



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

**Civil Suit 1106 of 2005**

**ZEBAK LIMITED.....PLAINTIFF**

**VERSUS**

**NADEM LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

This is an application brought by the plaintiff by way of Chamber Summons under Order VIA Rule 3(1) and 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders that, the plaintiff be granted leave to amend its reply to defence and defence to counterclaim and that, the draft reply to the defence and defence to counterclaim annexed to the application, be deemed to be duly filed and served upon payment of the requisite fees.

The reasons advanced for the application are that;

1. The plaintiff seeks to introduce an amendment so as to bring the matters in issue in this suit to fore.
2. That the nature of the amendment does not change the character of the action in any way, manner or form.
3. That the earlier pleading filed by the plaintiff's former advocates on record do not fully capture the plaintiff's response to the counterclaim.
4. That the defendant will not suffer any loss that cannot be compensated by way of costs.

In addition to the grounds set out above, there is a supporting affidavit sworn by Mohammed Parvez Saroya said to be a Director of the plaintiff. The application is opposed and there is a replying affidavit sworn by one Kaburu A.P Ikiungu said to be one of the Directors of the defendant.

Both learned counsel have filed written submissions and cited some authorities which I have noted. The thrust of the defendant's opposition to the application is that, the issues raised in the application are res judicata and that the application is an abuse of the court process. It is also submitted that the cause of action being raised in the amended pleading is statute barred.

It is a generally accepted principle that, 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 compensated by costs. See Eastern Bakery – vs – Castelino (1958) E.A 461

The other accepted principles are that, a party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided;

1. There has been no undue delay
2. No new or inconsistent cause of action was introduced.
3. No vested interest or accrued legal right was affected; and
4. The amendment could be allowed without injustice to the other side. See Central Kenya Limited – vs – Trust Bank Limited (2000) 2 E.A 365

By an application dated 7th August, 2007 the plaintiff sought leave to enjoin the Commissioner of Lands and the Lands Registrar. It also sought an order that, subsequent to the granting of such a prayer leave be granted to amend its defence in terms of the amended plaint and that the said draft amended plaint be deemed to be properly filed and served upon payment of requisite filing fees.

It is clear that, the previous application cannot be said to be the same as the present application and the submission of res judicata cannot be invoked. It is also trite law going by decided cases that, the issue of limitation is now a triable issue and cannot be raised as a preliminary point in opposing this application.

Order XVIA Rule 3(1) of the Civil Procedure Rules provides inter alia that, the court may at any stage of the proceedings on such terms as to costs or otherwise as may be just, and in such manner as it may direct, allow any party to amend his pleadings. It is clear that the court has a wide discretion under the said rule but I bear in mind that the said discretion should be exercised with due regard to the interests of all parties to the dispute.

Going by the observations I have stated above, and considering that no prejudice has been alleged shall befall the defendant if the order sought is granted, I am inclined to allow the application as sought by the plaintiff. I am fortified in so holding by the provisions of Section 1A of the Civil Procedure Acts as introduced by Act No.6 of 2009 which emphasizes the overriding objectives of the Act, that is, to facilitate the just, expeditious, proportionate and affordable resolution of civil dispute governed by the Act. Accordingly, leave is granted as prayed. The draft reply to defence and defence to counterclaim annexed to the application shall be deemed to be duly filed upon payment of the requisite fees within 7 days of today. Thereafter the same shall be served upon the defendant. The costs of this application shall however be paid by the plaintiff to the defendant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 28th day of September, 2010.

1. MBOGHOLI MSAGHA

JUDGE