REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 122 of 2008

DALBIT PETROLEUM LIMITED…….....……..…PLAINTIFF

- VERSUS –

VICTORY CONSTRUCTION CO. LTD……DEFENDANT

R U L I N G

Order VIA Rule 5(1) of the **Civil Procedure Rules** grants this court discretion either on its motion or on application by any of the parties order any pleading amended in such a manner as it may direct and on such terms as to costs or otherwise as are just. The overriding principle is that the court should freely allow parties to amend their pleadings if it will enable the court to determine the real questions in controversy or if it is meant to correct any defect or error in the proceedings that does not go to the substance of the suit. In ***Central Kenya Limited vs. Trust Bank Limited [2002] 2EA 365*** at page 369, the Court of Appeal held that:

"*As we stated earlier the learned trial judge took issue with the length of the proposed amendments. In his view they were too long. Mere length of proposed amendments is not a ground for declining leave to amend. The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.*"

In ***Eastern Bakery vs Castelino [1958] EA 461***, the Court of Appeal of East Africa held at page 462 as follows:

"*It will be sufficient, for purposes of the present case, 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 that there is no injustice if the other side can be compensated by costs.*"

In ***Simonian vs Johar [1962] EA 336***, at page 343, Crawshaw J.A. who was delivering the leading opinion of the Court of Appeal in the case had this to say regarding amendments of pleadings, in circumstances where the respondent had complained that he would suffer injustice:

"*I fail to see what injustice could result to the respondents or any of them by allowing the amendments. The trial has not started. Amended pleadings in defence would be no more onerous than pleading to a new suit. Abortive pleadings to date can be compensated in costs. The mere fact that the plaintiff may succeed on the amended pleadings where he would have failed on the original pleadings is not an "injustice" to the defendants. As to convenience, it seems to me that there would be no greater convenience to the respondents in filing amended written statements of defence than in filing defences to*

a new suit."

In the present application, the defendant sought leave to amend its defence to include a counterclaim and a set-off in accordance with the draft amended defence, set-off and/or counterclaim annexed to the affidavit of Amritpal Singh Suri, a director of the defendant. The defendant, in the grounds in support of the application urged the court to grant it leave to amend its defence since at the time the original defence was filed, the director of the defendant who instructed counsel did not have all the particulars in respect of the plaintiff's claim. The defendant stated that the plaintiff would suffer no prejudice if the application to amend the defence is allowed. The defendant was of the view that for the determination of the real questions in controversy, it would necessary for the defendant to be granted the leave sought to amend its defence in accordance with the draft amended defence, set-off and/or counterclaim.

The application is opposed. The plaintiff filed a notice of preliminary objection to the application. It was the plaintiff's contention that the application was brought in bad faith since it was meant to forestall the hearing of an application for summary judgment which the plaintiff had listed for hearing on 9th July, 2008. The plaintiff argued that the proposed amendments intended to be made to the defence was frivolous and sham and would prejudice the plaintiff because it would deny the plaintiff an opportunity to be heard by the court on its said application. The plaintiff was of the view that the draft defence raised no issues capable of persuading this court to grant the defendant leave to amend its defence. At the hearing of the application, Mr. Ongwae for the plaintiff reiterated the grounds in the preliminary objection and further submitted that the affidavit sworn in support of the application was fatally defective since the deponent did not disclose upon whose authority he had sworn the affidavit. He was of the view that the said deponent should have disclosed the sources of his information. He further submitted that the person who should have sworn the affidavit in support of the application was the person who gave fresh instructions to the counsel for the defendant. On his part, Mr. Nyawara for the defendant insisted that the application before the court was meritorious and supported by a competent affidavit in support thereof. He urged the court to allow the application.

I have carefully considered the facts in issue in this application. As stated earlier in this ruling, this court has unfettered discretion to allow any party to amend his pleadings provided that, ordinarily, an application for such amendment is made before the hearing of the suit commences. In the present application, the plaintiff objects to the defendant's application on the grounds that, firstly the affidavit in support of the application was incompetent and secondly, that the application to amend the defence was made in bad faith since it was meant to forestall an earlier application for summary judgment which had been filed by the plaintiff. Are the reasons advanced by the plaintiff in opposition to the application for amendment tenable? I do not think so. Whether this court finds the affidavit in support of the application for amendment to be competent or not, does not bar this court from granting leave to the defendant to amend its defence as this court can on its own motion grant any party leave to amend their pleadings.

I think the raising of technicalities in a bid to defeat a legitimate application presented by a party in a suit to the court is a practice that is deprecated. Secondly, the ruling in respect of the application for amendment was made before the date for the plaintiff's application for summary judgment is scheduled to be heard. The plaintiff will thus not be prejudiced. In any event, any prejudice that the plaintiff will suffer will adequately be compensated by an award of costs. Further, whether the amendments to the defence will raise any triable issues, is a matter that will be determined by the court hearing the application for summary judgment. The plaintiff will have an opportunity to reply to the defence, set-off and/or counterclaim filed by the defendant.

In the premises therefore, I will allow the defendant's application dated 8th May, 2008. The defendant is granted leave to amend its defence so as to include the particulars of set-off and the counterclaim in accordance with the draft amended defence, set-off and/or counterclaim annexed to the affidavit in support of the application. The defendant shall file and serve the said amended defence with seven (7) days of today's date. The plaintiff shall be at liberty to file a reply to the amended defence within seven (7) days after service. The plaintiff shall have the costs of the application.

DATED at NAIROBI this 27th day of June, 2008.

L. KIMARU

JUDGE