REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case148 of 2004

MEDITERRANEAN SHIPPING CO. S.A. …….. PLAINTIFF

- Versus -

KENYA PORTS AUTHORITY …… DEFENDANT

R U L I N G

The defendant herein seeks leave to amend its defence in terms of the draft amended defence annexed to the application. It also applies for orders that the draft amended defence exhibited in the application be deemed as having been duly filed and served on the plaintiff.

The application is brought by a chamber summons dated 30th August, 2006, and taken out under Order VIA rules 3 & 8; Order VIII rule 1 of the Civil Procedure Rules; and Section 3A of the Civil Procedure Act. It is supported by the annexed affidavit of Raha Mwambela Jillo, the defendant's legal officer and is based on the ground that at the time of filing the defence, the defendant had not received particulars of the pleadings filed by the plaintiff, neither had it received survey reports and other documents necessary for preparing a reasonably comprehensive defence. The second ground is that the proposed grounds will provide the defendant with a strong defence to the plaint and that it is in the interests of justice to permit the proposed amendments.

During the oral canvassing of the application, Mr. Noorani appeared for the defendant/applicant while Mr. Ouma appeared for the plaintiff/respondent. Citing EASTERN BAKERY v. CASTELINO [1958] E.A. 461, Mr. Noorani argued that amendments should be freely allowed if they don't cause injustice, and there is no injustice if the other side can be compensated by costs. There is no dispute that the suit has not yet gone to hearing, and the amendment sought to be introduced is a plea of a statutory legal basis which favours the defendant while determining whether the defendant is liable to compensate the plaintiff or not. The replying affidavit does not explain the nature and extent of any prejudice to be suffered. Mr. Noorani then submitted that any such prejudice can be compensated by costs.

Responding to these submissions, Mr. Ouma opposed the application and relied on the replying affidavit. He submitted that the wide discretion of the court to allow amendments should not be a blank cheque, and that the intended amendments are being sought belatedly whereas they should have been brought within a reasonable time. He submitted that what the defendants are seeking to introduce was in existence since 1970 and therefore they have not been diligent. Referring to EASTERN BAKERY v. CASTELINO (supra), Mr. Ouma submitted that on amendment may be declined. He also submitted that in this matter the plaintiff may be prejudiced and that the defendants are not bringing the amendment in good faith. He further argued that the Eastern African Railways & Harbours Regulations, 1970, were

made under a statute which is non existent and urged the court to disallow the application.

In reply, Mr. Noorani said that in the grounds in the chamber summons there is an explanation why it took the defendant that long to come to court. He then submitted that whether the East African Railways & Harbours still exists is a matter to be addressed after the defence has been amended, and for that matter in the arguments after the hearing. He reiterated that Mr. Ouma had not explained what prejudice his client will suffer, and submitted that the defendant cannot be denied a right to put forward a defence in good faith.

After considering the application and the submissions of counsel, I find it pragmatic to commence by reference to EASTERN BAKERY v. CASTELINO (supra) which both counsel referred to. In that case, Sir Kenneth O'Cannor reviewed the previous cases and summarized the principles which would act as beacons in guiding the court in granting or refusing amendments to pleadings. He stated as follows –

"It will be sufficient … to say that amendments to pleadings sought 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 court will not refuse to allow an amendment simply because it introduces a new case … But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit. The court will refuse to amend where the amendment would change the action into one of a substantially different character; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side."

In this matter, we are dealing with a case which is still at the pre-trial stage at which, prima facie, amendments ought to be freely allowed if they can be made without causing injustice to the other side.

In the 12th Edition of their book on Precedents of Pleadings at page 130, Bullen and Leake and Jacob give an overview of the primary considerations which come into play in determining whether to allow or disallow amendments. They say –

"The circumstances in which amendments of pleadings may be sought are infinitely various … Each case must be decided having regard to all the surrounding circumstances of the particular case … the first and in a way the paramount consideration is whether the application for leave to amend is made in good faith. For this purpose, good faith means that the amendment is sought for the purpose of raising the real question in controversy between the parties, and is not dishonest or intended to overreach the opposite party, or made for any ulterior motive and relies on facts which are substantially true and germane to the matters in controversy between the parties …"

The above observations reduce the jurisprudence of amendments of pleadings to two main considerations i.e. whether an application for amendment is made in good faith and whether there is any undue delay in the making of the application.

In my view, it is improper to impute a bad motive in the absence of some very cogent evidence to support the imputation. Although Mr. Ouma alleged that the defendants were not bringing the amendment in good faith, there is no evidence in support of that allegation. The proposed amendment is intended to buttress the defendant's defences, and I am not able to read any mala fides into it.

As to whether there was delay or not in making the application, it is noteworthy that this case was filed in court in June, 2004. This application was itself filed on 30th August, 2006. This was slightly over two years after the filing of the suit. Given that nothing much had been done on the file, and that nearly two years after the filing of that application this case is far from ripe for hearing, I don't consider a two year delay as inordinate in those circumstances. In any event, the defendant explains in the grounds upon which the application is premised that at the time of filing the defence, the defendant had not received particulars of the pleadings filed by the plaintiff, nor had it received survey reports and other documents necessary to preparing a reasonably complete defence. For these reasons, I don't consider the delay as

unreasonable.

The upshot of the above considerations is that since the trial of this matter is yet to commence, and the plaintiff has not demonstrated what injustice it will suffer if the amendment is allowed, the application for leave to amend the defence is allowed as prayed. The draft amended defence annexed to the application shall be deemed as having been duly filed and served on the plaintiff upon payment of the requisite court fees. The defendant will pay the plaintiffs costs of this application in any event.

Orders accordingly.

Dated and delivered at Mombasa this 23rd day of May, 2008.

L. NJAGI

JUDGE