



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 1779 of 2001**

**AMOS KABIRU KIMEMIA.....PLAINTIFF**

**VERSUS**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....DEFENDANT**

**R U L I N G**

This application has been brought by the Defendants under Section 3A of Civil Procedure Act, Order VIA rule 3(1), (2), (3), (4), (5) and 5(1), Order VIII rule 7, 8 and 9 of the Civil Procedure Rules. It is dated 5<sup>th</sup> February, 2007 and it seeks prayers 3 and 4 of the application namely:

**3. THAT this Honourable court be pleased to grant leave to the 1<sup>st</sup> Defendant to amend its Defence herein as per the draft Defence & Counterclaim annexed hereto.**

**4. THAT the Plaintiffs be allowed to file its Reply to Defence and Defence to counterclaim within such time as this Honourable court deems fit.**

The application is supported by an affidavit sworn by DISMAS OYIEKO, Loans and Investment Manager of the 1<sup>st</sup> Defendant dated 5<sup>th</sup> February, 2007.

The gist of the application is that the 1<sup>st</sup> Defendant wishes to amend its defence in order to counterclaim for Kshs.12,838,627/- being the amount outstanding as at 30<sup>th</sup> November, 2001 from various loan and guarantee transactions and agreements between the 1<sup>st</sup> Defendant and one Messrs Rift Valley Cake Bakers Limited. It is averred that the Plaintiffs in the suit, including those sought to be joined in the suit as Plaintiffs guaranteed the loan. The 1<sup>st</sup> Defendant avers that it seeks to counter claim for the said outstanding amount from the Plaintiffs.

The application is opposed. The Respondent on 20<sup>th</sup> February, 2007 filed grounds of opposition in which it has raised three grounds namely:

- 1. The intended amendments will lead to a serious misjoinder of issues and parties.**
- 2. The effect of the intended amendment will be a nullity insofar as it would allow the**

**Defendant to bring in a claim against parties who are not party to the suit and who the defendant would not have claim against in the suit.**

**3. The intended amendment is not necessary for determining the real issue or issues in controversy between the Plaintiff and Defendant in this suit.**

The Applicants were represented by Mr. Mulwa. It was Mr. Mulwa's submission that the Defendant, which is the Applicant, wished to amend the defence in order to include a counterclaim in the sum of Kshs.12 million. Mr. Keyonzo who is for the Plaintiff/Respondent has opposed the application on a technical point. It is Mr. Keyonzo's submission that even though the application is expressed to be brought under Order VIA of the Civil Procedure Rules, that it should actually have been brought under Order I rule 10 since it seeks to add parties to the suit.

The settled rule with regard to amendments of pleadings has been concisely stated in **Vol. II of the 6<sup>th</sup> edition** at page 2245 of the **Air Commentaries on the Indian Civil Procedure Code** by **Chittaley** and **Rao** in which the learned authors state:

***“That a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”***

The draft amended defence and counterclaim is annexed and I note from it that what the Defendant/Applicant is proposing to do is to join five new parties to the suit whom he has named as the 2<sup>nd</sup> to the 6<sup>th</sup> Plaintiffs. In the counterclaim, the 1<sup>st</sup> Defendant has counterclaimed for Kshs.12 million against the new Plaintiffs whom he intends to join in the suit.

I agree with Mr. Keyonzo that what the Applicant is proposing to do is to add parties to the suit in order to counterclaim against them. That kind of an amendment can only be made under Order I rule 10 of the Civil Procedure Rules. Order I rule 10 provides for the substitution and addition of parties to the suit. By introducing five new Plaintiffs to the suit, the Defendant is actually proposing to make additional parties to this suit. He has moved the court invoking the wrong provisions of the law.

Mr. Keyonzo has also raised another point with which I agree, that the introduction of the five new parties as Plaintiffs in the suit was not a step towards aiding the court to determine the real question in controversy between the current parties to the suit nor is it a necessary amendment since it introduces a totally new cause of action which was non-existent when the current Plaintiff filed the suit. The bigger problem which I have to the proposed amendment is that the Applicant seeks to introduce new Plaintiffs to the suit through the back door.

A party cannot be forced to sue in a matter where they are not interested. By introducing the new Plaintiffs, the Defendant is forcing these parties, who have not even been served with the current application, to sue it. The court cannot countenance that kind of an act by the Defendant. It could have been different if the Defendant was seeking to join the new parties, not as Plaintiffs in the current suit, but as Defendants in its counterclaim.

**For this reasons, I agree that the Defendant has approached the court invoking the wrong provisions of the law and has also attempted to make an amendment that is unnecessary, that will not aid in the determination of the issue in controversy between the parties, and which will only create confusion in the matter. For these reasons the application dated 5<sup>th</sup> February, 2007 is hereby dismissed with costs to the Respondent.**

**Dated at Nairobi this 28<sup>th</sup> day of November, 2008.**

LESIIT, J.

JUDGE

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

Odongo holding brief for Mr. Mulwa for the Applicants

N/A for Mr. Keyonzo for the Plaintiff/Respondent

LESIIT, J.

JUDGE