

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

Civil Suit 2335 of 1997

MORTICHAND VIRPAL SHAH.....1ST PLAINTIFF

RAMJI VIRPAL SHAH.....2ND PLAINTIFF

DHARMESH KUMAR RAMJI

VIRPAL SHAH.....3RD PLAINTIFF

VERSUS

INVESTMENTS & MORTGAGES BANK LTD..... 1ST DEFENDANT

SHAH MOTORS LTD (IN RECEIVERSHIP).....2ND DEFENDANT

HARIT SHETH.....3RD DEFENDANT

RULING

Before me is an application by the plaintiffs made under the provisions of **Order VIA Rule 3, 5 and 8** of the **Civil Procedure Rules** seeking the leave of this court to amend their chamber summons dated 23rd December 2008 in terms of the draft amended chamber summons annexed to the affidavit of Gladys Mwangi, the advocate for the plaintiffs. The grounds in support of the application are stated on the face of the application. Essentially, the plaintiffs wishes to amend the said application so as to set out the correct rule under the **Advocates (Remuneration) Order** (i.e. **Rule 11(1) and (4)**) upon which they predicate their application. They further sought to amend a prayer in the application so as to bring forth the correct prayer as envisaged by the said rules.

At the hearing of the application, Miss Mwangi urged the court to allow the application pleading that the mistake was occasioned by counsel who instead of seeking extension of time to object to the order of taxation by the Deputy Registrar of the court, sought extension of time to file reference to the High Court from the taxation of the Deputy Registrar. Mr. Ngunjiri for the defendants opposed the application for amendment. He was of the view that the application to amend the original chamber summons did not cure the fatal flaws in the previous application. He submitted that the plaintiffs cannot seek extension of time to object to the taxation but rather they ought to have sought extension of time to seek reasons from the Deputy Registrar before lodging their objection to the High Court for the specific items which they would be objecting to. He submitted that objection to taxation envisages that an aggrieved party objects to a specific item in the bill presented to the Deputy Registrar to be taxed. In the circumstances, he submitted that the application for amendment would serve no purpose since the amendment sought would not cure the material defects that are apparent in the application presented in the court seeking to challenge the taxation by the said taxing officer.

I have considered the rival arguments presented to this court by learned counsel for the parties in this application. The plaintiffs seek to amend their application so as to bring it within the ambit of the law that they crave this court to exercise its discretion in their favour. It was clear that in the application dated 23rd December 2008, the plaintiffs obviously made an error when they sought leave of this court to “file a

reference against the taxation made by the Deputy Registrar of this court on 3rd December 2008 out of time". The plaintiffs were required to seek extension of time to enable them give notice in writing to the taxing officer of the court of the items of taxation that they were objecting to. In the present application, the plaintiffs have sought to amend the said application so that the prayer sought may read "*to extend time within which the applicants herein may object to the taxation made by the Deputy Registrar of this court on 3rd December 2008*".

Although Mr. Ngunjiri correctly submitted that the plaintiffs ought to have specifically applied for extension of time to give notice in writing to the taxing officer of the items of taxation to which they were objecting to, in my view the entire process that the plaintiffs wish to put in motion is the objection of the taxation of certain items in the defendants' bill of costs by the Deputy Registrar of this court. I am of the view that whereas the plaintiffs would have set out the said prayer in the amended chamber summons in clear terms than they did, this court is in no doubt that the plaintiffs have put the court in the picture of what they require the court to exercise discretion in their favour.

I agree with the submission made by Miss Mwangi that courts should freely allow parties to amend their pleadings provided that the opposing party will not suffer any prejudice, injustice or injury that cannot be compensated by an award of costs. I see no compelling reason for me to depart from this established practice of freely granting leave to a party to amend his pleadings. In the present application, it is clear that, without the proposed amendments, the application would be incompetent. I will therefore allow the plaintiffs' application dated 10th February 2009. The plaintiffs are granted leave to amend their application (*chamber summons*) dated 23rd December 2008 in terms of the draft amended chamber summons annexed to the affidavit of Gladys Mwangi sworn in support of the present application for amendment.

The said amended chamber summons should be filed and served within ten (10) days of today's date. The plaintiffs shall be at liberty to fix the said amended application for hearing, on priority basis, at the civil registry. The defendants shall, in any event, have the costs of the application.

DATED at NAIROBI this 29TH day of APRIL, 2009.

L. KIMARU

JUDGE