



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

**Civil Suit 2715 of 1987**

**1. LAKHAMSHI KHIMJI SHAH**

**2.LAKHAMSHI KHIMJI AND SONS LTD.....PLAINTIFF**

**VERSUS**

**1. AJAY SHANTILAL SHAH**

**2. SANDEEP RATILAL SHAH**

**3. DEVELOPMENT FINANCE CO. OF KENYA.....DEFENDANT**

**RULING**

The background information on the application subject of this ruling as gathered from the record is that there is on record an application presented by the plaintiffs counsel dated 19<sup>th</sup> October 2006 and filed on 23<sup>rd</sup> day of October 2006. It is by way of chamber summons brought under order VIA rule 3,5 and 8 of the CPR. In a summary form it seeks leave of court, to amend the plaint dated 7<sup>th</sup> July 1987 and filed herein on the same 7<sup>th</sup> July 1987, in terms of the amended plaint annexed and the annexed amended plaint to be treated as having been filed and served on the date the court, order granting leave is made subject to payments of the requisite court fees. Upon such order on the amendment being made, the defendants be at liberty to amend their pleadings accordingly within 14 days from the date the order granting leave is made. The court to be at liberty to make further orders as the court may deem fit to grant. This application is still pending disposal.

Also found on the record is another application also presented by the plaintiffs counsel dated 15/06/2007 and filed on 18<sup>th</sup> June 2007. It is brought under order L rule 16 (2) of the CPR and section 3A of the CPA. For purposes of the record only, it seeks leave of the court, to be granted to the plaintiff/applicant to file a supplementary affidavit in support of their application dated 19<sup>th</sup> October 2006, and upon such leave being granted by the affidavit sworn by Nalinchandra Lakhamshi on the 12<sup>th</sup> February 2007 and filed in court on the same day be admitted as such affidavit, and that the court be at liberty to grant such other further or alternative relief as the court, may deem fit to grant and that costs be provided for. The said application too is still pending.

The same plaintiffs have once again moved to this court, by way of another chamber summons dated 11<sup>th</sup> day of February 2008 and filed on the same date. It is brought under order VI rule 3,5, and 8 and order XI rule 2 of the CPR and section 3A of the CPA six prayers are being sought namely:-

1. *That the plaintiffs do have leave to amend their notice of motion dated 15<sup>th</sup> June 2007 as shown and read in the Amended notice of motion attached here to and upon this prayer being granted serve the Amended notice of motion on the defendant within 7 or such number of days as this Honourable court may specify for service.*
2. *That the plaintiffs do have leave to file an affidavit to supplement the replying affidavit sworn by Nalinchandra Lakhamshi Khimji Shah on 3<sup>rd</sup> November 2006 in response to the application dated 14<sup>th</sup> August 2006 filed by the 2<sup>nd</sup> defendant in the form attached here to within such time as this Honourable court may specify from the grant of this order.*
3. *That the plaintiff do have leave to file an affidavit to supplement the affidavit sworn by Nalinchandra Lakhamshi Khimji Shah on 19<sup>th</sup> October 2006 in support of the plaintiffs application dated in the form attached here to within such times as this Honourable court, may specify from the grant of this order.*
4. *That the following application filed in this suit by the parties have to be consolidated and be heard together by the same judge.*

1. *Application dated 19<sup>th</sup> July 2006 filed by the 1<sup>st</sup> defendant to amend his defence herein.*
2. *Application dated 14<sup>th</sup> August 2006 filed by the 2<sup>nd</sup> defendant to amend his defence herein.*
3. *Application filed by the plaintiffs on 19<sup>th</sup> October 2006 to amend the plaint herein.*
4. *Application dated 15<sup>th</sup> June 2007 filed by the plaintiffs for leave to file a supplementary affidavit as amended.*
5. *That this Honourable court may make such further or other orders as it may deem fit and proper in this matter.*
6. *That the costs of this application be provided for.*

Before coming to the merits of the application, it is proper to reflect the application, filed by the 1<sup>st</sup> and 2<sup>nd</sup>

defendants which have been mentioned in the current application. The application of the first defendant is indeed dated 19<sup>th</sup> July 2006, brought by way of chamber summons filed on the 20<sup>th</sup> day of July 2006. It is by way of chamber summons brought under order VIA rules 3, 5 and 8 of the CPR. For purposes of the record it seeks 4 prayers and in a summary form these are:-

*“That the honourable court, do grant leave to the 1<sup>st</sup> defendant to amend the statement of defence dated 23<sup>rd</sup> October 1987 and filed therein on the 26<sup>th</sup> day of October 1987 in terms of the amended statement of defence of the 1<sup>st</sup> defendant annexed to the affidavit in support of the application, that the amended statement of defence of the 1<sup>st</sup> defendant be filed within 14 days of the orders prayed for being granted and the plaintiffs be at liberty to file such amended pleadings as they may consider necessary within 14 days of the service of the Amended statement of defence of the first defendant on the plaintiffs. That costs be provided for and that the court, may be pleased to make such further or other orders as are just and fair in the circumstances of this case.”* The second defendant mentioned application dated 14/8/2006 has not been traced on the record.

