REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 594 of 2009

IQUIP LIMITED …….. PLAINTIFF

VERSUS

THE EAST AFRICAN MARINE SYSTEMS LIMITED …… DEFENDANT

RULING

The plaintiff instituted this suit simultaneously with the chamber summons dated 19th August 2009. This suit was brought under certificate of urgency and an interim orders of injunction was issued on 14th August 2009 in order to preserve the status quo in the following terms :-

"***That an interim injunction be and is hereby issued against the Defendant prohibiting it from parting possession with, allotting or otherwise alienating 62 shares reserved for the Plaintiff under the Share Subscription and Loan Agreement in The East African Marine Systems Limited to any party other than the Plaintiff pending directions on this application by the Duty Judge, Milimani Commercial Courts on 17th August 2009".***

This Application has subsequently come up for hearing but both counsel for the plaintiff and defendant requested to take it out in order to negotiate an out of court settlement. Eventually on 29th October 2009, the parties informed the court that the negotiations had failed therefore they intended to proceed with the hearing of the application. Soon thereafter counsel for the plaintiff filed notice of motion seeking for leave to amend the chamber summons and add a new prayer 4 (A) as indicated in the proposed draft amendment.

The main thrust of this matter is that there should be interim orders pending the matter being referred to arbitration. The interim order is meant to preserve the status quo. The amendments sought were necessitated by events that took place since the matter was filed. There is justifiable risk that unless the application is amended the plaintiff will suffer and continue to suffer irreparable loss which cannot be compensated by damages, but even more importantly the entire suit by the plaintiff will be rendered nugatory.

This application was opposed by counsel for the respondent; M/s Dar argued that the application is bad in law because it is not brought within the provisions of order 6(A) of the CPR which deals with amendments. Counsel made reference to the Court of Appeal decision in the case **of Board of Governors Nairobi School vs. Getah 1999 LLRRL 4130 (CAK)**. In that decision, the Court of Appeal held that chamber summons is not a pleading within the meaning of the term as used in the Civil Procedure Act and the rules there under. The opinion of the Court of Appeal was that "Pleading" is defined in section 2 of the Civil Procedure Act as follows:-

"***. . . includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant"***

There seems to be divided opinion because in the case of E**charia vs Echaria [1997] LLR 2532 (CAK)** a five Judge Bench of the same Court held that a defect in a notice of motion can be curable by an amendment. Counsel for the applicant was given leave to amend the notice of motion.

The whole purpose of amending pleadings, apart from curing a defect is also to bring out all the issues in controversy for their determination. I do not see why an applicant should be denied leave to amend pleadings by whatever form unless if the application is not made in good faith, for example the application is meant to delay the cause of justice. This leave can be granted by the court within the inherent powers vested by dint of section 3(a) of the Civil Procedure Act. Ordinarily even within the general provisions of the civil procedure, the court is granted powers to allow even an oral application for amendment or even on its own motion or an application by any other party the court can order any document to be amended.

I do not see any prejudice that the defendants will be caused by the amendments sought herein. The plaintiff contends and I have no reason to doubt after reading the proposed intended amendments that they are meant to bring all the matters in controversy for determination by the court. It is further contended that if the amendment is not allowed the whole suit by the plaintiff will be rendered nugatory. There is a great deal of jurisprudence where the High court and the Court of Appeal has allowed amendments to cure defects in the pleadings including chamber summons and emphasized that the rules of procedure are handmaidens of the court and should not be converted into the fetish of mistresses of justice. I share this view and find no plausible prejudice that will be caused to the defendant apart from delay and costs for this application which in any event I award to the respondent.

Accordingly, I grant leave to the applicant to amend the chamber summons and serve upon the respondent within 7 days; the respondent will also be at liberty to file a replying affidavit within 7 days of service. It is so ordered.

RULING READ AND SIGNED ON 10TH NOVEMBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE