REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

CIVIL CASE NO. 443 OF 2003

B W K :: PLAINTIFF

VERSUS

E K ::DEFENDANT

RULING

The Plaintiff's first Plaint on record is dated 13th May 2003 and filed on 14th May 2003. the Court has not traced an amended plaint on the record or an order allowing the said amendment. But has traced an order made on 22.6.04 allowing the defence to amend their defence. On 6.7.04 there is an entry for the filing of a re-amended plaint.

The plaintiff has come to this Court once again vide an application by way of Chamber Summons dated 3rd day of July, 2007 and filed on 4th July 2007. It is brought under Order VI A rules 13, sub rules 1, 2 and 5 Civil Procedure Rules and all enabling provisions of the law. It seeks the following orders:-

(1) That leave be granted to the Plaintiff/Applicant to further amend the Re-amended plaint as per the draft further amended plaint annexed herewith.

(2) That the Further Re-Amended Plaint be deemed duty filed upon payment of the requisite court fees.

(3) That the cost of this application be costs in the cause.

The grounds are set out in the body of the application supporting affidavit written skeleton arguments and case law. The major ones are that:-

(1) The Plaintiff filed her suit herein against the defendants raising complaints contained therein which plaint was amended on 4th day of July 2003 and on 5th July, 2003.

(2) That she is now desirous of Further Reamending the said Re-amended plaint to further plead more particulars of sexual harassment which are necessary to be included, which further-re-amendment is necessary to enable the court dispense with all the issues arising from the said transactions/set of facts once and for all.

(3) They wish to tap on the courts immense power to allow amendment.

(4) They contend there has been no inordinate delay in presenting the application for further re-amending of the plaint.

(5) They contend the proposed further Re-amendment will not prejudice the defendants in any manner.

(6) Instead it is the plaintiff who will suffer irreparable loss and damage if she is not allowed to amend her plaint to include further particulars of assault, battery, and sexual harassment that will assist this Honourable Court in conclusively determining the issues at hand.

(7) Amendment can be done at any stage of the proceedings for purposes of bringing into the case the real issues in controversy between the parties and the defendants will not be prejudiced beyond what can be remedied by payment of costs.

(8) This is an opportune time to further-re-amend as neither party has tendered evidence and as such each side will have an opportunity to adduce evidence in respect to the same.

(9) They maintain they are within the applicable principles of law and are therefore entitled to the relief's being sought.

On case law the court was urged to be guided by the decisions in NBI HCCC NO. 1811 of 1999 **BLUE SHIELD INSURANCE COMPANY LIMITED VERSUS RICHARD MBONDO, DUBAI BANK KENYA LTD VERSUS COME CONS AFRICA LTD NBI HCCC NO. 68 OF 2003 AND NAIROBI HCCC NO. 2002 OF 2000, J.P. MACHARIA VERSUS WACHIRA WAIRURU AND ANTOHER.** The Court has perused all of them and noted them. But for purposes of the record the court would like to borrow the observations of Aaron G. Ringera J. as he then was in the Blue Shield Insurance company case (supra) at page 4 of the ruling line 5 from the bottom where it is stated. *"It is never too late to make an amendment as long as no injustice is occasioned. Amendments can be sought and granted even in the cause of the trial itself. Secondly the defendants have not shown they would suffer a prejudice which cannot be compensated in costs. Even if it were necessary to start the case a new, the most prejudice the defendants would suffer is inconvenience, delay and expense. That prejudice could be compensated by awarding the defendants all the thrown away costs for it is not shown that the evidence could not be re-assembled without unnecessary delay or expense which the court would regard as unreasonable in all the circumstances of the case."*

The 1st defendant has opposed the application on the ground that the application is incompetent and an abuse of the due process of the law. Where as the second defendant put forward 6 grounds of opposition namely:

(1) Application is incompetent, bad in law and misconceived.

