



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

**CIVIL CASE 2205 OF 2000**

**HARRISON C. KARIUKI.....PLAINTIFF**

**VERSUS**

**BLUE SHIELDD INSURANCE CO. LTD.....DEFENDANT**

**RULING**

Hearing of this suit commenced on 16<sup>th</sup> September, 2004 when issues to be determined were by consent framed. A number of facts were also admitted by consent of the parties. The parties also agreed to put in a common bundle of documents before the next hearing date, 13<sup>th</sup> October, 2004. On that day the parties put in a list and bundle of agreed documents and hearing of testimony commenced. The Plaintiff testified. He concluded his testimony on 11<sup>th</sup> November, 2004 and closed his case. The Defendant's case commenced on 28<sup>th</sup> April, 2005 and was concluded on 17<sup>th</sup> May, 2005. The Defendant called two witnesses. Upon close of the Defendant's case the learned counsels appearing informed the court that they wished to put in written submissions. It was ordered that they do exchange and file their written submissions within thirty (30) days. The case would be mentioned on 21<sup>st</sup> June, 2005 to take a date for judgment. On that date neither counsel had filed submissions and the matter was fixed for further mention on 6<sup>th</sup> July, 2005. On that date the Plaintiff's counsel had not filed his submissions, and he requested more time. The matter was fixed for further mention on 20<sup>th</sup> July, 2005. The Defendant's counsel had filed his submissions on 29<sup>th</sup> June, 2005.

On 20<sup>th</sup> July, 2005 the Plaintiff's counsel informed the court that he had filed an application by chamber summons dated 19<sup>th</sup> July, 2005 for leave to amend the plaint. That application is the subject of this ruling. It is brought under Order 6A, rules 3, 5(1) and 8 of the Civil Procedure Rules. Sections 3A, 63(e) and 100 of the Civil Procedure Act are also quoted. A draft amended plaint is annexed to the application. It is stated in the grounds for the application appearing on the face thereof, *inter alia*, that amendment is sought so that the Plaintiff may plead specifically "the claim or total sums sought which was inadvertently omitted by his advocates"; that this will merely be a rectification of errors and omissions in the plaint in order to properly plead all issues for trial and determination; that the Plaintiff's previous advocates inadvertently failed to properly plead "the issues for determination and specifically failed to plead the sum claimed and/or sought by the Plaintiff"; that the mistakes of an advocate should not be visited upon a litigant; that the intended amendments will enable the court to adjudicate on the real question in dispute between the parties; that there are no new issues being introduced; that no new or inconsistent cause of action is being introduced by the intended amendment; that the Defendant stands to suffer no prejudice that cannot be compensated by way of costs; and that it is just an equitable to allow the Plaintiff to amend the plaint. A supporting affidavit sworn by the Plaintiff is an elaboration of those grounds.

The Defendant has opposed the application as set out in the grounds of opposition dated 28<sup>th</sup> July, 2005. It is argued therein that the Plaintiff has no right to seek leave to amend the plaint after the suit has been fully heard, all the evidence taken, the Defendant's submissions filed, and the case only pending judgment; that the application is a belated afterthought; that the Plaintiff is guilty of a long, inexplicable, fragrant and inordinate delay in seeking leave to amend; that before trial commenced both counsels deliberated upon and framed the issues for determination, yet the Plaintiff did not seek to amend at that stage; that during cross-examination of the Plaintiff it came out that some of the special damages that he sought to recover had not been specifically pleaded, yet he did not seek to amend the plaint at that stage; that the Defendant's written submissions also raised that issue; that the amendments sought are so extensive that the whole structure of the Plaintiff's suit is altered, ten (10) new paragraphs are introduced pleading afresh the contract between the parties *in extenso*; and that these intended amendments are not simple clarifications or corrections of accidental slips or mistakes; and that the intended amendments entail inclusion of substantial claims previous unclaimed and unpleaded. It is also argued that to allow the amendments sought at the present stage of the proceedings will mean reopening the whole case with new pleadings to be filed and the case heard afresh. The Defendant further argues in the grounds of opposition that litigation must come to an end, and there will be no end to litigation if parties are permitted to undo a full trial that has taken place by amending their pleadings so belatedly, and to the prejudice of the other parties. Finally it is argued that seeking to amend the plaint at this stage of the proceedings is an abuse of the process of the court.

I have considered the submissions of the learned counsels appearing. I will say at the outset that under rule 3(1) of Order 6A of the Civil Procedure Rules the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend its pleadings. Under rule 5(1) of the same Order the court may, either of its own motion or on the application of any part, order any document to be amended in such manner as it directs and such terms as to costs or otherwise as are just for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings. See the case of **DANIEL MIGWI NJAI –vs- HIGH VIEW FARM LIMITED AND ANOTHER**, Court of Appeal Civil Appeal No. 139 of 1989 (Unreported). So, I do not accept the argument that by the mere fact that the present application has been brought after all the evidence has been taken and while the case is pending judgment the Plaintiff has abused the process of the court. He was entitled under rule 3 aforesaid to bring the application, and the same must be disposed of on its own merits.

