



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 538 of 2008**  
**POWER MIKE SECURITY SERVICES LTD..... PLAINTIFF**

**VERSUS**  
**GOTHIC INVESTMENTS.....DEFENDANT**

**RULING**

Before me is the plaintiff's application made pursuant to the provisions of Order VIA Rule 3(5) and 5 of the Civil Procedure Rules seeking the leave of this court to be allowed to amend the plaint in terms of the draft amended plaint attached to the affidavit in support of the application. The plaintiff wishes to amend its plaint so that, according to it, it may bring into focus the real questions or issues in controversy for determination by the court. The application is opposed. Maurizio Cortzi, the managing director of the defendant swore a replying affidavit in opposition to the application. At the hearing of the application, I heard oral submissions made by Mr. Wanjohi for the plaintiff and Dr. Khaminwa for the defendant.

Having carefully considered the facts in issue in this application, the issue for determination by this court is whether the plaintiff laid sufficient basis for this court to grant it leave to amend its plaint. As a general rule, this court will not refuse any party to amend their pleadings unless the court is of the view that the opposing party will suffer prejudice which cannot otherwise be compensated by an award of costs. In Kassam vs. Bank of Baroda (Kenya) Ltd [2002] 1KLR 294, Kuloba J summarized the instances upon which the court may grant leave to a party to amend pleadings. After citing several authorities, he held that the general rule is that amendments should be allowed if the court is satisfied that the party is not acting *mala fide*; the amendment will not cause injury to the other side which cannot be compensated by costs; the amendment is not a device to abuse the court process; the amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits; and, that the amendment will not alter the character of the suit.

Dr. Khaminwa urged the court not to grant leave the plaintiff to amend its plaint because, in his view, the application was made in bad faith. He further submitted that if the application for amendment is allowed the character of the suit would be fundamentally changed that it will not be similar to the suit that the plaintiff filed against the defendant. He further argued that the defendant would be prejudiced by the proposed amendment because it will suffer injustice. The plaintiff is however of a contrary view. It is the plaintiff's case that it should be allowed to amend its plaint to enable the real issues in controversy to be brought out in a clear manner.

I have perused the proposed amendment. With the greatest respect to Dr. Khaminwa, I see nothing in the proposed amended plaint that would prejudice the defendant if the same is allowed. The defendant will have an opportunity to respond to the amended plaint in its defence to the amended plaint. It appeared to the court that the defendant was concerned that the plaintiff had annexed an alleged agreement between itself and the defendant in the application seeking leave to amend the plaint. The defendant should not be unduly worried. That agreement has not been formally produced in evidence. If the defendant disputes its authenticity, it will have the opportunity at the appropriate time to apply for its exclusion from evidence. Any prejudice that the defendant may likely to suffer by this court allowing the plaintiff to amend its plaint, will adequately be compensated by an award of costs.

The upshot of the above reasons is that the plaintiff is hereby granted leave to amend its plaint in terms of its proposed amended plaint. The plaintiff shall file and serve the amended plaint within seven (7) days of today's date. The defendant shall be at liberty to file and serve a response to the amended plaint within fourteen (14) days after service. The defendant shall be paid costs of the application in any event.

DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF MARCH 2010.

**L. KIMARU**  
**JUDGE**