The grounds in support of the application are set out in the body of the application, supporting affidavit, written skeleton arguments as well as case law. The major points relied upon by the applicant are as follows:-

- The filing of the present application under consideration and subject of this ruling was necessitated by reason of the facts deponed in paragraphs 6, 7, and 8 of the supporting affidavit to this current application. The error being that in prayer 1 of the said plaintiff/applicants application dated 15<sup>th</sup> June 2007 whereby it is stated the supplementary affidavit in respect of which leave was being sought for it to be introduced was stated to be in supplement of the plaintiffs supporting affidavit to the application dated 19<sup>th</sup> October 2006 filed by the plaintiff. Where as the same had been sworn by the plaintiff to supplement the plaintiffs affidavit sworn on 3<sup>rd</sup> November 2006. In reply to the 1<sup>st</sup> defendants application to amend its defence dated 19<sup>th</sup> day of July 2006 and filed in court, on the 20<sup>th</sup> day of July 2006.
- The court is invited to accede to the applicants request so as not to allow the minor error to derail the course of justice.
- The plaintiff/applicants concede this error and are willing to compensate both defendants with an award of costs.
- They contend that the application presented is within the ambit of the law as order VIA rule 3 under which the application is presented allowed amendments to be done at any stage of the proceedings.
- No prejudice will be suffered by the opposite parties if the amendment is allowed has there as been alleged by the respondents in their deponement.

Case law cited goes to demonstrate that unless there is any special reasons, amendments should be allowed freely.

- The filing of the said supplementary affidavit was prompted by the preliminary objection raised by the 1<sup>st</sup> defendant to the effect that the said affidavit did not depone to the effect that the deponent had been duly authorized by the 2<sup>nd</sup>

plaintiff to depone on their behalf.

-That the supplementary affidavit was deponed correcting the detailed error and filed without leave hence the filing of the application dated 15<sup>th</sup> June 2007 to seek leave to file the same and have it deemed to have been duly and properly filed.

-That the move to correct the afore mentioned error is what has prompted the plaintiff/applicant to file the application of 11/2/2008 subject of this ruling.

-The current application further seek to consolidate for purposes of hearing the amended application of the plaintiff to amend dated 19<sup>th</sup> October 2006, and the 1<sup>st</sup> defendants application to amend dated 19<sup>th</sup> July 2006 and that of the 2<sup>nd</sup> defendants dated 14<sup>th</sup> August 2006 and the applicants application sought to be amended.

- The reason for seeking consolidation is because they invoke similar if not the same question of law and fact.

- Jurisdiction to consolidate is donated by the provision of order X1 rule CPR.

-This jurisdiction is supposed to be invoked in situations where the same or similar questions of law or facts are invoked.

-The jurisdiction is exercisable where the court, moves to do so on its own motion, or upon application of either party.

Herein, the court, is being moved on the application of a party, the plaintiffs.

- Contend that consolidation in the manner sought is the most expedient and cost saving method of dealing with these applications which will save a great deal of valuable judicial time.

-They will demonstrate that parties had agreed way back in 1987 to the amendment of the plaint through correspondences, exhibited and when the application to amend was filed by the plaintiffs, the same was opposed solely because the plaintiffs had opposed the 1<sup>st</sup> defendants application to amend the defence and plead the issue of limitation 10 years after the matter had been in court.

-Deny that their application of 15/06/2007 has been determined in one way or another.

-The amendment sought to be introduced will assist this court, to determine the really issues in between the parties.

-Nothing has been demonstrated herein to prevent this court, from granting the consolidation sought more so when it is on record that the same could even be ordered by this court, on its own motion more so when it has not been specified by the respondents as to what they mean by crowded issues being created by an order for consolidation has not been explained. Further the prejudice to be suffered by them if the consolidation order is made has not been demonstrated.

-It is their stand that since the application for 15/06/2007 was marked as having been stood over generally, this is not a bar to an order for consolidation since the application has not been disposed off and no substantive orders have been in respect of its merits.

- Allegation of the application being misconcerned, bad in law and an abuse of the due process of the court, have not been specified. Neither has it been explained how the said application is spent or exhausted.

-The mistake being sought to be corrected by the amendment is a genuine one.

