REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 92 of 2003

NATIONAL BANK OF KENYA (K) LTD:.....PLAINIFF

VERSUS

SYNTAX PRINTERS LTD:……..…….1ST DEFENDANT

PAUL KIPKURUI CHEMWENO:…..……2ND DEFENDANT

JOHN CHEMERINGO:…….....……..3RD DEFENDANT

RULING

For consideration now is this application by way of Chamber Summons stated to be brought under Order VIA Rules 3(1)5,7 and 8 of the Civil Procedure Rules and all other enabling provisions of the Law praying that the 3rd Defendant/Applicant be granted leave to amend his defence in terms of the draft annexed to the application and upon the same being granted the draft defence be deemed filed and served subject to payment of the requisite court fees. It is premised on the grounds that it is imperative to amend the defence for the proper determination of issues in dispute as important issues were left out when defence was filed and these ought to be pleaded so as to arrive at a fair trial. Further grounds are that the 3rd Defendant was not a guarantor as pleaded in the plaint and that the 2nd Defendant was a genuine director of the 1st Defendant and he executed the guarantee securing the disputed amount. That it is important to include the 1st and 2nd Defendants' into the suit for its proper determination that the application is brought in good faith and the Plaintiff will not suffer any prejudice if the orders sought are granted. The application is supported by the affidavit of John Chemaringo the 3rd Defendant herein in which he states that material particulars were inadvertently left out when the defence was first drawn and it is necessary to include those now.

The application is opposed and grounds of opposition are filed. These are that the application is brought after undue delay and brought in bad faith with the intention of delaying the Plaintiff's application for summary judgment and in any event even the draft defence does not raise any triable issues. The application is said to lack merit and should be dismissed.

At the hearing it was urged for the 3rd Defendant applicant that he was never a director of the 1st Defendant and that the real issues for determination must be placed before the court and that costs would compensate the Plaintiff.

For the Plaintiff/Respondent it was submitted that the application was brought merely to defeat the application for summary judgment and bad faith is shown by lack of service of the application on the 1st and 2nd Defendants by the 3rd Defendant. It is finally submitted that the issues now intended to be brought in by the amendment were in the knowledge of the 3rd Defendant when the defence was drawn and they should have been pleaded.

On my part I have given due consideration to the application and submissions by both counsel on their respective rival positions. The court's power to order amendments is not in issue. It is a discretionary power to be exercised judicially having regard to principles upon which amendments are to be allowed and those are that amendments of pleadings to be allowed so that the real issues in controversy between parties or defects or errors in pleadings may be corrected and placed before the court for determination. Such amendments will be allowed freely at any stage of the proceedings so long as they do not cause injustice to the other party which injustice cannot be compensated for in costs. **BEOCO LIMITED –V- ALFA LAVAL CO. LTD (1994) 4 ALL.E.R 464.**

It has not been denied that the matters sought now to be included in the amended defence were in existence and in the knowledge of the 3rd Defendant at the time of filing defence. In fact that defence was drawn by an advocate. The instant application appears to have been prompted by the Plaintiff's application for summary judgment**. NAIROBI CIVIL APPEAL NO.2 OF 2002 – OCHIENG ODUOL –VS- RICHARD KULOBA** - here it was stated that material in the knowledge of the party who ought to have pleaded them in the first instance ought to be pleaded in the initial pleading and allowing such pleading by way of an amendment would be to aid a negligent pleader. I do not wish to offer such aid and I am not persuaded that such information as is now sought to be pleaded was not in the knowledge of the 3rd Defendant. The plaint was filed during 2003. Defence was filed by an advocate in 2004. Application for summary judgment was filed on 9/3/2004. Three years later on 10/5/2007 an application to amend defence was made. That by any standards is undue delay and looked at from the point that it was brought to be heard after the application for summary judgment was fixed for hearing, it gives the clear intention of wanting to circumvent the earlier application. In conclusion, the application under consideration is found to have been brought after undue delay and to allow it would be equivalent to aiding a negligent pleader and the same is for those reasons, found to be without merit and it is accordingly hereby dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 4TH DAY OF MARCH, 2010.

P.M.MWILU

JUDGE

IN THE PRESENCE OF:-

Paul Ekitela - Court clerk

Matutu holding brief for Marube – Advocate for Applicants.

Chemoinyai holding brief for Songok Advocate for Respondent.