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

Civil Suit 630 of 2004

DAVID JONATHAN GRANTHAM…….....1ST PLAINTIFF

WILLIAM KUNG'U KINYANJUI T/a Intergrated YMR Partnership...2ND PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND……..….....DEFENDANT

R U L I N G

The application is a chamber summons dated 20th July, 2006 and brought by the Plaintiff under Order VIA, rule 3, 5 & 8 of the Civil Procedure Rules (Revised) Order VII, rule 2, Order XVIII, rule 1, 4 and 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks five prayers:-

1.) That the plaintiff/Applicant be granted leave to further amend the plaint.

2.) That leave be granted to the Plaintiff to file an amended verifying affidavit.

3.) That the draft further amended plaint and the amended verifying affidavit annexed hereto be deemed duly filed and served.

4.) That the defendant be granted leave to amend the file its defence within fourteen (14) days of the date of the orders herein.

5.) **That the costs of this application be provided for.**

The grounds of the application are cited on the face of the application and briefly include the fact that the further amendment of the plaint was necessary to determine the real question in controversy, that there was an error which occurred during the preparation of the plaint and words omitted i.e. 'The Board of Trustees' from the defendant's title. Further that the name of the Advocates who drew the verifying affidavit was also omitted. The Applicants also base their application on grounds the oversight should not be visited upon them and further that no prejudice will be suffered by the Defendant if the application is allowed.

The application was opposed. There is a replying affidavit sworn by Mr. Said Juma Chitembwe, Advocate and Corporate Secretary of the Board of Trustees of National Social Security Fund (NSSF). The deponent seeks the striking out of the affidavit sworn by MBUTHI GATHENJI Advocate on behalf of his client. It also challenges the application as an attempt to circumvent an earlier ruling on another

similar application by the Applicants where Njagi, J. struck out the application. The deponent also avers that the amendments sought are a serious revision of the suit. The deponent also raises the validity of the draft further amended plaint on grounds it is incompetent for not being properly marked.

Mr. Gathenji, advocate for the Plaintiff argued the application. It was his submission that this court had power to allow the further amendment of the plaint under Order VIA, rule 3, 5 & 8 of the Civil Procedure Rules. Even to the extent sought of amending the name of the defendant, Mr. Masinde for the Respondent was of a different view. Mr. Masinde argued that the amendment sought to be made cannot be allowed in law as it has the effect of substituting a non-existent party with an existing one. Mr. Masinde pointed out Section 4 of the NSSF Act which establishes the Body Corporate and stated that the provision was within the knowledge of the Plaintiff as it was cited in the plaint filed in court on 22nd November, 2004, at paragraph 2. Mr. Masinde submitted further that the current application ought to have been brought under Order 1, rule 10 of the Civil Procedure Rules.

On the application being made at a late stage as Mr. Masinde argued, Mr. Gathenji submitted that the error in the plaint was noted just before the date set for hearing of the suit i.e. 31st July, 2006 and that the application to rectify the error was filed on 20th July, 2007 and that in the circumstances it was timeously filed.

I am guided by the Court of Appeal Case NO. 149 of 1991 **JOSEPH OCHIE'NG & 2 OTHERS t/a AQUILINE AGENCIES –VS- FIRST NATIONAL BANK OF CHICAGO** on the principles applicable on amendments. Shah J.A summarized the principles thus:-

"….amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule however late the amendment sought to be made should be allowed if made in good faith provided costs can compensate the other side; that exact nature of the proposed amendment sought ought to be formulated and submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantially of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical…"

The court's power to allow amendments is donated under Order VIA, rule 3, 5 & 8. The court can allow amendment at any stage of the proceedings. The only test being whether it was timeously made; whether it is in good faith; and whether costs can compensate the Defendant/Respondent and whether the amendment sought is material and not merely technical.

On the timelines of the application; it is Mr. Masinde's argument that the Plaintiff's Advocate ought to have known better who to name as the Defendant in the suit. To that my view is that error is to human. The application to amend was made as soon as the error was noted as Mr. Gathenji has submitted. There is nothing on record to dispute that the error was not noted at the time that the Applicants' Advocate has stated. I do not find that the application has been brought at a late stage of the proceedings. In any event Order VIA, rule 3 gives the court power to amend at any stage of the proceedings. The application was timely. Even if the error ought to have been noted earlier had the Applicants' Advocate exercised diligence nevertheless I do find that it has been brought in good faith. I am also satisfied that the Respondents will not suffer any prejudice and if at all it will I find that in any event costs can sufficiently compensate the Respondents for same.

