



**REPUBLIC OF KENYA**

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

**Civil Case 664 of 2002**

**ALFA MOTORS LIMITED..... PLAINTIFF**

**VERSUS**

**TOYOTA EAST AFRICA LIMITED.....DEFENDANT**

**RULING**

This is an application by the plaintiff primarily for leave to join Toyota Tsusho Corporation of Japan (hereinafter “TTC”) as a further defendant and if the order is granted the plaintiff seeks leave to serve the Notice of Summons abroad. There is also a main prayer for leave to amend the plaint as shown in the draft amended plaint annexed to the application. The application is expressed to be brought under the provisions of Order 1 Rules 10 and 22, Order V Rules 21, 23, 26, 27 and 32, Order VI A Rules 3, 5 and 8, Order VIII Rules 7 and 8 of the Civil Procedure Rules, Sections 3A and 100 of the Civil Procedure Act and other enabling provisions of the Law.

The application is grounded on an affidavit sworn by one Herbinder Singh Bhogal a director of the plaintiff and its majority shareholder. There are two further affidavits; one sworn by the same director and another by the plaintiff’s Advocate, Azim Taibjee.

The primary grounds for the application as expressed on the face of the application are as follows:-

- 1) That it is necessary to add TTC to this suit as fresh evidence indicates that it is the majority shareholder of the defendant and has always controlled its management.**
- 2) That there is need to lift the veil of incorporation of TTC in order to determine all matters in dispute effectively.**
- 3) That the proposed 2<sup>nd</sup> defendant is incorporated in Japan and is substantially a defendant and reliefs sought by the plaintiff are against the 2<sup>nd</sup> defendant.**
- 4) That the amendment sought is vital and necessary for the determination of the real issues in dispute.**
- 5) That no prejudice or injustice shall be caused to the defendant if the amendment is allowed.**

The supporting and further affidavits aforesaid elaborate the above primary grounds. The application is opposed and there are two affidavits sworn in opposition to the application by one Mahmood Omar the defendant’s General Manager Finance and Administration. The main points taken in opposition are that

the application is intended to intimidate the defendant and delay the hearing of the suit; that the application has been brought late; that TTC is a distinct and separate legal entity from the defendant; that the proposed amendments are prejudicial to the defendant; that no cause of action is disclosed against the proposed additional defendant and that the draft amended plaint contains inconsistent averments.

I have considered the application, the affidavits filed both in support of the application and in opposition thereto. I have also carefully considered the submissions made to me by counsel including the authorities relied upon by Counsel. Having done so, I take the following view of the matter. In **Central Kenya Ltd – vs – Trust Bank Ltd and 4 others CA No.222 of 1998 (UR)** the Court of Appeal stated as follows:-

**“The overriding consideration in applications for such leave (leave to amend) is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the Law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudicated or suffer injustice which cannot properly be compensated for in costs.”**

I have carefully considered the draft amended plaint. Paragraphs 5.1, 6.3, 6.4, 8, 11, 13, 15, 19, 20 and 21 make express reference to TTC. In my view, the plaintiff lays definitive claims against TTC. The defendant may be of the view that the inclusion of TTC will not advance the plaintiff’s case. It is entitled to that view. In my view it is not a proper ground of consideration that the proposed amendment, does not advance the party’s case further. If the plaintiff thinks that the amendment will advance its case, it is entitled to seek leave to amend if the same will not prejudice the defendant beyond what is compensable by an award of costs.

In **Central Kenya Ltd – vs – Trust Bank Ltd and 4 others (supra)** the Court of Appeal said as follows:

**“The jurisdiction of the court under Order 1 Rule 10 (2) and Order VI Rule 3 (1) of the Civil Procedure Rules, respectively, is specific. The decision as to who to sue is essentially that of the plaintiff and the court’s duty thereafter is to consider the allegations made against the named defendants and if it considers that there are other parties who should have been joined or were improperly joined give appropriate directions under order 1 Rule 10 (2).”**

I have found that the plaintiff makes definite claims against TTC. It was in my view entitled to seek leave to join TTC. Indeed if the original plaint had been drawn in the terms of the draft amended plaint without mentioning TTC, the court would be duty bound to direct that TTC be joined as a necessary party for the effectual and complete adjudication of all the questions involved in the suit.

The defendant has argued that the proposed amendment is intimidating. In my view, the voluminous nature of the proposed amendments and the sums claimed on their own cannot be grounds for declining leave to amend.

The defendant has also argued that there has been delay in bringing this application. However, the hearing of this suit has not commenced and will in all probability not commence during the current session. In the premises, granting leave to amend will not cause any delay that will prejudice the defendant.

With regard to the contention that the defendant will be prejudiced if the leave sought is granted, I am afraid such prejudice that would be beyond compensation by an award of costs has not been demonstrated. I have also not detected inconsistencies in the draft amended plaint that will prejudice the defendant.

Finally, with regard to the argument that the proposed amendment will deny the defendant the defence of limitation, I note that under sub rule 5 as read with sub rule 2 of rule 3 of Order VIA amendment may

be allowed even if application for leave is made outside the relevant period of limitation notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as pleaded in the original plaint.

As already observed, I discern no prejudice to the defendant if the amendment sought is allowed.

My findings above show that the plaintiff has satisfied the parameters for the grant of the leave sought and for leave to serve Notice of Summons abroad upon the proposed 2<sup>nd</sup> defendant. I will therefore allow the application in terms of prayers 1, 2, 4 and 5 thereof. The defendant may file an amended defence within 14 days of today. The 2<sup>nd</sup> defendant should be served in accordance with the provisions of Order V Rules 2 of the Civil Procedure Rules. The return date be 21 days from the date of service. The Registrar of this Court is directed to comply with Rule 27 of Order V of the Civil Procedure Rules.

The defendant will have the costs of this application.

Orders and directions accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2007.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:**

Malik for the defendant and Taibjee for the plaintiff.

**F. AZANGALALA**

**JUDGE**

**21/11/07**