(2) Verifying affidavit accompanying the Further re-amended plaint is baseless, superfluous, and vexatious and there is no provision in law for filing it and it should be struck out.

(3) Particulars of sexual harassment to be introduced are repetitive of what has already been pleaded in the Plaintiffs re-amended plaint dated 5th July 2005.

(4) Plaintiff/applicant has already been allowed to amend her plaint twice and the 3rd amendment now sought is frivolous and an outright abuse of the court process.

(5) It has been brought in bad faith as it is intended to defeat the 2nd defendants preliminary objection dated 9th March 2007.

(6) The application is unsuitable.

1st defendant filed no written skeleton arguments. The 2nd defendant did and the points raised are:-

(1) A right to re-amend the plaint does not go hand in hand with a right to amend the verifying

affidavit and for this reason the court is urged to strike out the accompanying verifying affidavit.

(2) The request to re-amend is not merited as what is sought to be introduced in paragraph 5 (m) (n) (e) and (d) are repeatative of what has already been pleaded in items (c) (j) (i) and (f). On this account they are immaterial, useless and merely technical and they should be disallowed.

(3) The proposed amendments are belated, the applicant is already a beneficiary of two previous amendments. What is sought to be introduced has all along been within the knowledge of the applicant and no reasonable explanation has been given as to why these were not introduced in the first two amendments.

(4) It is their stand that to ask the Court for a further re-amendment especially when nothing new is being introduced is a blatant abuse of due process of the Court and the same should not be allowed.

On case law the court was referred to the case of **DAVID JONATHAN GRANTHARM AND ANOTHER VERSUS NATIONAL SOCIAL SECURITY FUND NAIROBU MILIMANI COMMERCIAL COURT CASE NO. 630 OF 2004** where in L. Njagi J. in a ruling delivered on 14th day of April 2005 on an application for an amendment allowed the request for amendment but struck out an accompanying verifying affidavit because order VII rule 2 and3 do not require an amended or re-amended plaint to be accompanied by a verifying affidavit.

The case of JOSEPH OCHIENG, PHILIP KAFUANDE AND HENRY HEGGA TRADIGN AS ACQUILINE AGENCIES VERSUS FIRST NATIONAL BANK OF CHICAGO NAIROBI CA 149 OF 1991 SHAH JA as he then was (now rtd.) set out the principles governing amendments at pages 5-6 of the judgment. These are:-

(i) powers of the Court to allow amendments is to determine the true substantive, merits of the case.

(ii) These should be timeously applied for.

(iii) This power can be exercised at any stage of the proceedings inclusive of the appellate stage.

(iv) However late the amend merit, sought to be made, it should be allowed if the same is made in good faith provided costs can compensate the other side.

(v) The exact nature and extend of the amendment should be formulated and be submitted to the other side and the court.

(vi) If the court is not satisfied as to the substantiality of the proposed amendment the same should be dis allowed.

(vii) The court has to ensure that the proposed amendment must not be immaterial or useless or merely technical.

(viii) An amendment which will leave the claim un supportable should be disallowed.

(ix) If the proposed amendment introduces a new case or new ground of defence it can be allowed in case it would change the action into one of substantially different character which could more conveniently be made the subject of a fresh action.

(x) Amendment should be declined where the defendant is likely to be deprived of his right to claim limitation of action.

In addition to the foregoing the Court also refers to the case of **EASTERN BAKERY VERSUS CASTELINO [1958] E.A. 461** in which the Court of Appeal held inter alia that amendment to pleadings brought before the hearing should be freely allowed if they can be made without injustice to the other side

and there is no injustice if the other side can be compensated by costs.

The courts assessment of the facts herein is that there is no dispute that the plaintiff moved to this court vide a plaint dated 13th day of May 2003. The said plaint was amended on 4th day of July 2004 and then re-amended on the 5th day of July 2004. The application subject of this ruling is to seek leave of this court to further reamend the said plaint.