In response to the applicants application and submissions, the 1<sup>st</sup> defendants put in a replying affidavit by one Ajay Shantilal Shah deponed on the 21<sup>st</sup> day of April 2008 and filed on the 22<sup>nd</sup> day of April 2008, and written skeleton submissions dated the 18<sup>th</sup> day of November 2008 and filed on the same 18<sup>th</sup> day of November 2008. The major points relied upon by them are as follows:-

-When the application dated 15/6/2007 came up for hearing on 8/10/2007 it was not reached and then it was stood over to 28<sup>th</sup> November 2008 when orders were made requiring parties to file their respective skeleton submissions, and then ordered stood over to 11/2/2008 for counsels to highlight their submissions. The parties duly complied with those orders and filed their respective submission. This being the case, it is the stand of the 1<sup>st</sup> respondent. The issue in respect to the said application became exhausted and what is remaining for the court to do is simply to give a ruling. The same is not available for amendment.

- The applicants to the application of 15/06/2007 were to file responses to the 1<sup>st</sup> defendants' application which was to be made by 4/2/2008 which was not complied with, thus making the issues in so far as the application of 15/06/2007 is concerned exhausted and as such the same cannot be revisited for purposes of amendment and instead it should be dismissed with costs.

-Prayer 2 and 3 are new prayers unconnected to the application of 15/06/2007 and were not envisaged by the consent orders of 28<sup>th</sup> November 2007 and as such this court, cannot deal with these prayers herein as they are new prayers and an after thought.

-That however desirable it may be to consolidate the court, is reminded that it is only seized of the application of 15/06/2007 and not the other pending application for amendment.

- The court, is invited also to take note of the fact that the 1<sup>st</sup> defendants' application dated 19<sup>th</sup> July 2006 was the one which was to be heard first and it is the counsels submissions that objection to the plaintiffs responding replying affidavit to the said 1<sup>st</sup> defendants application which prompted the filing of the applicants application of 15/06/2007 sought to be amended.

-The court, is enjoined to hold that the applicant should not be allowed to unilaterally vary the consent orders of 28/11/2007 by bringing in new prayers.

-Still maintain that the plaintiffs affidavit in support of the application dated 11/2/2008 has not complied with the provisions of order 3 rule 2 (2) of the CPR.

-Maintain the errors that led to the filing of the application dated 15/06/2007 sought to be amended persist to the present day even in the submissions in support of the application for leave to amend.

The 2<sup>nd</sup> defendants apposition also comes from a replying affidavit sworn by one Sandeep Ratilal Shah deponed on the 25<sup>th</sup> day of April 2008, and filed the same date, and written skeleton arguments dated 20<sup>th</sup> November 2008 and

filed the same date. The major points relied upon by them are:-

- The 2<sup>nd</sup> defendant is a director of the second plaintiff, and has no knowledge of the said company having given the deponent of the supporting affidavit authority to depone to the said affidavit on behalf of the 2<sup>nd</sup> plaintiff.
- The current application of 11/2/2008 seeks to cure a default after the skeleton arguments had been filed and as such the issue raised by the said application are crowded and the 2<sup>nd</sup> defendant respondent will suffer prejudice if they were to respond to those issues in the manner framed.
- Maintain that this court having already granted orders respecting the application dated 15/6/2007 on the mode of procedure as regards that application it can not go back on its orders and then grant additional orders regarding consolidation of other pending applications on amendments.
- Contend that the application dated 11/2/2008 is muddled up as it seeks a multiplicity of orders and as such, the same is incapable of being granted. More so when it was marked stood over generally when it came up for highlighting of skeleton arguments which had already been filed respecting it.
- Also contend that since the applications sought to be consolidated do not seek similar prayers they should not be consolidated.
- That the second defendant stands to be prejudiced if the said application were to be allowed as he cannot effectively respond to the issues raised therein.
- The application is an abuse of the court, process and it has the effect of disintitling the 2<sup>nd</sup> defendant to a fair hearing.

The applicant filed responses to the skeleton arguments of the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents. Both are dated 28<sup>th</sup> November 2008 and filed the same date of 28<sup>th</sup> November 2008. As regards the response of the 1<sup>st</sup> defendant/respondents, counsel submitted that as far as he understood the said submissions the 1<sup>st</sup> defendant/respondent has opposed the application because the application dated 15/06/2007 is alleged to have been exhausted, the current application of 11/2/2008 is alleged to be in defiance of the consent order which have not been altered and or varied. To this their responses is that the purported consent of 28/1/2008 did nothing but to afford an agreement between counsels as regards the dates on which each was to file their respective submissions and had nothing to do with the merits disposal of the said application.

- Concedes that the application of 11/2/2008 was prompted by the 1<sup>st</sup> defendant's written skeleton arguments and there was nothing wrong in the applicant presenting the current application to correct an apparent error.
- Concede that indeed they did not file their submissions in reply, by 4/2/2008 because they had made up their mind upon the afore said error being brought on to the fore that there was need to amend the application of 15/06/2007 hence the presentation of the application of 11/2/2008.
- Contend failure to comply with step 3 of the consent order of 28/11/2007 does not oust the need for the applicants to

seek an amendments to correct a serious error which had come to their notice, more so when the said application had not been heard and determined as the same had been fixed for 11/2/2008 to highlighting of the submission.

