



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 1981 of 2000**

**SUPREME SERVICE STATION LIMITED.....PLAINTIFF**

**VERSUS**

**AGIP KENYA LIMITED.....DEFENDANT**

**R U L I N G**

The application is a Chamber Summons dated 24<sup>th</sup> April, 2008 brought under the provisions of Order VIA Rule 3, 5 and 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In this application, leave is sought for the Plaintiff to amend the plaint in terms of the annexed amended plaint. The grounds of the application are that the amendments sought particularize the Plaintiff's claim as required and that the same are necessary to enable the court effectively determine the real issues in controversy.

The application is also supported by an affidavit sworn by JAMES MWAI KAMOTHO, a director of the Plaintiff Company dated 22<sup>nd</sup> May, 2003 and filed on 23<sup>rd</sup> May, 2003. The affidavit also annexes the draft amended plaint. I have considered the contents of the said affidavit.

The application is opposed. The Defendant filed grounds of opposition to the application on the 26<sup>th</sup> May, 2008 in which five grounds are set out as follows:

1. The Plaintiff has not offered any explanation to justify the making of the application very late in the day especially after the Plaintiff's main witness has completed her testimony;
2. No evidence in support of the proposed amendments has been put before the Court to enable the court determine whether the amendments are necessary at this stage or at all or why they were not included in the Amended Plaint filed on 29<sup>th</sup> January 2001;
3. There is no material placed before the Court to enable the Court exercise its discretion in favour of the Plaintiff;
4. The application has been made after inordinate and unexplained delay;
5. The Defendant is prejudiced by the proposed amendments made at this stage in the proceedings, after the joinder of issues, completion of discovery and testimony by the Plaintiff's main witness.

I have considered each of these grounds. The parties filed written submission to the Plaintiff's application, which they highlighted in court on 10<sup>th</sup> June, 2008.

I have carefully considered the rival submissions by the Advocates to the parties in this case. I must set out a little background of the facts of this case.

This suit was filed on the 7<sup>th</sup> November, 2000 when the Plaintiff filed its plaint in the matter. The substantive prayer in the plaint was for an order of declaration that the Plaintiff was entitled to at least one month's notice before its operator's license could be determined or alternatively an injunction restraining the Defendant from terminating the Plaintiff's operator's licence.

That plaint was amended and an amended plaint filed on 29<sup>th</sup> January, 2001. In the amended plaint, the Plaintiff sought a declaration that the Plaintiff is entitled to at least one month's notice by the Defendant before the Agreement can be determined. It also sought a mandatory injunction compelling the Defendant to restore the goods to the Plaintiff and general damages for breach of contract.

The Plaintiff now seeks to further amend the plaint in order to plead a claim for special damages and to particularize the special damages sought.

The application has been made after the Plaintiff called one of its two witnesses. The witness testified for a couple of days and was cross-examined at length. The second witness was waiting in the wing when this application was made.

The bone of contention in this application appears to me to be the time it took the plaintiff to make the application and the fact that in light of the amendment being sought to be made, the Defendant faces a substantial monetary claim which was not part of the Plaintiff's claim all along and that in the circumstances the Defendant will be prejudiced.

**Order VIA rule 3(1) of the Civil Procedure Rules** provides:

***“3.(1) Subject to Order 1, rules 9 and 10m, order XXIII rules 3, 4, 5 and d7 of the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”***

The power to allow amendments is discretionary and one that has to be exercised judiciously. The Defendant relies on the decision of **Bosire, J.** as he then was, in **Mowa Publishers Limited & Another vs. AG & Another [1991] KLR 46**, in paragraphs 3, 6, 7 and 8 the learned judge held:

***“3. Where the Court is moved by any of the litigants, the applicant must show either:***

***a) That the amendment sought is necessary for the purpose of determining the real question in controversy between the parties; or***

***b) That there is an error or defect in the proceeding which need to be corrected by the amendment sought.***

***6. Even when an application to amend pleadings is made at the right stage, the Court has a duty to ensure that it does not allow amendments to the prejudice of the opposite party.***

***7. In law, a litigant who brings an application for leave at a late stage, has a duty to the Court to show that the Court should exercise its discretion in his favour notwithstanding the delay.***

***8. The applicants in this case did not offer any explanation as to the reasons for the delay in presenting the application and they could not therefore expect the indulgence of the Court.”***

In addition the Defendant relies upon the case of **KYALO –V- BAYUSUF BROTHERS LTD. Civil Appeal No. 38 of 1983** where Madan, Law & Miller JJA held:

***“Applications for amendment of pleading should only be allowed if they are brought within a reasonable time because to allow a late amendment would amount to an abuse of the court process. In this case, the amendment came six years late.”***

These cases set out the tests to be applied to an application for amendment of the plaint.