The amendment sought to be made on the plaint is to add the words "**The Board of Trustees"** to the Defendant's name to read "**The Board of Trustees of NSSF".** That amendment is neither immaterial nor purely technical. As noted by Mr. Masinde, Section 4 of the NSSF Act creates the Body Corporate which under the Act can sue or be sued. That Body Corporate was the one intended to be sued by the Plaintiffs in the instant case. The amendment sought will therefore properly describe the Defendant and will assist the court to determine the real question in controversy.

Mr. Masinde has persuaded this court to find that the amendment sought is a substitution of the

Defendant, and that Order I, rule 10 applies. Mr. Masinde has relied on **MULLA THE CODE OF CIVIL PROCEDURE 16TH EDITION VOL. II, SOLIL PAUL AND ANUPAM SRIVASTAVA PG. 1844** where it is stated:-

"***Name of a party should not be allowed to be added by amending the plaint where:-***

(i) The suit is already barred by limitation as against the party so proposed to be added, and

(ii) the omission to join him originally is not due to* bonafide *mistake."

Mr. Masinde also relied on the case of **SIETCO (K) LTD** v **FORTUNE COMMODITIES HCCC 1264/20**02 and the case of **ATIENO** v **OMORO (1985) KLR 677**. In Atieno case, Trainor J at holding 5 held:-

"There is a distinction as laid out in the Civil Procedure Rules between the substitution or addition of a party to proceedings and the amendment of the pleadings and the position in the instant case is governed by Order I, rule 10."

Mr. Gathenji sought to distinguish the cases cited by the Defendant's advocate by urging the court to note that these were High Court cases and therefore merely persuasive. Mr. Gathenji submitted that Njagi, J. in **SIETCO CASE, SUPRA**, was not drawn to the attention of the Court of Appeal cases. Mr. Gathenji relied on **A. N. PHAKEY** v **WORLD WIDE AGENCIES LTD (1948) 15 EACA 1**. In the cited case, the Court of Appeal for Eastern Africa declined to disallow an amended plaint put in before close of pleadings in which the name of the plaintiff was changed from "**Traders Ltd"** to "**World Wide Agencies Ltd trading as Traders."** The Justices of the court held that the Plaintiff forms part of the plaint, that in light of the Defendants set off and counterclaim and the fact no injustice was alleged to be suffered by the Defendant in the said amendment, the justice of the case required the amendment.

Mr. Gathenji also relied on the Court of Appeal for Eastern Africa case of **GEORGE AND COMPANY (M. P GEORGE t/a GEORGE & COMPANY in amended plaint)** v **PRITAM'S AUTO SERVICES (1952) 22 EACA 233**. The Justices of Appeal followed **PHAKEY V WORLD WIDE AGENCIES CASE, SUPRA**. I quote from pg 236 & 237.

"***In the instant case the plaintiff M. P. George trades in the name of "George and Company", and he is so registered under the Registration of Business Names Ordinance, 1951. The learned Judge in the court below found however that the appellant could not cure the misnomer by amendment without leave under Order 6 rule 19, but must apply for leave to substitute under Order I rule 10. It is unfortunate that at the hearing in the court below the learned Judge's attention was not drawn to the decision of this Court in PHAKEY v WORLD WIDE AGENCIES LTD. (Trading at Traders) (1948) 15 E.A.C.A. 1, a case which is on all fours with the instant one. In that case the name of the plaintiff was originally shown as "Traders Ltd." And on discovery that there was no such company but that the name of the plaintiff was "World Wide Agencies Ltd. (Trading as Traders)" the mistake was rectified within the prescribed time under Order 6 rule 19. Application was made under Order 6 rule 21 to disallow the amendment, and the dismissal of that application was affirmed on appeal. S in the instant case a mistake was made in giving the trading name of the plaintiff instead of the real name, and the trading name did not constitute a legal persona. Further although in the instant case the trial Judge did not deal with the point, it is clear from the defence filed, as in Phakey's case, that the defendant well knew by whom he was being sued, and that it could not be said that the justice of the case did not require the amendment."***

The Justices of Appeal in the **GEORGE & COMPANY CASE**, **Supra**, seem to be saying that where the amendment in the pleadings sought is a change in description of a party, that cannot amount to substitution. A change in description is not a substitution of a party and therefore the application should not be brought under Order I, rule 10 but under Order VIA, rule 3 of the Civil Procedure Rules. The cited Court of Appeal cases are saying that even where the amendment sought changes the description of the party even if it is that of the Plaintiff, such an amendment should be allowed under Order VIA, rule 3

even where the description sought to be changed was for non-existent *persona* in law. The amendment sought in this case is to the description of the Defendant and the same principles apply that a court should allow the amendment so long as it causes no injustice to the other party and where compensation by costs is sufficient. I will quote from **KULOBA** v **ODUOL (2001) 1 EA 101 at pg. 104** where my brother **Visram, J.** quotes from another case **EASTERN BAKERY** v **CASTELLO (1958) EA 461** thus:-

"***(a) Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect, there is no injustice if the other side can be compensated by costs.***

(b) The court will not refuse to allow amendment simply because it introduces a new case. However, there is no power to enable one distinct cause of action to be substituted for another nor to change by amendment the subject matter of the suit."