-They defend their move to consolidate the applications for amendment and have them heard together, because they are inter related in that in them parties seek to amend their perspective pleadings with corresponding leave to the other parties to amend theirs accordingly, matter the respondents do not seem to have appreciated. This move though not obligatory on the court, to grant those orders it will save on costs and time.

-Contend that the plaintiffs own up to the mistake on the said application of 15/06/2007 and their move to rectify the error is not foreign in such litigation and so there is nothing extra ordinary about it.

-Maintain they took the right step to rectify the error which had been brought to their attention and this not a defiance of the said consent order. Failure to take the remedial step taken would have rendered the application of 15/06/2007 in its original form meaningless as its determination would not have resulted in the cure it was intended to cure.

-Maintain the order on consolidation is proper as the pending applications are between the same parties and involve similar questions of law.

As for the responses to the submissions of the 2<sup>nd</sup> defendant/respondent, they applicants contend that no reasons have been given as to why the 2<sup>nd</sup> Defendants/Applicant contends that the application sought to be amended is muddled up neither have they explained why the orders sought cannot be granted. More so when the application of 11/2/2008 is clear cut and can be understood by all those participating in it.

-Maintain they are on the proper course as an application can be amended at any stage of the proceedings and their application is perfectly in order.

-They take issue with the 2<sup>nd</sup> respondents assertion that he is unable to responded to the said application as he has not specified how that difficulty has arisen or what the alleged difficulty is.

-The case law relied upon by the 2<sup>nd</sup> respondent has no relevance to the issue herein.

-They do not agree that a party who has made an application, submission on the same filed, but no final determination made on the same cannot move and rectify an error brought to its attention before final determination of the application.

On legal provisions and case law, the applicants referred the court, to Mulla on the code of civil procedure 14<sup>th</sup> Edition page 1005 where it is stated thus:-

*“**Leave to amend when given:**- power to allow amendment should be liberally exercised. Hence as a general rule leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party except such as can be sufficiently compensated for by court, or other terms to be imposed by the order.....My practice has been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that by his blinder he had done some injury to his opponent which could not be compensated for by costs or otherwise it does not matter that the original omission and however late*

*the proposed amendment, the amendments should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated for by way of costs.....There is one panacea which heals every sore in litigation and that is costs.....Broadly stating, if there is no injustice in granting an amendment if the opposite side can be compensated for by way of costs. It is only when compensation will not be an adequate compensation that an amendments order of costs however must be reasonable and not by way of punishment. It is immaterial whether the error sought to be amended was accidental or not. There is no rule limiting amendment to accidental error. The rule says:- All such amendments shall be made as may be necessary for the purposes of determining the real question in controversy .....There is no kind of error or mistake which if not fraudulently or intended to over reach, the court, ought not to correct if it can be done without injustice to the other party.....Even an admission made by mistake may be allowed to be withdrawn and the pleading amended accordingly”*

At page 1008 leave to amend is to be refused.

“It follows from what has been stated above that leave to amend will be refused-

1. Where the amendment is not necessary for the purposes of determining the real questions in controversy between the parties as where it is.
  - (i). Merely technical
  - (ii). Useless and of no substance
2. Where the plaintiffs suit would be wholly displaced by the proposed amendment.
3. Where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time.
4. Where the amendment would introduce a totally different new and inconsistent case and the application is made at a late stage of the proceedings.
5. Where the application for amendment is not made in good faith.”

The case of **SAMMY MWANGANI AND 9 OTHERS VERSUS THE COMMISSIONER OF LANDS, ATTORNEY GENERAL AND 8 OTHERS** decided by P.J Ransley J on the 18<sup>th</sup> day of July 2005 (as he then was). At page 2 of the ruling line 7 from the top the learned judge as he then was made observations that:-

“Consolidation is usually ordered where similar issues arise between parties and it’s convenient to hear the suits as one”

The case of **NYATI SECURITY GUARDS AND SERVICES LIMITED VERSUS MUNICIPAL COUNCIL OF MOMBASA HCCC NO. 992 OF 1994** decided by Maraga J on the 20<sup>th</sup> day of January 2004. On an application for consolidation orally made and opposed by the opposite party. At page 2 of the ruling, the learned judge made the following observations:-“consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to **save costs, time and effort**

**and** to make the **conduct of general** actions more convenient by treating them as one action. The situation in which consolidation can be ordered invalid where there are two or more suits or matters pending in the same court where:-

1. Some common question of law or facts arise on both or all of them or
2. The right or relief claimed in them are in respect of or, arise out of the same transaction or series of transactions or
3. For some other reasons it is desirable to make an order for consolidating them.