As set out earlier in this ruling it is her stand that both the provisions of the law under which the request has been presented to this court as well as case law on the subject both from courts of concurrent jurisdiction and the Court of Appeal are all in agreement that she is entitled to the relief sought and that this court has jurisdiction to grant the same.

The application is brought under Order VIA rules 3 sub rules 1,2 and 5 Civil Procedure rules. The operative words in each sub rule are:-

> Sub rule 1 - "*The court may at any stage of the proceedings on such terms as to costs or otherwise as may be just and in such a manner as it may direct, allow any party to amend his pleadings*.
>
> *Sub rule 2 - "If request to amend is made after any period of limitation, the court may nevertheless grant such leave, if it thinks just to do.*
>
> *Sub rule 5 – An amendment may be allowed notwithstanding that its effect will be to add or to substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment. (emphasis added)*

These principles have been restated in case law cited. All these point to the following.

> **(1)** There is jurisdiction to allow an amendment at any stage of the proceedings.
>
> **(2)** The move should be intended to bring out the real issues in controversy in order to enable the court finally determine the issues in controversy as between the parties.
>
> **(3)** In doing so the court will be exercising a judicial discretion and like all other aspects where the court is called upon to exercise its discretion, the same is expected to be exercised judiciously in the interests of justice to litigants.

Applying these to the applicant's request, it is clear that it matters not that the applicant has come to this court seeking to have a 3rd bite as far as amendment of the pleading is concerned. Irrespective of the numbers, the court has jurisdiction to allow the same if Justice so demands.

It is the applicant's stand that what she seeks to introduce will not prejudice the defence since the hearing has not yet started, it will not substantially alter the claim.

From the grounds put forward, the 2nd defendant attacked the annexing of the verifying affidavit and secondly that the introduction of what is sought to be introduced is unnecessary as the same is merely repeatative. This court has given due consideration to both arguments. As regards the filing of the verifying affidavit I agree with the respondent's contention that the rules do not provide for this. A verifying affidavit as a process is introduced by Order VII rule 1(2) which provides "*The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint"*. Sub rule 3 provides "*The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub rule (2) above.* There is no requirement that the verifying affidavit has to accompany the plaint as and when amended. For this reason this court agrees with the reasoning of L. Njagi J. in the DAVID JONATHEN GRANTHAM CASE (SUPRA) that where such a move is made the affected verifying affidavit is a proper candidate for

striking out.

This court has had occasion to peruse the verifying affidavit accompanying the intended further re-amended plaint and the one that accompanied the original plaint and find that they are similar in all material particulars save that in the place of the "*plaint*" it is inserted "*further re-amended plaint*". It therefore follows that striking it out will not occasion any injustice to the plaintiff as the original verifying affidavit is by law deemed to verify all the subsequent amendments.

As regards repetition of the new items being introduced this court has read the new item (m) (n) (o) and (q) and compared them each with each of items (c) (j) (i) and (f) and find that with the exception of a few additional words item (m) can match with (c) while item (p) can match with item (f). However the near similarities not withstanding the court finds no prejudice in the said items being left to stand as presented. The court is of the opinion that no prejudice will be suffered by the opposite party. If left intact more so when there is room for the defence to respond to the same if they so wish.

For the reasons given the court makes the following orders.

(1) The Plaintiff applicant has leave to further reamend the plaint in the manner shown.

(2) Though there is a prayer for the copy annexed to be treated as being duly filed, this is declined as the copy has been annexed as an annextures. The plaintiff is therefore to file another copy within 14 days from the date of the reading of this ruling.

(3) The filed copy to be served on the defendants within 14 days from the date of filing.

(4) The defendants each to have 14 days from the date of service upon them of the further re-amended plaint to amend their defences if they so deem fit.

(5) The verifying affidavit annexed to the further re-amended plaintiff annexed to the application is ordered to be struck out for the reasons given.

(6) The defendants will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 22nd DAY OF FEBRUARY 2008.

R.N. NAMBUYE

JUDGE