



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 694 OF 2009**

**SAMURA ENGINEERING LIMITED ..... PLAINTIFF**

**VERSUS**

**KENYA TEA DEVELOPMENT AUTHORITY ..... 1<sup>ST</sup> DEFENDANT**  
**NJUCA CONSOLIDATED LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

The 1<sup>st</sup> defendant's application dated 16<sup>th</sup> May, 2011 seeks leave to amend its statement of defence dated 28<sup>th</sup> October, 2009 to include a counterclaim.

The application was supported by an affidavit sworn by **Benard Wafula Nalyanya**, an Electrical Engineer working for the 1<sup>st</sup> defendant. He stated that the 1<sup>st</sup> defendant had reconciled its accounts relating to this matter and ascertained that the amount due and owing from the plaintiff's failure to complete its part of the contract and the subsequent engagement of another contractor to complete the work is **Kshs.10,265,076.70**. That is the amount sought to be prayed for in the intended counterclaim.

The plaintiff opposed the application and filed grounds of opposition stating:

- “1. THAT the Notice of Motion by the 1<sup>st</sup> defendant dated 16 May 2011 has not been brought to court timeously.**
- 2. THAT the plaintiff will be greatly prejudiced as the pleadings have closed and the suit had been set down for hearing.**
- 3. THAT the said Notice of Motion will occasion delay in trial of the matter and to that extent is an abuse of court process.**
- 4. THAT the said Notice of Motion lacks merit in any event.”**

Mr. Ohaga for the applicant (1<sup>st</sup> defendant) and Miss Kipkorir for the plaintiff made brief submissions. The Court of Appeal decision in **EASTERN BAKERY v. CASTELINO [1958] E.A. 461** sets out the principles upon which applications for amendments to pleadings ought to be considered. The principles may be summarized as hereunder:

- (i) Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.**
- (ii) There is no injustice caused to the other side if it can be compensated with costs.**
- (iii) The court will not refuse an amendment simply because it introduces a new case.**
- (iv) There is no power to enable one distinct cause of action to be substituted for another nor to change, by means of amendment, the subject matter of the suit.**
- (v) The court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation.**
- (vi) The principles applicable to amendments of plaints are equally applicable to amendments of written statements of defence.**
- (vii) A judge has discretion to allow amendment to the statement of defence to introduce a counterclaim provided that such an amendment does not transgress any of the aforesaid principles.**

It is on the basis of the above principles that I will determine this application. The court is alive to the fact that the purpose of an amendment is to identify all the real questions and controversies between parties and determine them at once.

In this matter, the 1<sup>st</sup> defendant intends to introduce a counterclaim whose basis has been well explained by Mr. Nalyanya in his affidavit in support of the application. The depositions in that affidavit have not been challenged by way of a replying affidavit and therefore the court accepts them as factually correct.

Considering the nature of amendment that is sought to be made by the 1<sup>st</sup> defendant, I do not think that it will prejudice the plaintiff in any material way. No hearing date has been fixed as yet and whatever delay that may be occasioned by introduction of the counterclaim is minimal.

In view of the foregoing, I hereby grant leave to the 1<sup>st</sup> defendant to amend its statement of defence to bring on board a counterclaim in terms of the amended defence and counterclaim that is annexed to the supporting affidavit. That should be done within the next fourteen (14) days from the date hereof. The plaintiff shall be at liberty to file a defence to the counterclaim within fourteen (14) days from the date of service of the same. The costs of this application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER, 2011.**

**D. MUSINGA**  
**JUDGE**

**In the presence of:**  
**Muriithi/Kirui – Court Clerks**  
**Miss Mburu for Mr. Kipkorir for the Plaintiff**  
**Miss Othero for Mr. Ohaga for the Defendant**