



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Suit 5 of 2006**

**THE COUNTRY COUNCIL OF**  
**KWALE.....PLAINTIFF**

**VERSUS**

**BAMBURI CEMENT LIMITED.....DEFENDANT**

**RULING**

By this Chamber Summons, the plaintiff seeks leave of this court to amend its plaint in the manner and style contained in the draft amended plaint annexed to the Chamber summons. The application is based on three grounds contained in the body of the Chamber Summons. They are that:-

- 1) there has been discovered some omissions in the plaint that would require corrections.
- 2) the plaintiff is desirous of bringing all issues to the attention of the court for the matters in issue to be determined once and for all.
- 3) the amendment is only to remove the reference to plots 1, 3 and 4 – Tiwi Beach.

In the supporting affidavit sworn on 21<sup>st</sup> August 2008 by Joseph Mutua Malinda, the plaintiff's clerk, it is deponed *inter alia* that the plaint contains a typographical error which if amended as proposed will occasion no prejudice to the defendant but will enable the court determine all relevant issues between the parties.

The application is opposed on the basis of Grounds of Opposition filed by the advocates for the defendant. No replying affidavit has been filed to controvert the facts contained in Mr. Malinda's affidavit. In the said grounds of opposition the defendant contends that the application is frivolous, vexatious and an abuse of the process of the court; that the application is bad in law and defective for failure to disclose the manner in which the plaint is to be amended, that the application is a cheeky attempt to withdraw part of the claim and that the amendment would amount to reduction of the plaintiff's claim. The defendant has not demonstrated how the application is frivolous, vexatious and an abuse of the court process. On the objection that the plaintiff has not indicated in what way it proposes to amend its plaint, the same flies in the face of grounds 3 and 4 which could not have been raised if the plaintiff had not indicated the manner in which it proposes to amend its plaint. Indeed the very first prayer in the plaintiff's Chamber Summons introduces the proposed amended plaint. In my view therefore, all the grounds raised by the defendant do not really address the factors that have to be taken into consideration in deciding whether or not to allow the amendment.

Under Order VIA Rules 3 and 5 of the Civil Procedure Rules the court has a wide discretion in exercising its jurisdiction with respect to granting leave to amend. Rule 3 provides that:-

“the court may at any stage of the proceedings .....allow any party to amend his pleadings.”

AND Rule 5 provides that the object of allowing amendments to pleadings is to facilitate the determination of “the real question in controversy between the parties.”

Bullen and Leake 4<sup>th</sup> Edition page 124 gives useful guidelines. It reads as follows:

“The guiding principle of cardinal importance on the question of amendment is that generally speaking all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings. The rule of conduct of the court is that, however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated for by costs but if the amendment will put the other side into such a position that they must be injured it ought not to be made.”

The defendant has not alleged that it will be prejudiced beyond what can be compensated by costs if the amendment is allowed. I have perused the proposed amended plaint. It is clear to me that the same is intended to bring before the court relevant and pertinent matters in issue between the parties for the determination of the court. There is no basis for denying the plaintiff the leave sought. The application must and is hereby allowed as prayed in terms of prayers 1, 2 and 3 thereof.

Costs however will be borne by the plaintiff.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2008.

**F. AZANGALALA**

**JUDGE**

Read in the presence of:

Mwangi for the Applicant.

**F. AZANGALALA**

**JUDGE**

**23<sup>RD</sup> SEPTEMBER 2008**