The general principles governing amendments are very clear that amendments should freely be allowed even if they introduce a new cause of action so long as they do not cause any injustice to the other party and where costs could adequately compensate them.

I have looked at the Defendant's defence filed on 18th January, 2005 in answer to the original plaint. At paragraph 5 through to paragraph 17 the Defendant answers to the claim in the plaint in a manner that demonstrates that the Defendant had full knowledge of the cause at the time the original pleading was filed. The Defendant will therefore suffer no prejudice if the amendment sought is allowed. I am guided by the **PHAKEY CASE, Supra, GEORGE & CO. CASE, Supra** and **EASTERN BAKERY** v **CASTELLINO CASE Supra,** to hold that an amendment brought under Order VIA, rule 3 to change the description of a party is competent and if the principles governing such an amendment are not contravened, then the application should be allowed subject to court's order as to costs or other direction. The court's power to allow such amendment are unfettered in law. The application was made before the hearing of the suit commenced and therefore the Respondent will have time to put forward their case fully and to be heard on any issues they could have raised at the time the original plaint was filed.

The draft further amended plaint is properly marked with different ink as required in the rules. The Advocate's affidavit in support of the application swore to matters of law explaining the reason for the application being sought and the circumstances, which led to the application being made all which were within the knowledge of the Advocate. I see no merit in the Respondent's averment in the replying affidavit that the Applicants Advocate lacked locus to swear to the facts deponed to in the said affidavit in support.

The application to amend the plaint as sought is deserved as mistake to the plaint was genuine and should be allowed in the interest of justice and for purposes of helping the court determine the question in controversy between the parties in this suit.

I now turn to prayer 2 of the chamber summons dated 20th February, 2006. The Respondent has deponed that the issue of amendment of the verifying affidavit was firmly dealt with by **Njagi, J.** in his ruling dated 14th April, 2005 and that therefore it is a spent issue.

I had occasion to peruse my learned brother's ruling at pg. 11 the learned Judge observes:-

"In the instant case, the plaintiff seeks leave to amend the plaint. The plaint and the verifying affidavit are entirely different documents altogether, and leave to amend the plaint does not incorporate leave to amend the verifying affidavit. In the circumstances of this case, an amendment to the verifying affidavit would enable the plaintiff to steal a march on the defendant in whom has vested a right to challenge it in its original form. In any event, according to counsel for the applicant, the original verifying affidavit is not defective. If that be so, then there is no purpose amending it, and, at any rate, there has been no application for leave to amend that affidavit."

The learned Judge struck out the draft amended verifying affidavit on grounds no leave was sought in

the application under consideration for its amendment. The striking out of the draft verifying affidavit does not render the current application to amend it incompetent as the merits of such amendment was never determined by the court.

Mr. Masinde has submitted that a verifying affidavit contains evidence and that since evidence is not amendable, the proper course for the Applicant to take is to seek leave to expunge the bad affidavit and leave to file a compliant one.

I have considered the submissions on the issue of the verifying affidavit. I hold the view that Section 35 of the Advocates Act does not apply to verifying affidavits for the simple reason that the Advocates Act was in force long before verifying affidavits were introduced in the Civil Procedure Rules, Order VII, rule 1(2). The new rule was brought in through L.N. No. 36/2000. There is no way that verifying affidavits could have been envisaged or contemplated to fall within the provisions of Section 34 and Section 35 of the Advocates Act.

Secondly, it is my view that having allowed the application to amend the plaint in terms sought, that of necessity the verifying affidavit will need to be amended.

Having carefully considered the plaintiffs' application dated 20th July, 2006 I order as follows:-

(1) The application to amend the plaint in terms sought is granted subject to payment of thrown away costs to the Respondent.

(2) The Applicant is granted leave to file a compliant verifying affidavit to cover, *inter alia,* the amendments in the further amended plaint.

(3) The costs of the application shall be to the Respondent.

Dated at Nairobi this 25th day of May, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Ndegwa holding brief for Gathenji for Applicant.

Masinde for Respondent.

LESIIT, J.

JUDGE