

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

Civil Case 2030 of 2000

ALPHA KNITS LIMITED PLAINTIFF

VERSUS

KENINDIA ASSURANCE COMPANY LTD.....DEFENDANT

AND

BID INSURANCE BROKERS LIMITEDTHIRD PARTY

R U L I N G

This is an application by the Third Party for leave to amend its statement of defence. The application is expressed to be brought under Order VIA Rules 3, 5 and 8 of the Civil Procedure Rules. The application is based on the affidavit of Rapinder Singh Sehmi, the Third Party's advocate which is annexed thereto.

The Third Party's case is that the proposed amendments are necessary to enable the Court to effectually and completely determine all the issues in dispute between the parties and the same do not cause any prejudice to the defendant but will help in setting out clearly the issues in dispute.

The defendant's counsel strenuously opposes the application. He sees the proposed amendments as raising matters which are res judicata between the defendant and the Third Party by the judgment of the Court of Appeal in Civil Appeal No.330 of 2001 and the ruling of Hon. Ochieng' J of 8.12.2005. He is also of the view that the amendments sought raise matters which the third party is estopped from raising by reason of a consent letter of 9.8.2001 and the order thereon made on 27.8.2001 which matters the third party dealt with in the said Civil Appeal No.330 of 2001. The defendant's further contention is that it is against public policy to allow the third party to relitigate on matters already determined.

I have considered the application, the supporting affidavit and the proposed amendments to the third party's defence. I have also considered the Grounds of Opposition filed by counsel for the defendant. Finally I have given due consideration to the submissions of the counsels appearing. It is now settled that the overriding consideration in applications for leave to amend is whether the amendments sought are necessary for the just determination of the controversy between the parties. The policy of the law being that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side (**see Eastern Bakery – vs – Castelino [1958] E.A. 461**).

The granting or refusal of leave to amend any pleading is a matter of the discretion of the court. The discretion like all other judicial discretions should be exercised rationally and on the above principles. In the matter at hand the defendant's primary concern is that the third party by the proposed amendments raises matters that are res judicata and the court will be asked to sit on appeal against decisions already made on the same matter by courts of the same jurisdiction and even the Court of Appeal. The defendant does not allege that the proposed amendments will occasion it any prejudice or injury beyond what is compensable by an award of costs. Indeed no ground in the Grounds of Opposition is devoted to any such consequence.

In my view if the third party is of the view that the proposed amendments will improve its case leave cannot be refused merely because the defendant is of a contrary view. At this stage it is immaterial that the defendant may have a water tight answer to the proposed amendments. That is not a consideration at this stage. I therefore refrain from considering whether or not the proposed amendments will raise

matters that are res judicata or that have been compromised in a previous consent. I do so because, arguments on the same matters may still be raised should the defendant be so minded in its response once leave is granted. As it is now, and applying the principles stated in the **Eastern Bakery – vs – Castelino case (Supra)** the third party was entitled to seek the leave of the court to amend its defence and the court will grant leave to amend if the same will not prejudice the defendant beyond what is compensable in costs. As already stated, the defendant has not demonstrated that it will be occasioned such prejudice or injury if the leave sought is granted. I am therefore inclined to grant the leave to amend as prayed and order that the amended statement of defence of the third party annexed to the affidavit in support of this application be deemed to be duly filed and served on terms that the defendant has leave to amend its pleading in response to the amended defence of the third party within fifteen days of today. For the avoidance of doubt, the third party's said amended defence will only be deemed duly filed and served on payment of the requisite court fees.

I grant the defendant costs of this application and all costs thrown away in any event. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH, 2007.

F. AZANGALALA

JUDGE

16/3/2007

Read in the presence of: Sehmi for the 3rd Party and Frazar for the defendant.

F. AZANGALALA