The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly actions relating to the same subject matter between the same plaintiffs and the same defendants, or between the same plaintiff and the same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated.....(page 3) There is no doubt that the court, has under order 11 rule 1 or discretion to order consolidation an application or Suomoto. Order 11 does not state whom the application is to be made”

The case of **SAMIR MOHAMED ABDO AND 2 OTHERS VERSUS ABDI KADIR SHEIKH NUR NAIROBI** decided by J.B. Ojwang J on the 24<sup>th</sup> day of June 2005. It involved an application to have an earlier chamber summon dated 19<sup>th</sup> March 2004 which had not been formally prosecuted be consolidated with the instant application to be heard wholly or in respect of the prayers there in that had not been dealt with. At page 5 of the ruling the learned judge made the following observation:-

“Mr. Abdala urged that the applicants’ two applications be consolidated and heard together. I think this was quite reasonable request, given the problematic, Special circumstances attending the claims between the parties in this case, and in related cases. Only such a consolidation would in my view set this process of litigation on a path that may lead towards finality.

The case of **JOHN K. KABUCHI VERSUS SURE MOTOR COMPANY LIMITED NAIROBI HCCA NO. 390 OF 2002** decided by A. Visram J as he then was (now JA) on the 19<sup>th</sup> day of July 2005. At page 3 line 3 from the bottom the learned judge made the following observation:-

“Similarly order 6 rule 3 allows for amendments of pleadings” at any stage” of the suit. The courts’, discretion should be exercised judiciously with a view to achieving the ends of justice. In my view such an application to add or amend should nor be rejected only on the ground that the suit would have to be reopened a fresh. So if the hearing has to start all over again and if that is in the best interest of justice, that is exactly what the court, should do, and where necessary condemn the guilty party with an order of costs.....Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs”

The case of **LEROKA VERSUS MIDDLE AFRICA FINANCE LIMITED (1990)KLR 549** decided by Mbitio J as he then was. It was held inter alia that:- *“An amendment ought to be allowed if there by the real substantial question can be raised between the parties and a multiplicity of legal proceedings avoided.*

(ii) *On the costs of the application, there was no reason to depart from the usual practice that it is the defendant who should be paid in such applications since the plaintiff is deemed to be the author of the inconvenience.*

The case of **CENTROL BANK OF KENYA LIMITED VERSUS TRUST BANK LIMITED (2000) EA 365** decided by the (CAK) where it was held inter alia that that:-

The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendment of pleadings as were necessary for determining the really issues in controversy or avoiding a multiplicity of suits provided.

(i). There had been no undue delay

(ii). No new or consistent cause of action was introduced

(iii). No vested interests or accrued legal rights was affected.

(iv). The amendments could be allowed without injustice to the other side.

(v). All amendments should be freely allowed at any stage of the proceedings provided that the amendment or joinder did not result in prejudice or injustice to the other party ,that could not be properly compensated for in costs. Neither the length of the proposed amendments nor mere delay were sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs.

The second Defendant/Respondents on the other hand referred the court, to the case of **ORBIT CHEMICALS INDUSTRIES LIMITED VERSUS NATIONAL BANK OF KENYA. NAIROBI MILIMANI HCCC NO. 146 OF 1990** decided by Azangalala J on the 25<sup>th</sup> day of September 2006. It concerned an application to re amend the plaint. At page 2 to 3 the learned judge quoted with approval the following case law on leave to amend:-

-The case of **MOLU AND ANOTHER VERSUS KENYA RAILWAYS AND ANOTHER (2002) 2KLR 551** where it was held inter alia that where the hearing of a suit has not commenced, leave to amend should be freely granted.

-The case of **KULOBA VERSUS ODUOL (2001) IEA101**- leave to amend should not be declined on the ground that a defence of limitation would be defeated by the amendments.

-The case of **EASTERN BAKERY VERSUS CASTELINO (1958) EA** where it was held inter alia that:- amendments to pleadings sought before hearing, should be freely allowed if they can be made without injustice to the other side and there can be no injustice if the other side can be compensated by costs.

The case of **WAMUIGA VERSUS CENTROL BANK OF KENYA (2002) IEA 319** in which Mbaluto J stated:-

- *That amendment to pleadings sought before the hearing should be freely allowed if no injustice is caused to the other party. However negligent and carelessness may have been the first omission and however late, the proposed amendments if no injustice is occasioned the amendment should be allowed.*
- *At page 6 **CENTROL BANK OF KENYA LIMITED VERSUS TRUST BANK LIMITED (SUPRA)***
- ***KYALO VERSUS BAYUSUF BROTHERS LIMITED (1983)** where the CA held that application for amendments of pleadings should only be allowed if they are brought within a reasonable time, because to allow a late amendment would amount to an abuse of the court process.*
- ***WELDSOON VERSUS NEAL (6) (1887) 19Q.B. 394-** the court, will refuse leave to amend where the amendment 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 accrued since the issue of the writ”*

