



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

Civil Case 324 of 2006

ERNIE CAMPBELL & CO. LIMITED.....PLAINTIFF

VERSUS

THE AUTOMOBILE ASSOCIATION OF KENYA.....DEFENDANT

RULING

This application has been brought by the Plaintiff under Order VI A rule 3 and 5 of Civil Procedure Rules and Section 3A of Civil Procedure Act. The Plaintiff seeks to amend its plaint and further, seeks to have the plaint annexed to the application be deemed to be duly filed and served.

The grounds for the application are four folds and are stated on the face of the application thus:

- a) **To enable the court to determine all the issues in dispute between the parties, it is important for the plaint to be amended.**
- b) **The amendment arises from a genuine mistake on the part of the Plaintiff's counsel which should not be visited on the Plaintiff in any event.**
- c) **The intended amendment will not cause the defendants any prejudice.**
- d) **It is fair and just to allow the application for the amendment.**

There is also an affidavit sworn by the Managing Director of the Plaintiff company, Parbat Halai, on 24th July 2006. The gist of the affidavit is that the amendment is intended to bring out all the issues necessary for the determination of the court. It is further deponed that no prejudice will be suffered by the Respondent.

A notice of preliminary objection was filed by the Defendant which raises one issue as follows:

“The entire suit being a nullity ab initio cannot be cured by amendment and should be struck out”

Mr. Mwangi, who argued the application on behalf of the Applicant, submitted that the amendment was intended to rectify a genuine mistake on the part of the Applicant's counsel. Mr. Mwangi explained that the Plaintiff had sued the Defendant in its own name instead of the officials of the said Defendant. Counsel submitted that no prejudice would be suffered by the Respondent if the application was allowed and amendment made. The Applicant was willing to pay the Respondent's costs.

Counsel relied on two authorities **VOI JUA KALI ASSOCIATION VS SANGE & OTHERS [2002] KLR 474**

KENYA COLD STORAGE [1964] LTD VS OVERSEAS FOOD SERVICES (AFRICA) LTD [1982] KLR 453.

The application was not opposed. Mr. Nyaencha for the Respondent did not argue the notice of preliminary point filed herein. Counsel merely urged the court to order re-issue of summons to the three named officials, if the court was inclined to allow the application.

There are two points for consideration. One whether the amendment is necessary. The Plaintiff/Applicant has sued an Association in it's own names. The Applicant has deponed in the supporting affidavit that the Association could only be sued through its officials. Mr. Mwangi relies on the case of VOI JUA KALI ASSOCIATION VS SANGE & OTHERS [2002]2 KLR holdings 1 and 2 where **Onyango Otieno, J** as he then was, observed:-

1. A society cannot sue and cannot be sued in its own name. It can only sue through its officials and can only be sued through such officials.

2. Even though the plaint was initially filed in the name of a society, the plaint was capable of being amended to change the name of the Plaintiff and such a change did not amount to a substitution of the parties.

The point is clear that the Plaintiff sued an association in its name instead of suing it through its officials. In the circumstances I am satisfied that to join the officials of the Defendant's company is not similar to substituting the party to the suit. If that were the case then the application should have been brought under Order 1 rule 10 of the Civil Procedure Rules. Mr. Nyaenga for the Respondent has not raised any issues on that point. The amendment is necessary, in the circumstances in order to give the plaint competence and legality.

The second issue is whether the application to amend should be allowed. The general rule is that leave to amend will be granted if it will enable the real question in issue between the parties to be raised and where such an amendment will not occasion any injury to the opposite side, **which adequately be compensated by an award of damages. See KENYA COLD STORAGE [1964] LTD VS OVERSEAS FOOD SERVICES (AFRICA) LTD 1982 KRL 453.**

I have considered the application. Mr. Nyaenga did not give submissions in regard to any injury his client would suffer except to request that to the new parties summons be re-issued.

There is no injury or prejudice the Respondents may suffer which an award of damages cannot adequately compensate.

I will therefore allow the application and grant leave to amend the plaint as sought subject to payment of thrown away costs to the Respondent. The court also directs that fresh summons do hereby issue to the parties as per the amended plaint to be obtained upon payment of filing of the amended plaint.

Dated at Nairobi this 19th day of October 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of :-

Boi holding brief Mwangi for Applicant

N/A for Respondent

LESIIT, J.

JUDGE