



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

**Civil Suit 588 of 2004**

**ELECTRO RESEARCH LIMITED.....PLAINTIFF**

**VERSUS**

**MERI MIZRAHI.....1<sup>ST</sup> DEFENDANT**

**DEDAN GICHURU.....2<sup>ND</sup> DEFENDANT**

**AHARON SHVARTZ.....3<sup>RD</sup> DEFENDANT**

**MONIER INTERNATIONAL LTD.....4<sup>TH</sup> DEFENDANT**

**MONIER HOLDINGS LTD.....5<sup>TH</sup> DEFENDANT**

**MONIER 2000 LTD.....6<sup>TH</sup> DEFENDANT**

**RULING**

Before me is the plaintiff's chamber summons dated 30<sup>th</sup> March 2009 purportedly made under provisions of **Order VIA Rules 3, 5 and 8** of the **Civil Procedure Rules** and **Sections 3A and 100** of the **Civil Procedure Act** by which the plaintiff seeks the court's orders to be granted leave to further amend and file a further amended plaint in terms of the proposed draft further amended plaint annexed to the affidavit in support of the application. The grounds in support of the summons are stated on the face of the application. The application is supported by the annexed affidavit of M. Billing, the advocate for the plaintiff. He states that after taking over from the previous advocate for the plaintiff, and upon conducting pre-trial conference with the plaintiff, he discovered that there was necessity to plead particulars of breach of trust as well as particulars of fraud as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He stated that the further amendments are sought in order to enable the plaintiff set out the real issue in controversy between the parties herein and for the conclusive determination by the court of the said issues or its merits. He was of the view that the defendants will not be occasioned any prejudice if the amendment sought is granted.

The application is opposed. Nelson Havi, the advocate for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> defendants filed a replying affidavit in opposition to the application. He raised several issues, which, in his opinion, should persuade the court not to allow the plaintiff to further amend its further amended plaint. He states that if the application is allowed, it would introduce new causes of action for breach of trust and fraud as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and will therefore have the effect of taking away and defeating the defence which had accrued to the said defendants. He deponed that the issues sought to be raised by the said proposed amendments were time barred. He further deponed that the plaintiff should be allowed to amend its pleadings in light of the fact that it had been dissolved by the Registrar of Companies. In a similar fashion, he noted that the suit against the 5<sup>th</sup> defendant was unsustainable in view of its dissolutions by the same Registrar of Companies. He deponed that the plaintiff had failed to establish sufficient ground to enable the court exercise its discretion to allow the plaintiff further amend the said amended plaint. He urged the court to dismiss the application with costs.

At the hearing of the application, I heard rival submissions made by Mr. Billing for the plaintiff and Mr. Havi for the defendants. I have considered the said arguments. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by the court is whether the plaintiff established sufficient grounds to entitle the court grant it leave to further amend its amended plaint. **Under Order VIA Rule 5 of the Civil Procedure Rules**, this court has discretion to allow any party to amend his pleading to enable the determination of the real issues in controversy or the correcting any defect or error in the proceedings. The court may allow such party to amend his pleadings subject to the overall interest of justice being served. It is trite that the court should freely allow parties to a suit to amend their pleadings before the conclusion of the hearing of the case provided no prejudice will be suffered by the opposing party.

It was apparent to the court that the mentioned defendants opposed the plaintiff's application to further amend its amended plaint on grounds that were basically technical. Having evaluated the grounds advanced in opposition to the application, this court is of the view that the very same reasons were argued, considered and dismissed by Lesiit J when she ruled on the said defendants' application which sought to strike out the plaintiff's suit. It appears that the said defendants are having a second go at the court with a view to advancing the same arguments that were previously considered by the court. I was not persuaded by the defendant's argument that to the effect that if leave to amend is granted, it would deprive them of their defence. Nothing can be further from the truth. The said defendants' defence will not be defeated by the mere fact that the plaintiff has been allowed to further amend its amended defence. The defendants will obviously be at liberty to respond to the allegations made against them by the plaintiff in the further amended plaint. Their defence will infact be reinforced by being given an opportunity to further respond to the issues raised by the plaintiff. If the said defendants are sufficiently aggrieved, they are at liberty to file an appropriate application to secure the striking out of the pleadings filed by the plaintiff as disclosed in the further amended plaint.

It is clear from the foregoing that the plaintiff's application is merited and is hereby allowed. The plaintiff is granted leave to amend its further amended plaint in terms of the proposed further amended plaint annexed to the affidavit sworn in support of the application. The plaintiff shall file and serve the said further amended plaint within fourteen (14) days of today's date. The defendants shall be at liberty to file and serve a response to the further amended plaint within fourteen (14) days after service. The costs of the application shall be paid to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in any event. It is so ordered

**DATED at NAIROBI this 29<sup>th</sup> day of JULY 2009.**

**L. KIMARU**

**JUDGE**