



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 711 OF 1993

**MKILO VILLAGE WELFARE GROUP
HAMISI NGAO BENZAO
IDDI HAMISI MBOVUPLAINTIFFS**

VERSUS

**KWALE COUNTY COUNCIL
THE ATTORNEY GENERAL
NELSON MANGALE
SHABAN KALIMBO NYONDODEFENDANTS**

R U L I N G

The 1st Defendant, the Kwale County Council filed this Application dated 16.02.2010 for, inter alia, that lease be granted to the 1st Defendant/Applicant to amend its Defence as in the annexed draft Amended Defence.

The application is based on the following grounds:-

- 1. That the Defence has failed to disclose some of the material facts affecting the final determination of the case as against the 1st Defendant.*
- 2. That the amendment is necessary to the final and full conclusion of the suit and*
- 3. That no injustice shall be occasioned by the amendment.*

The application is supported by an affidavit sworn by Counsel for the 1st Defendant, Mr. Njoroge Mwangi.

The Application is opposed by the plaintiff on two main grounds, namely:-

- 1. The application is incompetent as the Old Civil Procedure Rules, Order VIA Rules 3, 5 and 7 do not apply since the Revised Rules came into force on 17.12.2011.*
- 2. That the Application was filed outside the time within which the court directed it should be filed.*

I have considered the application, affidavits and submissions by Counsel. The New Civil Procedure Rules came into force on the same day that the application was filed. Amendment of pleadings under the new Rules is provided for in Order 8 but there was little change, if any. Rules 3, 5 and 7 remained in the same terms. I therefore, hold that applying the principles in section 1 A and 1 B of the Civil Procedure Act,

having filed the application on 17.12.2011, the same day the New Act came into force, I think that the Applicant was entitled to rely on the previous Rules having prepared and dated the application before 17.12.2010.

With regard to the second point raised, it is true of that this court directed that:- 1.11.2010 **“That any party who wishes to amend their pleadings must file the application for leave expeditiously and not later than 21 days from this date.”** However, this was not a grant of leave itself. The purpose was to ensure that any application for amendments were done quickly so that there is no further delay in this old case of 1993. Application was not filed within 21 days but after 46 days. While this is out of the period directed by the court for expedition, I am not inclined to reject the filing of the application. The delay is not substantial or prejudicial. It can be compensated in costs.

The proposed amendments are reasonable and will enable the 1st Defendant place all aspects of its defence before the court leading to a wholesome determination of the matters in dispute.

I hereby allow the application in terms of prayers 1 and 2. The 1st Defendant shall pay the costs of the application due to the delays resulting.

Orders accordingly.

Dated and delivered at Mombasa this 13th day of May 2011.

**M.K. IBRAHIM
J U D G E**

Coram:

Ibrahim, J

Court clerk – Kazungu

Mr. Okanga for Mr. Mwaboza for the plaintiff

Mr. Kyeli for Mr. Njoroge Mwangi for 1st Defendant

Ruling delivered in their presence.

Ibrahim, J