been instructed on behalf of the first and second Defendants in September 2013 to file an application to enable them to retrieve their passports which were being held pursuant to a Ruling of this Court delivered on 16th February 2012. The application so filed was the said Notice of Motion dated 18th September 2013. Mr. Onyango stated that although the said application addressed the rights of the first and second Defendants to retrieve their passports, it did not address the real question in controversy as between the parties. He went on to say that the first and second Defendants were not fully conversant with the terms of the Consent Order leading to the deposit of their passports in Court. He noted that the passports were, by consent, deposited in Court as per the Consent Order issued on 20th May 2011, pending the hearing of the Plaintiff's application dated 8th April 2011. However, Mr. Onyango noted that the Plaintiff had not sought the deposit of the passports as security in its application dated 8th April 2011. For one reason or another, there was a delay in the hearing of the Plaintiff's said application dated 8th April 2011 and pending that, the first and second Defendants filed an application dated 15th November 2011 for the release of their passports. Those two applications were then consolidated, the same were heard together and disposed of. The first and second Defendants noted that in disposing of the said application dated 8th April 2011, the Court should release the passports as the matter was now spent. According to Mr. Onyango, the real issue in controversy between the parties herein was whether the Ruling dated 16th February 2012 ought to be reviewed for an error apparent on the face of the record or for any other sufficient reason. This was what necessitated the proposed amendments to the said Notice of Motion dated 18th September 2013.
3. The Replying Affidavit of **Dipak Panachand Shah**, the Managing Director of the Plaintiff company, was sworn on 7th November 2013. Apart from detailing with what the deponent had been informed by his advocates in relation to the Application before Court, he drew the attention of the Court to an affidavit sworn by the first Defendant in support of his said application dated 15th November 2011. He attached a copy of that said Affidavit. Further, he detailed that the Supporting Affidavit to the Application made no attempt to explain why the application dated 18th September 2013 had not addressed the real question in controversy between the parties. It then went on to detail the two points upon which the application dated 18th September 2013 was grounded. He insisted that the real question in controversy between the parties, according to the application dated 18th September 2013, was and had always been whether the depositing of the passports of the applicants with the Court under the Consent Order breached their fundamental rights under Article 39 of the Constitution. He pointed out that what the applicants were now attempting to do was to plead an entirely different case for the release of their passports to them. The Amended Notice of Motion now sought an application for review under **Order 45** of the *Civil Procedure* which was an entirely different kettle of fish from the first and second Defendants' application dated 18th September 2013. In the deponent's view, the first and second Defendants should withdraw their application dated 18th September 2013 and file a fresh one.
4. When parties appeared before court on 14th November 2013, Mr. Oraro for the first and second Defendants noted that this was a comparatively simple Application for amendment of the Notice of Motion dated 18th September 2013, which sought the setting aside of an Order made by consent on 15th February 2012. That Order detailed that the first and second Defendants' passports should be retained in Court on the ground that the Order had lapsed earlier. In reply thereto, the Plaintiff had submitted that the Order was made by consent and accordingly, such

