

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 1535 OF 2007

MALVA CONSTRUCTION LIMITED PLAINTIFF

VERSUS

EABS BANK LIMITED DEFENDANT

RULING

The plaintiff/applicant in the Chamber Summons dated 29th April 2009, applied for leave to substitute the name of the defendant from **East Africa Building Society Bank Limited** to **Eco Bank Kenya Limited**. This application is brought under several provisions of the law including order 1 Rule 10 of the Civil Procedure Rules. The application is premised on the grounds stipulated on the body thereto and matters deposed to in the supporting affidavit by **Mr. Billing**, counsel for the plaintiff/applicant.

The gist of this application is the amendment sought by the applicant is necessary for determination of the real issues in controversy between the applicant and the respondent. Secondly, the respondent will not suffer any prejudice or hardship as a result of the amendment. The amendment is meant to clarify the position because the respondent East African Building Society changed its name on or about 16th June 2008 and henceforth became known as Eco Bank Kenya Limited by virtue of gazette notice dated 20th June 2008. **Eco Bank Kenya limited** took over all the assets and liabilities of **EABS Bank Limited** As at the time the suit was filed, the respondent's name was correctly cited but since the respondent changed its name, it is necessary to amend the pleadings to reflect the correct respondent for the just adjudication and determination of the dispute before the court.

This application was opposed by the respondent, Mr. Nagpal, Counsel for the respondent relied on the replying affidavit by **Mr. D.B. Mehta** sworn on 15th June 2009. The opposition is based on technical points of law. Principally counsel for the respondent challenged references to the various sections of the law which have nothing to do with this application. Secondly, no explanation is given why the application is brought ten months later, from the date of the publication of the gazette notice announcing the change of the respondent's names. Thirdly, the supporting affidavit sworn by Mr. Billing was also faulted for not complying with the provisions of the Oaths and Statutory Declaration Act, which provides that all affidavits should be securely sealed under the seal of the Commissioner for oaths and marked with seal letter of identification.

The annexure according to Mr. Nagpal are not commissioned by the commissioner for oaths, he argued that the supporting affidavit is defective. For this proposition he cited the case of **West Kenya Sugar Company Limited v Panachand Jivraj Shah & Others** where **Otieno J** (as he then was) held that once an affidavit is struck out it goes out together with its annexure as the provisions of section 5 of the Oaths and Statutory Declaration Act are couched in mandatory terms that is, the place where the affidavit was made must be stated in the **jurat's** for the affidavit to be valid.

The above is the background information and the summary of the rival arguments of this application that seeks for an amendment to substitute a party. The law regarding this kind of an amendment is provided for under order 1 Rule 10 of the Civil Procedure Rules, which provides as follows;-

“where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.”

I am of the humble view that the above provisions would also apply in case where the suit is filed against the wrong defendant. After all under order 1 rule 9, misjoinder or non joinder of a party cannot be a reason for a suit to be dismissed. The court is enjoined to deal with the matters in controversy so far as regards the rights and interests of the parties who are before the court. Coming to the objections raised in this application, it was faulted for relying on several irrelevant provisions of the law. Nothing turns on this point because the applicant merely cited several provisions which give the court inherent powers and jurisdiction to do justice.

The other matter to consider is, there is no dispute that the respondent changed its name as evidenced by the gazette notice, a fact that is also admitted in the replying affidavit by Mr. D.B. Mehta. That being the case, how else would the court determine the matters in controversy if the correct party is not substituted. On the issue raised regarding the supporting affidavit and the annexure thereto, I find all the annexure were marked as **RBI as one bundle** and then paginated from page 1 to 24. I am not persuaded that this contravenes the provisions of Oaths and Statutory Declaration Act.

In the upshot the respondent admitted they changed their names to Eco Bank Limited, it is in the interest of justice that the correct party be substituted so that the issues in controversy as envisaged under order 1 r9 can be determined. Moreover this application will not occasion any prejudice or hardship to the respondent. The application is allowed the respondent will have the costs. The applicant to amend the pleadings within 7 days.

RULING READ AND SIGNED AT NAIROBI THIS 17TH DAY OF JULY 2009.

M.K. KOOME

JUDGE