In addition to the above cited principles of law, and case law relied on by the parties, the court, draws an inspiration from an own ruling delivered on the 12<sup>th</sup> day of March 2010 in the case of **GLADYS H. MUCHEMA VERSUS AGA KHAN EDUCATION SERVICES KENYA, NAIROBI HCCC NO. 1238 - 2003.** At page 23-25 this court, set out ingredients for granting and withholding the relief of right to amend. Those for granting are:-

- (i) *That there has been no undue delay*
- (ii) *That no new or inconsistent cause of action was introduced*
- (iii) *No vested interest or accrued right was affected.*
- (iv) *The amendment could be allowed without injustice to the other side.*
- (v) *Amendment should be allowed at any stage of the proceedings.*
- (vi) *Each case depends on its own set of facts and merits.*
- (vii) *Neither the length of the amendment or the delay were sufficient grounds for disentitling a party to leave to amend.*
- (viii) *Leave to amend is a matter of discretion on the part of the court.*

*On the other hand, the right of the court, to withhold the right to amend arises where:-*

- (i) *The applicant is acting malafides*
- (ii) *The application has been presented expost facto.*
- (iii) *There has been inordinate and unexplained delay.*
- (iv) *The amendment is likely to cause an injustice to the opposite party.*
- (v) *Where the application has been presented at a late stage, but the applicant has not fulfilled his/her duty to the court, by showing or explaining or demonstrating to the court, that the court, should exercise its discretion in his or her favour.*
- (vi) *The failure to move promptly to take action when the defect ought to be remedied are brought to his/her*

*notice.*

(vii) *Laxity or negligence of the counsel on record as the reason why the applicant seeks the courts', indulgence.*

Due consideration has been made by this court, of the said rival arguments and the same considered in the light of the principles of law and case law relied upon by either side and the court, proceeds to make findings to the effect that the application subject of this ruling has two limbs to it. The first limb covered by prayers 1-3 seeks to amend the application dated 15/6/2007 so that the reliefs sought to be granted by the court, relate to leave to file supplementary affidavit to supplement the replying affidavit sworn by one Nalichandra Lakhamshi Khimji Shah on 3<sup>rd</sup> November 2006 in response to the application dated 14<sup>th</sup> August 2006, filed by the 2<sup>nd</sup> defendant in the form attached herein within such time as this court, will grant on the one hand, and leave to file an affidavit to supplement the affidavit sworn by Nalichandra Lakhamshi Khimji Shah on 19<sup>th</sup> October 2006 in support of the plaintiffs application of the same date in the form attached here to within such time as the court, may deem fit to grant.

The second limb deals with leave to consolidate. The reason for seeking this order has been stated to be because all the parties on board herein namely the plaintiff and two defendants have each separately presented applications to amend their pleadings with corresponding leave to the opposite participating parties to amend their pleadings accordingly. By reason of this, the Plaintiff/Applicant submits that the applications for amendments involve same questions of facts and law and as such interests of justice to the parties herein will be best served if these applications are consolidated and heard together. The major gain to the parties and the court, will be a saving on courts', and judicial time as opposed to each application being heard and ruled upon separately and.

As for the leave to introduce further affidavit, it has been argued that these are simply meant to correct an error which if not corrected will render the application of 15/6/2007 sought to be amended meaningless.

It is on record that each side has given reasons for and against the said reliefs already set out herein, but in a summary form, it is sufficient to say that the application of 15/6/2007 had sought leave to file a supplementary affidavit to the supporting affidavit to the said application and yet in fact what the relief should have sought was for leave to file a supplementary affidavit to supplement the replying affidavit filed by the plaintiff in reply to the 1<sup>st</sup> defendants application for leave to amend their defence herein. It is apparent that issue had been raised to the effect that the 2<sup>nd</sup> plaintiff being a jurisdicit person leave of the board of Directors by way of resolution was necessary before the deponment deponing an affidavit on behalf of the 2<sup>nd</sup> plaintiff could validity depon so on behalf of the 2<sup>nd</sup> plaintiff, this was the error that the plaintiff moved to cure by the anticipated leave to amend the application of 15/6/2007.

It has also transpired that, when the said application of 15/6/2007 came up for hearing, both counsels agreed by consent to file and serve written skeleton arguments for and against the relief sought in the said application of 15/5/2007. The said consent was endorsed by this court, on 28/11/2007 and it reads:-

1. *Can't be reached hearing on 11/2/2008 at 2. 30 p.m for high lighting.*
2. *The applicant to file and serve written skeleton arguments along side authorities relied upon by 15/1/2008.*
3. *The respondents to respond thereto by 25/1/2008*
4. *Applicant to reply by 4/2/2008*
5. *High lighting on 11/2/2008 on priority."*

It is on record that instead of the applicant doing what the consent of 28/11/2007 required him to do, he filed an application to amend. It has been conceded by them that the move to amend their said application was prompted by the defendants pointing out through their written skeleton arguments that, what was to be supplemented was not the affidavit in support of the main application, but the affidavit in reply to the 1<sup>st</sup> defendants application to amend the defence.

