



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU

Civil Case 67 of 2008

KRISHNA KUMAR SHIVLAL  
LAKHANI ..... PLAINTIFF

VERSUS

JULIUS MUNYURI MUTURIA  
..... 1<sup>ST</sup> DEFENDANT  
CYPRIANO KUBAI  
..... 2<sup>ND</sup>  
DEFENDANT  
CONSOLIDATED BANK OF  
KENYA LTD  
.....  
INTERESTED PARTY

RULING

The first and 2<sup>nd</sup> defendants seek the leave of this court to amend their defence to include a counter claim against the plaintiff by their Chamber Summons dated 2<sup>nd</sup> November 2009. That chamber Summons is brought under Order VIA Rule 3, 5, 7 and 8 of the Civil Procedure Rules. The amendment that is sought is based on allegation that the plaintiff in seeking orders of inhibition from the court caused plot number *Meru Municipality Block II/36* result in interest accruing to the tune of Kshs. 4,961,831.66. It is that interest that the defendants seek to counterclaim from the plaintiff. The application was opposed by the plaintiff on the basis that it was filed more than one year later, that the defendant had intimated previously that they would settle the matter and at one time they offered the plaintiff their lorry for the plaintiff to recover Kshs. 2.5million they owed him. The issues raised by the plaintiff in opposition to the defendant's application have to be considered in the background of the general principle that leave to amend pleadings ought to be granted unless it can be demonstrated that it would be unjust to do so. Amendment would not be granted if the prejudice the plaintiff will suffer cannot be compensated by an award of costs. In **Eastern Bakery Vs. Castelino [1958] E.A.** 461 Sir Kenneth O'Connor summarized the principle as follows:-

***“It will be sufficient ..... to say that an amendment to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and there is no injustice if the other side can be compensate by costs ..... The court will not refuse to allow an amendment simply because it introduces a new case.....But 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. The court will refuse to amend where the amendment would change the action into one of 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 accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side.”***

There is no prejudice that the plaintiff has shown he would suffer which cannot be compensated by an award of costs. Accordingly, I grant

the following orders:-

1. *The first and 2<sup>nd</sup> defendants are hereby granted leave to amend their defence as per draft annexed to the chamber summons dated 2<sup>nd</sup> November 2009 and such amendments shall be filed and served within 14 days from this date hereof.*
2. *The costs of the Chamber Summons dated 2<sup>nd</sup> November 2009 shall be in the cause.*

Dated and delivered at Meru this 7<sup>th</sup> day of May 2010.

**MARY KASANGO**  
**JUDGE**