



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**CIVIL SUIT 1041 OF 2002**

**ELF OIL (K) LIMITED.....PLAINTIFF**

**VERSUS**

**OMAR TRANSMOTORS LIMITED.....DEFENDANT**

**RULING**

The application is a Chamber Summons dated 16<sup>th</sup> September, 2008 brought under Order I rule 10(1) and (2), Order VIA rule 3, 5 and 8 of Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks to amend the plaint as per the annexed draft amended plaint. The grounds for the application are cited on the face of the application as follows:

- a) THAT the pleadings have closed in this suit.
- b) THAT the Plaintiff company herein was acquired by Total Kenya Limited.
- c) THAT following the sale of the Elf Oil (K) Ltd. to Total Kenya Limited all matters pertaining to the Plaintiff company herein were adapted and assigned to Total Kenya Limited.
- d) THAT it is imperative to amend the Plaint to reflect Total Kenya Limited as the Plaintiff herein place of Elf Oil Kenya Limited.
- e) THAT no prejudice will be occasioned to the Defendant if this application is allowed.
- f) THAT it is in the interest of justice that the matters in dispute between the parties herein be determined once and for all.

The application is supported by the affidavit sworn by FRANKLIN JUMA, a director and Legal Manager of Total Kenya Limited. The gist of the application is that the directors of Total Kenya Limited and Elf Oil Kenya Limited approved a merger between the two companies in March 2001. That merger was authorized by the Minister of Finance under Section 31 of the Restrictive Trade Practices, Monopolies and Price Control Act, by a Gazette Notice 'FJ1' dated 9<sup>th</sup> March 2001. The amendment sought is meant to neglect the said change.

The application is opposed. The Respondent has filed grounds of opposition in which the following five grounds are raised.

1. That the revelation that the plaintiff company merged with TOTAL (K) LTD. in March 2001 means

that the plaintiff had no legal capacity to file suit on 29<sup>th</sup> August 2002, hence the suit is incurably defective and cannot be cured by an amendment.

2. That the said application is incurably defective as it seeks to rely on an Agreement for which no stamp duty has been paid hence Legally inadmissible in accordance with the Provisions of the Stamp Duty Act.

3. That FRANKLIN JUMA has no and has not exhibited any authority to swear the supporting affidavit on behalf of the Plaintiff.

4. That no special resolution merging the 2 Companies ELF (K) LTD and TOTAL (K) LTD has been exhibited.

5. That since the defendant was unaware that the plaintiff has ceased to exist in 2001 then it will crave leave of the Court to file an application to strike out suit and pray for the refund of all the monies paid under the Plaintiff's deception.

I have considered the application together with the grounds of opposition raised by the Respondent. This application has been brought under Order I rule 10 of the Civil Procedure Rules.

The settled rule with regard to amendment 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.”***

Ms. Kanyiri for the Applicant submitted that the intended amendment was meant to substitute the Plaintiff, Elf Oil (K) Limited with a new Plaintiff, Total (Kenya) Limited. As already stated at the beginning of this ruling, the basis upon which this substitution is being sought is a merger that took place in which the current Plaintiff was taken over by the proposed new Plaintiff. Mr. Wahome for the Respondent in the first ground of opposition has raised an issue with the intended substitution. It is the Respondent's position that the current application has brought a revelation which according to the Respondent means that the Plaintiff had no legal capacity to file the suit and hence the suit is incurably defective. Order 1 rule 10 (2) provides:

***“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”***

The above provision gives the court power to allow an amendment by making an order that the name of any party improperly joined, whether as a Plaintiff or Defendant, be substituted with a proper Plaintiff or Defendant. All the court has to be satisfied is that the amendment is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. The court has to be satisfied that the amendment sought is necessary for determining the real question in controversy. The issue raised by the Respondent has no merit. Order 1 rule 10 contemplated a situation where a wrong party is named as the Plaintiff in a suit and under that rule it makes provision for such a party to be substituted.

The second ground of opposition is a non issue. The amendment is not made on the basis of any agreement between any parties. All the Applicant is seeking is to substitute the wrong Plaintiff with the

correct Plaintiff. The issue of payment of stamp duty cannot be used to deny the Applicant the right to amend the pleadings. It is also premature as it should be raised during the trial if an attempt is made to adduce the agreement in evidence.

The other grounds of opposition raised are also non issues in my view. Franklin Juma who swore the supporting affidavit in this application has clearly stated that he had due authority and was competent to swear the said affidavit. That is sufficient to establish the authority to swear the affidavit. It was not necessary for the said deponent to exhibit the actual authority that enabled him to swear the affidavit.

The fourth ground of opposition is covered in what I have stated above in regard to the first and second grounds of opposition.

As for the fifth ground, that cannot be a basis to deny the Applicant the leave sought to amend the plaint since the Defendant has the right at any time before the suit is heard to apply to strike out the suit or plaint for any reason it feels justified.

I am satisfied that the proposed amendment is necessary for determining the real question in controversy between the parties. I am satisfied that no vested interest or accrued legal right will be affected by the proposed amendment. I am also satisfied that no injustice will be occasioned to the Defendant which cannot be compensated by an award of costs.

In conclusion, the application dated 6<sup>th</sup> September, 2008 be and is hereby allowed in the following terms:

- 1. The name of Elf Oil (K) Limited be struck out and that of Total (K) Limited be added to the plaint.**
- 2. The Plaintiff is granted 14 days to file and serve the amended plaint in terms of the annexed draft amended plaint.**
- 3. The Defendant is granted leave to amend its defence within 14 days from the date of service with the amended plaint**
- 4. The Plaintiff will pay thrown away costs to the Defendant assessed at Kshs.20,000/=.**

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

**LESIIT, J.**

JUDGE

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

Ms. Nandwa holding brief Miss Kanyiri for the Applicant

N/A for Mr. Wahome for the Defendant

**LESIIT, J.**

JUDGE