- could only be varied in terms of setting aside a contract. Counsel then took the Court through the sequence of events in relation to the proceedings herein. He noted that the two applications, the first of the Plaintiff dated 8th April 2011 and that of the first and second Defendants dated 15th November 2011 were consolidated and **Mutava J.** delivered his Ruling thereon on 16th February 2012. In that Ruling, the Judge had ordered that the first and second Defendants' passports would be retained by the Court pending the hearing and determination of the suit on the grounds that the Order had lapsed earlier.
5. Coming to the Application before Court, Mr. Oraro submitted that the point in controversy was whether the passports should be deposited in relation to the resolution of the application dated 8th April 2011 and/or until the determination of the suit. The Application before Court had been made formally at the request of counsel for the Plaintiff. Counsel pointed to the Affidavit in support of the Application as well as to the Replying Affidavit of Mr. Shah. He noted that matters before Court these days were much more relaxed since the passing of the Constitution in 2010 and since the overriding principle had been inserted in the Civil Procedure Act. Courts were now friendlier to litigants. Mr. Oraro submitted that the first and second Defendants were not in violation of the Rules and he pointed to **sections 89 and 100** of the *Civil Procedure Act*. He submitted that the Court may make an amendment to proceedings before it at any time. In counsel's opinion, so long as something is for determining the real issue between the parties, the amendment should be allowed. As regards **Order 8 rule 8 (5)** any document may be amended. The Application before Court was to amend the Notice of Motion dated 18th September 2013 so that it be anchored on **Order 45**. He drew the attention of the Court to the List of Authorities that he had filed more particularly the cases of **Mathai v Hinga (1997) LLR No. 548 (CAK)**, **Echaria v Echaria Civil Appeal No. 247 of 1997, Central Bank of Kenya v Shah & Anor (2004) eKLR (as per Azangalala J.)** and **Baanji & 3 Ors v Rawal LLR No. 7416**.
  6. In his submissions, Mr. Nagpal, learned counsel for the Plaintiff, noted that amongst other provisions, the Application before Court was brought under **sections 1A and 1B** of the *Civil Procedure Act* which, in his view, were not enabling nor empowering sections. They were designed to ensure that advocates changed their attitude and didn't bring to many technical matters before Court. They were not intended to throw away the Rule Book so as to allow the Court to accommodate the applicant. In his view, the Application was really based on **Order 8 rules 3 and 5** for which the Court had to be fully satisfied. Counsel queried as to what was the real question in controversy between the parties. The application dated 18th September 2013 sought to set-aside or vary Order No. 1 of the Court's Ruling dated 16th of February 2012. That led to prayer no. 3 as to the release of the first and second Defendants' passports. Counsel noted the Grounds of the Application before Court and detailed that the same theme was repeated in the Supporting Affidavit to that application. The deponent had pleaded in relation to his freedom of movement as being curtailed or restrained. There was no prayer for the review of **Mutava J's** Ruling. In Mr. Nagpal's view the amendment sought by the current Application before court was not on technical grounds but on a new and important matter.
  7. The Plaintiff had raised a Preliminary Objection as against the said application of 18th September 2013 in that it was void *ab initio* and as a Constitutional right, the Applicant had come to Court under the wrong Rules. He noted that all affidavits in relation to the application of 18th September 2013 were filed as well as submissions relating exclusively to the Constitutional issue of the denial of rights of movement. This Application came before Court for amendment after all the documentation had been filed. Counsel further noted that they were now 4 new grounds in support of the Notice of Motion dated 18th September 2013. These grounds were totally different from those detailed in the original Notice of Motion. He maintained that the Affidavit in support of the Application before Court was defective and could not be looked at by Court. He pointed to the authority of **Yusuf Abdul Gani v Fazal Garage (1955) 28 KLR 17**. He went on to say that the deponent of the Affidavit in support had given no information as to where he had obtained his knowledge of the first and second Defendants being not fully conversant with the terms of the said Consent Order. Nowhere was it deponed as to where Mr. Awele had got his information from. As a result there was no proper and admissible affidavit in support of the Application upon which this Court can rely.
  8. What the first and second Defendants were doing now was to shift the entire ground to make a fundamental change to the Application of 18th September 2013 by seeking review. Paragraph 3 of

the Supporting Affidavit gave no real reason as to what was the real issues between the parties other than the Replying Affidavit and Preliminary Objection both dated 19th September 2013. Counsel maintained that there would be nothing easier than the first and second Defendants withdrawing the 18th September 2013 application and filing a new one. In any event, costs of the amendment, if allowed, would always be paid by the applying party. Thereafter, Mr. Nagpal reviewed the authorities put before Court by the advocates for the first and second Defendants, distinguishing the same as necessary. He noted that in those authorities the amendments made were simple in nature in contrast to the Application before Court.

9. Mr. Oraro, in a short response, commented that counsel for the Plaintiff had only put forward one simple reason in opposition to the Application to amend. Such was the setting aside of the Consent Order on constitutional grounds and now the first and second Defendants wished to set it aside upon review. It was the obligation of each party to bring his own case as per **Order 3 rule 4**. Any amendment that a party brings before Court should be allowed subject to the issue of costs where applicable. The reason for citing **sections 1A and 1B** of the *Civil Procedure Act* was not for the Application to be predicated upon the same but so as to ensure that substantive justice is rendered. In his opinion, all Mr. Nagpal's submissions were irrelevant save for those in relation to **Order 8 rules 3 and 5**. What should be of concern to this Court is whether the Application to amend contains the first and second Defendants' complete case before Court.
10. Mr. Oraro said that the purpose of quoting **section 89** of the *Civil Procedure Act* was so that the Court does not divorce the pleadings from the procedure. It could not be said that the *Civil Procedure Rules* override **section 100** of the *Civil Procedure Act*. The provisions of the Rules are made under the Act. The Application is not a pleading, it is a proceeding and by virtue of **section 89**, the same applies to all proceedings. He noted that counsel for the Plaintiff had criticised the Supporting Affidavit particularly paragraphs 3 and 4 thereof. Even if those paragraphs were struck out by Court, the rest of the Affidavit remains. The deponent thereto only details that the Applicants were not fully conversant with the contents of the Consent Order. Such may be different from the first Defendant's previous Affidavit but such was a matter of record not a matter of fact. The main issue was the issue of Review. Coming under that provision of the Rules rather than the Constitutional aspect, would cause little or no prejudice to the Plaintiff that could not be compensated in costs. In fact as, in this connection, had been ably covered by **Azangalala J.** in his Ruling in the **Central Bank of Kenya** case (supra). Counsel concluded his submissions by stating that it would be a sad day for the Application before this Court to be determined in relation to its drafting rather than its substance.
11. First of all let me state that I do not consider a Notice of Motion to be a pleading. **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 on 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 a suit as provided for under the Rules. In my opinion, it does not include what may be termed the interlocutory applications including Chamber Summonses and Notices of Motion. As a result, I do not consider that the first and second Defendants herein can bring their Application for amendment of the Notice of Motion dated 18th September 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. 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 for the purposes of determining the real question of controversy between parties. As a consequence, I agree with counsel for the first and second Defendants 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 first and second Defendants' Notice of Motion dated 18th September 2013. I believe that the decision of the Court of Appeal in the **Echaria v Echaria** case (supra) reflects the correct position, in which the Court had stated:

