



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 323 of 2007**

FOUR NINETY INVESTMENTS LTD. PLAINTIFF

VERSUS

ANTHONY AMBAKA KEGODE 1ST DEFENDANT

ELIZABETH ANN KEGODE 2ND DEFENDANT

UHAI LIMITED3RD DEFENDANT

R U L I N G

Application dated 18/6/2009 which is brought under **Order VIA Rule 3 (1), VI Rule 5, XXV Rule 1, 4 and 6, Section 3A, 27 of Civil Procedure Act and Section 301, Companies Act.** The orders sought are:-

- 1. Leave to amend defence and counter-claim;**
- 2. Plaintiff do furnish security to the tune of Kshs.4.5 million;**
- 3. Costs of the application.**

The grounds for prayer 1 are that the applicants filed defence to

this suit on 10/8/2007 and a reply was subsequently filed on 21/8/2007. The applicants instructed their advocates to apply to strike out the suit herein for reasons stated in the defence. On 12/2/2008 this court allowed this suit to proceed to full hearing hence the desire by applicants to amend their defence to include counter-claim.

On the issue of an order for security, it is alleged that the plaintiff company has no known assets and will be unable to pay defendants' costs should the defendant succeed. The plaintiff company fraudulently acquired EASA which was placed under receivership and has remained in receivership for 4 years. The only known director of the plaintiff company is a foreigner.

The application is supported by one Anthony Ambaka Kegode, the first defendant applicant and director of third defendant company. He swears that the applicant proposes to amend the defence as in draft annexed. The application is opposed by the plaintiff who relied on the Mulla Code of Civil Procedure at page 1836 – **Order 6 Rule 17** where it is stated that leave to amend may be refused:-

- (i) Where the amendment is not necessary for purpose of determining the real questions in controversy;**

- (ii) *Where the plaintiff's suit would be wholly displaced by the proposed amendment;*
- (iii) *Where the effect is to take any from the defendant a legal right which has accrued to him by lapse of time;*
- (iv) *Where the amendment would introduce a totally different new and inconsistent case at a late stage of the proceedings.*

In the present case the amendment is to include a counter-claim by the defendants. Mr. Angarwa has also cited some authorities:-

1. **Central Kenya Ltd. vs. Trust Bank Ltd.** Where it was held that:

“The amendment of pleadings and joinders of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his action”

Therefore amendments should be freely allowed at any stage of the pleadings.

2. Authority in **Missina & another vs. Stallion Insurance Co. Ltd.**

This matter was regarding order for security. The court stated that:-

“The principle of poverty does not apply to a limited company. While the law rarely requires an individual plaintiff to give security for costs on the grounds of insolvency or poverty, the position is exactly reversed in the case of a company under Act. The court however retains its complete discretion to order security for costs.”

Reply plaintiff submits that it will be deprived of defence under limitation general damages must be particularized, they introduce matters not relevant. Pleading is embarrassing, inconsistent with pleadings. Application is filed in bad faith and with delay. The matter should be dismissed.

On issue of costs there is no material before the court and the fact that a party is a foreigner is not relevant.

On consideration of submissions by both parties, it does the proposed amendments to the statement paragraph 3 thereof it is proposed to strike out some matters now not relevant and paragraph 5 and paragraph 25.

The applicant proceeds to introduce a counter-claim. A counter-claim is a counter suit and when it arises between the same parties and from the same facts the filing of the same prevents multiplicity of suits. In this counter-claim there is a claim against the plaintiff and its director, the now first defendant in counter-claim where fraud is alleged and misrepresentation and several prayers for declarations and general damages are made, these are not amendments but statement of claims for the counter-claim.

On the issue of delay the defence was filed in August 2007. There have been activities in between. On 30/5/2008 there was a ruling made. On 12/2/2008 there was a ruling by Hon. Okwengu, J. I do not hold that there has been unreasonable delay. On the issue of security it appears the company is registered in the country and although the director is a British citizen, it is said he resides in Kenya. However, the director cannot ordinarily be held liable for his company's debts.

There is evidence that the company is carrying on business in Kenya and therefore the fact that one director is a foreigner is not adequate reason to grant security order. I decline the order.

The upshot is that leave to amend the defence in terms proposed in the draft is granted. The draft shall be deemed filed if the filing fees is paid within the next 7 days from today.

Costs shall be to the applicant.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 9th day of October 2009.

JOYCE N. KHAMINWA

JUDGE