



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 106 of 2006**

**THE CYCLE IMPORTERS LIMITED..... PLAINTIFF**

**VERSUS**

**VIJAYKANT KHIMJI PATEL ..... 1<sup>ST</sup> DEFENDANT  
AMRAT VIJAYKANT PATEL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff's chamber summons dated 5<sup>th</sup> October 2009 is brought under the provisions of order VI A rules 3 and 5 of the Civil Procedure Rules. The applicant is seeking to amend the plaint as per the attached draft amended plaint. The applicant has listed the particulars it intends to introduce in the amendment which it claims are necessary for the court to determine the actual matters in controversy. The application is supported by an affidavit of **Nadiah Sign** sworn on 5<sup>th</sup> October 2009.
2. According to the applicant, it inspected the suit premises the subject matter of this suit and discovered latent defects/damage and it is necessary to amend the plaint to include those damages. According to counsel for the applicant, the amendment will not cause the defendant any prejudice and or an injustice that cannot be compensated with damages. He argued that amendments to pleadings sought before a hearing, should be freely allowed if they can be made without injustice to the other side and if the other side can be compensated by costs.
3. This application was opposed by counsel for the defendant. It was argued that the pleadings in this matter were instituted in March 2006. The cause of action arose in May 2003. The pleadings closed in May 2006 thus the amendment sought is after six years which is even outside the limitation period. It was further submitted that the plaintiff's case will rely on oral evidence regarding the notice of defects and the witness may have died or forgotten the evidence as their

memories may fail. Moreover, allowing the amendment will delay the matter and the defendants will be prejudiced.

4. The amendments sought by the plaintiff after more than six years is not founded on good faith. The plaintiff should have found the cause of dampness in the suit premises because by seeking to introduce a new cause of action at this late hour, will not be in the interest of justice. Counsel cited the decision by the Court of Appeal in the case of **Joseph Ochieng & Others vs. First National Bank of Chicago civil appeal No. 149 of 1991 (unreported)**. Where Shah JA held:

*I would add that allowing an amendment to include a fresh claim of approximately 9 million shillings plus interest from 1984 would cause injustice not only to an individual but also to a banking institution which institution has moneys belonging to the ordinary people of this country. Even such institutions have to make provision for such claims and to ask them to make such a provision some more than 6 years after the alleged event would be doing injustice to such institutions.”*

5. The amendments sought to be introduced merely give particulars of Damages, otherwise the plaintiff's claim is liquidated. Generally under the provisions of order VI, the court can grant leave to amend a plaint or defence at any stage of the proceedings and that power is discretionary. Leave is granted when it is necessary for the court to identify the real matters in controversy and to ensure that substantive justice is done. The key elements for the court to bring to bear is; that the amendment should not cause the other side an injustice that cannot be compensated for with costs. Secondly, the purpose of amendment is to cure a defect in the pleadings. The nature of the amendment and how it affects the character of the pleadings is another matter to consider.
6. The defendant's complaint is that the plaintiff waited until it was too late to seek to introduce new allegations which will necessitate the defendant's to look for evidence after such an inordinate delay. That may very well be so, but I have looked at the proposed amendments, I am satisfied that they merely give the particulars of the special damages sought under prayer no 5 of the plaint. The amendments sought although made late, will assist the court to determine the issues in controversy and the inconvenience caused to the defendants can adequately be compensated with costs. I accordingly allow the application. The plaintiff should amend the plaint within fourteen days file

and serve the defendants. The defendants will also have leave to file an amended defence within fourteen days. The defendants shall have the costs of this application.

RULING READ AND SIGNED ON 19<sup>TH</sup> FEBRUARY 2010 AT NAIROBI.

**M.K. KOOME**  
**JUDGE**