**“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.”**

That decision 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*.

13. Of particular assistance to the Court was the finding by my learned brother **Azangalala J.** in the **Central Bank of Kenya** case (supra). He summed up the discretionary position admirably as follows:

**“I have considered the Application, the Affidavit in support thereof, the Grounds of Opposition and the Submissions of Counsel. Having done so I take the following view of the matter. To grant or not to grant the leave sought is a matter of discretion. I have to decide whether or not in the circumstances of this case I should exercise my discretion in favour of the Applicant. The main objection to the leave sought in my view is that the proposed amendment seeks to introduce a new and inconsistent cause of action and further that if allowed will cloud the issues in dispute rather than crystallize them. The Applicant should therefore have withdrawn this Application and filed a fresh one.**

**I have perused the proposed amendment. I am not persuaded that the same introduces a new and inconsistent cause of action. The Applicant had originally sought stay of further proceedings including execution proceedings. I am not also persuaded that the proposed amendment will have the effect of clouding the issues in dispute. The proposed amendments are simple amendments and cannot confuse the Respondents who are ably represented by very experienced Counsels.**

**It is our Law that amendments may be allowed at any stage before judgment provided that the damage which may arise as a result of the amendment can be cured by way of costs. The main prejudice the Respondents will suffer is one of delay in the conclusion of this matter. This per se is not sufficient to refuse leave to amend. It has also not been demonstrated to me that the delay in bringing this Application has caused the Respondents damage or injury which cannot be cured by an award of costs.**

**Rule 5 (1) of Order VA Civil Procedure Rules is in the following terms:**

**5 (1) For the purpose 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.**

**The Respondents have not demonstrated that if leave to amend the Application in question is granted they will suffer any injustice or injury that cannot be compensated by costs. In the result, I allow the leave sought. The Applicants'**

**Application dated 12<sup>th</sup> November, 2004 is therefore allowed in terms of prayer 2. The Respondents shall have the costs of this Application”.**

14. I find myself unable to agree with Mr. Nagpal in connection with the **Azangalala J.** Ruling as above that what was before the learned judge were amendments to the application that were simple in nature. In that case the amendment sought was to cite the correct provisions of the Rules under which the application before Court was made and to specifically pray for stay of execution instead of stay of proceedings. In this instance, the first and second Defendants are seeking an amendment to their Notice of Motion dated 18th September 2013 in order to bring the same under **Order 45 rule 1 (1) (a) and Order 8 rule 8**. They also seek to come before Court under **section 80** of the *Civil Procedure Act* as opposed to **section 63 (e)** thereof. I cannot agree with counsel for the Plaintiff that the Orders sought are that different. The original Notice of Motion dated 18th September 2013 in prayer 2 seeks an Order that the Court:

**“be pleased to vary and/or set aside its order Number 1 of its ruling dated 16th February 2012.”**

The Amended Notice of Motion retains that prayer as prayer 3 but adds a new prayer:

**“That this Honourable Court be pleased to review its order made on the 16th February, 2012 on grounds of error apparent on the face of the record and for sufficient reason.”**

To my mind, this is not a substantial move away from the original prayers sought and to my mind, should be allowed.

15. The outcome of the above is that I allow the first and second Defendants’ Notice of Motion dated 1st November 2013. As it is the first and second Defendants seeking the amendment, I consider it only fair that the Plaintiff be allowed the costs of the amendment Application.

**DATED and delivered at Nairobi this 22<sup>nd</sup> day of November, 2013.**

**J. B. HAVELOCK**

**JUDGE**