It is also common ground that the Plaintiff/Applicant just moved to put in the application for leave to amend without asking the court, to interfere with the consent orders of 28/11/2007. It is also common ground that the failure to move to the court, to interfere with consent orders of 28/11/2007 is what has prompted the defence to argue that the Plaintiff/Applicant stands non suited in so far as the application for leave to amend is concerned because in so far as they are concerned, the application of 15/6/2007 is fore closed save for purposes of high lighting on the same.

The Plaintiff/Applicant has countered that opposition by arguing that the orders of 28/11/2007 do not operate to oust the fact that the said application still remains unheard and therefore the door is open for them to seek an amendment of the same.

(ii) That the said orders of 28/11/2007 do not operate to oust the principles of law on amendment to the effect that leave to amend should be allowed freely and at any stage of the proceedings to bring on board the really issues in controversy between the parties for determination by the court. The really issues in controversy between the parties herein sought to be introduced by the application of 15/6/2007 was not the supplementary affidavit in support of the main application of 19/10/2006 for leave to amend the plaint, but the supplementary affidavit to supplement the replying affidavit in opposition to the 1<sup>st</sup> defendants application for leave to amend the defence. It is their stand that, this being the case, proceeding with the application of 15/6/2007 in the manner originally presented without an amendment would have resulted in the said application being rendered meaningless as it would not have cured the errors that it was meant to cure.

The question that the court, has to ask itself at this point in time is which version is to be upheld. The court, has duly considered the same and it is of the opinion that as a court, of law it cannot allow itself to process litigation to its logical conclusion as an exercise in futility. It is duty bound to allow such a litigation to progress to finalization only if it is going to determine or make a mark on the issue in controversy on the one hand, on the other hand the court, is also duty bound to be mindful of the rules of procedure put in place which are not meant to be put in place for cosmetic value but to serve ends of justice to the litigants. Some of these rules are those relating to amendment of processes before court.

The salient features of the same have already been set out herein namely that:-

- (i) Amendments should be allowed at any stage of the proceedings before final orders are made.
- (ii) They should be allowed where they intend to bring on board the really issues in controversy between the parties.
- (iii) It matters not how late they may be, they should be allowed if they are relevant.
- (iv) There is no error which cannot be rectified by an amendment.
- (v) The only licence that entitles the court, to with hold such a relief of leave to amend should only arises where there has been no demonstration that the application to amend has been presented malafides and or with the intention of over reaching or stealing a match against his opponent.
- (vi) Where there has been a demonstration that costs will not be an adequate compensation for the inconvenience caused to the aggrieved party.

These have been applied by this court, to the defence opposition to the application for leave to amend and the court, finds them ousted for the following reasons:-

- (a) The relief of the right to amend the said application of 15/6/2007 is available to the Plaintiff/Applicant because final orders have not been pronounced by this court, on the said application.
- (b) Allowing the relief of leave to amend being sought by the Plaintiff/Applicant herein is appropriate in the circumstances of this case herein because the intention of the plaintiff when they set out to present the application of 15/6/2007 was not to seek leave to file a supplementary affidavit to supplement the affidavit in support of the application, but to seek leave to file a supplementary affidavit to supplement the replying affidavit to the 1<sup>st</sup> defendants' application seeking leave to amend the 1<sup>st</sup> defendants defence. It therefore follows that if this court, were to deny the application for leave to amend, then it is going to usher in wrong issues in controversy between the parties. This being the case, interests of justice demands that the amendment sought be allowed to bring on board the really issues in controversy between the parties for determination.
- (c) The court, is also inclined to allow the application for leave to amend because it can not be said that the move is late in that the attention of the error was brought to the attention of the Plaintiff/Applicant by the 1<sup>st</sup> defendants skeleton arguments filed in January 2008, and the plaintiff promptly filed the application for leave to amend in February 2008. Therefore the issue of in ordinate delay or belatedness does not arise.
- (d) It has not been demonstrated by the defence in their opposition that the error committed by the Plaintiff/Applicant herein in seeking to supplement the supporting affidavit instead of the replying affidavit both afore mentioned was out of the extraordinary. It was an error like any other error in judicial proceedings. Neither has it been demonstrated that the same is incapable of being rectified.
- (e) It has not been demonstrated that the plaintiff has presented the said application malafides or with an

intention to over reach the defence. This is so because, all that the defendant has demonstrated is that as long as the consent orders of 28/11/2007 stand, the only action, the plaintiff is to do in relation to the said application of 15/6/2007 is to high light on their submissions and have the same disposed off on its merits and nothing more. In response to this argument, this court, has ruled that the said argument does not oust the said principles on amendments already in place and available to the Plaintiff/Applicant.