I have considered this application and the amendments sought to be made vis-à-vis the amended plaint. Applying the principles set herein above I have formed the following view of the application. The Plaintiff had called a witness who was examined to completion. This witness did not give evidence touching on the special damages sought to be particularized in the amendment sought.

I have also considered that it is now over six years since the last amendment to the plaint. The Applicant has explained the reason for the delay in making the application which also served to show the necessity in making the amendments sought. It has been shown that since the amendment, certain facts of the case had changed which made the amendments necessary in order to bring out the real state of affairs and the real issues in controversy. It has also been shown that the amendment was necessary to particularize the Plaintiff’s claim as required to enable the court effectively determine the issues and that the amendment does not depart from the Plaintiff’s claim.

The power to allow amendment is discretionary as provided under **Order VIA rule 3(1)** of the Civil Procedure Rules which provides thus:

***“3.(1) Subject to order 1, rules 9 and 10, order XXIII rules 3, 4, 5 and 7 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just in such manner as it may direct, allow any party to amend his pleadings.”***

Amendment could be made before or in the course of trial. However the Applicant must not act *mala fide* nor use the amendment to abuse the court process. On the other hand, the amendment should not cause injury or damage to the Respondent, which cannot be compensated by an award of costs.

Having considered the amended plaint and the draft further amended plaint, I find the amendment sought is necessary. At the time of the initial amendment of the plaint, the Defendant’s were holding the Plaintiff’s goods. The special damages pleaded in the draft further amended plaint include the loss of the goods seized including loss of both stock and capital investments. Others include staff payments made upon termination of the Plaintiff’s license and liquidation of shares as a result of realization of security consequent upon the loss of the Plaintiff’s business. Not all these damages pleaded as special damages were foreseeable at the time of the initial amendment of the plaint. Some of the special damages being sought to be pleaded arose after the first amendment to the plaint and could not reasonably have been foreseen by the Plaintiff. For those the Plaintiff could have foreseen include the ones involving payment of salaries resulting from the termination of the Plaintiff’s licence. Whether foreseeable or not, I am satisfied that the amendment is necessary to bring out the real issues in controversy and also to enable the Plaintiff particularize its claim as a special damage, as opposed to the earlier pleaded claim of general damages for breach of contract.

Is the Defendant prejudiced by the proposed amendment in a manner an award of damages would not adequately compensate it? Considering that the amendment was necessary to enable the Plaintiff put forward its claim clearly, in order to enable the court better adjudicate on the real issue in controversy, and considering the amendment did not materially depart from the Plaintiff’s original claim, I see no prejudice or injury which the Defendant will suffer if the application is allowed. I have considered the Defendant’s submission that the amendment introduces a special damages claim of a colossal amount of money, which in its view, was within the contemplation of the Plaintiff since the institution of the suit. I agree that the amendment was made late. However, it was made in the course of the trial. In fact, it is being sought before the Plaintiff closes its case. The Defendant will still have an opportunity to amend its

defence and also to adduce evidence thereon and submissions thereon. I am also satisfied that the amendments were necessary, as stated, and that they have not been made *mala fide*. I am also satisfied that in the circumstances, no injustice will be suffered by the Defendant and that any damage it may suffer can easily be compensated by an award of costs.

Having considered this application, I am inclined to indulge the Plaintiff in order to give it an opportunity to put forward its claim as sought.

In the circumstances, the application dated 22<sup>nd</sup> May 2008 is allowed in the following terms.

1. The Applicant granted leave to file and serve a further amended plaint within 7 days from date herein.
2. The Defendant granted leave to file and serve a further amended defence within 7 days from date of service with the further amended defence, if need be.
3. The Plaintiff to pay thrown away costs and the costs of this application to the Defendant.

**Dated at Nairobi this 23<sup>rd</sup> day of June, 2008.**

**LESIIT, J.**

**JUDGE**

**Read, signed and delivered, in the presence of:**

Mr. Washe holding brief Mr. Kahonge for the Applicant

Mr. Muthomi holding brief Mr. Imende for the Respondent

**LESIIT, J.**

**JUDGE**