- (f) It has not been demonstrated that costs will not be adequate compensation for the in convenience suffered by the defendants should the court, be inclined to allow the amendments.
- (g) It has not been demonstrated that the Plaintiff/Applicant is un deserving of the court's exercise of its discretion in their favour to allow them amend in the manner sought. The court, is of the opinion that for the reasons given, this courts' discretion is available to the Plaintiff/Applicant to allow them leave to amend in the manner sought.

Turning to the issues of leave to consolidate, case law and legal texts relied upon demonstrate that the relief is available where the matter sought to be consolidated are based on the same set of facts and law.

The Plaintiff/Applicant herein has demonstrated that this is demonstrated herein by reason of the fact that the applications sought to be consolidated vide prayer 5 of the application subject of these ruling relate to applications of all participating parties who are seeking leave to amend their pleadings with corresponding leave to the opposing parties to amend their pleadings.

The opposing parties to the plaintiffs application for leave to amend are the two defendants. Where as the opposing parties to the defendant's application for leave to amend is the plaintiff. This being the case, the court, is satisfied that the likelihood of common issues of facts and law arising during the disposal of the said applications can not be ruled out. For this reason the court, is satisfied that interests of justice demands that a consolidation order would be appropriate in the circumstances of this case. In this respect too, it will be a saving on the courts', time and costs to both sides.

For the reasons given in the assessment the court, proceeds to make the following orders in the disposal of the application by the plaintiff dated 11/2/2008 and filed the same date.

1. Prayer 1,2 and 3 of the said application be and are hereby allowed because:-

- (i) The relief of leave to amend the application of 15/6/2007 is available to the Plaintiff/Applicant because case law on the subject have crystalized on the principles that leave to amend is only available where final orders have not been made. Herein no final orders have been made by this court, in respect of the application dated 15/6/2007.
- (ii) Allowing the relief to amend the said application is appropriate in that, it will bring on board the really issues in controversy in that what the plaintiff sought to introduce in the proceedings was a supplementary affidavit to supplement the replying affidavit to the 1<sup>st</sup> defendants' application for leave to amend the 1<sup>st</sup> defendants defence,

and not leave to introduce supplementary affidavit in support of the application for leave to amend the plaintiffs' complaint of 19/10/2006.

- (iii) There was an apparent error as stated in number (ii) above. It has not been demonstrated by the defence that the nature of the error displayed in number (ii) above is one that cannot be corrected by way of an amendment.
- (iv) The move to amend is not belated as the plaintiff moved to rectify the error as soon as the same was brought to their notice. The length of the delay to be considered is not the length of time the matter has been in court, but the time taken to address the deficiencies after these were brought to the attention of the applicant. See the case of **GLADYS N. MUCHENA (SUPRA) PAGE 29-30** line 3 from the bottom on page 29 upto line 6 from top on page 30
- (v) The plaintiffs' move to correct the said error cannot be said to be out of the extraordinary as the error sought to be rectified is not unknown in such litigation.
- (vi) There has been no demonstration that the plaintiffs' move to so rectify the error has been actuated by malafides or an intention to reach the defendants.
- (vii) It has not been demonstrated that costs will not be an adequate compensation to the defence.
- (viii) There has been no demonstration that the plaintiff is underserving of the courts', exercise of its discretion in their favour.
- (ix) Justice to both parties herein demands that the said leave to amend be granted.

2. Prayer 4, 5 and 6 of the said application are allowed because:-

- (i). There is a demonstration that since all the parties on board want to amend with corresponding leave to the opposite party to amend theirs, the likelihood of common issues of facts and law arising in the disposal of the said applications both in support and opposition thereof cannot be ruled out. This kind of scenario falls within the principles governing consolidation of proceedings and the move was therefore justified.
- (ii). The court is satisfied that consolidation order will save on costs and time in that instead of having three hearings and rulings each for each application for leave to amend, efforts both by the parties and the court will be comfortably consolidated considered in one hearing and one ruling to dispose off all the three applications.
- (iii). The court is also satisfied that costs will be adequate compensation to the defence.

- 3. The Defendant will have costs of the application dated 11/2/2008.
- 4. The Plaintiff to have 30 days from today to amend his application.
- 5. Leave be and is hereby granted to all the parties to file further affidavits and pleadings as necessary within 30 days of service of the amendments.

6. Mention on 2/6/2010 for discretion on speedy disposal of the main trial and to confirm the filing of the further affidavits and amended pleadings.

**DATED, READ AND ELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH 2010.**

**R.N. NAMBUYE**

**JUDGE**