The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no injustice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main thing is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined. In the case of **CENTRAL KENYA LIMITED –vs- TRUST BANK LIMITED** (2000) EALR 365 the Court of Appeal held as follows, *inter alia*,:-

***“The amendment of pleadings .....(is) aimed at allowing a litigant to plead the whole of the claim he (is) entitled to make in respect of his cause of his action. A party would be allowed to make such amendments of pleadings as (are) necessary for determining the real issue in controversy or avoiding a multiplicity of suits, provided, (i) there (has) been no undue delay, (ii) no new or inconsistent cause of action (is) introduced, (iii) no vested interest or accrued legal right (is) affected, and (iv) the amendment (can) be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment .....(does) not result in prejudice or injustice to the other party that (cannot) not be properly compensated for in costs..... Neither the length of..... proposed amendments nor mere delay (are) sufficient grounds for declining leave to amend. The overriding considerations (are), whether the amendments (are) necessary for the determination of the suit and whether the delay (is) likely to prejudice the opposing party beyond compensation in costs”.***

Under subrule (5) of rule 3 aforesaid an amendment may be allowed in certain circumstances

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 a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

That being the law, I must now determine if the proposed amendments will so prejudice the Defendant as to occasion it injustice beyond compensation in costs. It will be noted that the Defendant very early in the suit admitted and paid to the Plaintiff those sums that it felt were due to him, being KShs.1,480,168/55. See the consent order recorded on 30<sup>th</sup> January, 2001. At the beginning of the trial issues for determination were framed by both counsels; those issues were largely informed by that admission and payment. The issues as framed by consent are as follows:-

- 1. Whether the Plaintiff's dues as computed by the Defendant and resulting in the payment of KShs.1,480,168/55 as per the consent recorded on 30.1.2001 was correct.**
- 2. Whether there are any further dues payable to the Plaintiff.**
- 3. Whether the Defendant paid to the Plaintiff his due pension, and if it was paid, whether the Defendant was entitled to deduct the Plaintiff's debts to the Defendant from that pension.**
- 4. Whether the Plaintiff is entitled to severance pay under section 16A of the Employment Act, Cap 226.**

Some important facts were also admitted by consent as follows, again informed by the admission and payment already made by the Defendant to the Plaintiff:-

- 1. The Plaintiff was the Defendant's employee from 28<sup>th</sup> November, 1986 to 6<sup>th</sup> December, 2000.**
- 2. The Defendant terminated the Plaintiff's employment without due notice on 6<sup>th</sup> December, 2000.**
- 3. The Defendant is entitled to terminal dues, the question being only the quantum thereof.**
- 4. The Defendant is entitled to the following:-**
  - (i) 3 months salary in lieu of notice.**
  - (ii) Cash in lieu of leave for the year 2000.**
  - (iii) Leave allowance for the year 2000.**
  - (iv) 6 days leave for the year 1999.**
  - (v) Pension.**
- 6. The Plaintiff owed the Defendant KShs.415,339/00, the same being outstanding car loan, which sum the Defendant recovered before paying to the Plaintiff KShs. 1,480,168/55.**

Subsequently, the parties put in a common list and bundle of documents. The suit was then fully heard as already seen and was pending submissions by Plaintiff and judgment when the present application was brought.

The proposed amendments, as can be seen from the draft amended plaint annexed to the application,

are extensive. Some nine (9) new paragraphs are added to the plaint. There are also amendments to the reliefs sought. Even the Defendant's admission resulting in the consent order of 30<sup>th</sup> January, 2001 and the subsequent payment to the Plaintiff made by it has been pleaded. The Plaintiff, by these proposed amendments, is seeking to plead his case afresh and in great detail. New claims have been introduced. In paragraph 3D of the draft amended plaint there is a new claim of Kshs.91,797/00 per year for fourteen (14) years, the same stated to be the sum due to the Plaintiff from the Defendant as compensation at the rate of fifteen (15) working days for each working year. In paragraph 8A of the draft amended plaint damages are claimed. The question must be asked, if the Defendant had been faced with the Plaintiff's case as set out in the draft amended plaint, would it have made the admission it did and which resulted in the consent of 30<sup>th</sup> January, 2001? Probably not. If these proposed amendments are permitted, the Defendant will be faced with a much more expanded case than it has already defended. It appears to me that the case would have to be heard afresh. Witnesses would have to be summoned again and the parties would have to present their respective cases again. This is an old matter and with each passing year the memories of witnesses become hazier. Why should the Defendant have to go through the trial of the Plaintiff's case again? Why has the Plaintiff waited until so late to seek to amend his plaint?

The deficiencies in the Plaintiff's case became apparent when he was being cross-examined. Why did he not apply to amend at that stage? In this application he has sought to blame his previous counsel. Assuming that that blame is merited, is it a sufficient reason to allow the amendments sought at this late stage? The Court of Appeal had this to say in the case of MUNICIPAL COUNCIL OF THIKA AND ANOTHER VS LOCAL GOVERNMENT WORKERS UNION (Thika Branch), Court of Appeal, Civil Appeal No. NAI. 41 OF 2001:-

***“We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing amendment at a very late stage of the proceedings.”***

I hold that to allow the extensive amendments sought by the Plaintiff at this late stage will occasion great prejudice to the Defendant that cannot be made good by costs. It will occasion injustice to the Defendant who will have to extensively amend its defence. The Defendant will probably rue the admissions it made after suit was filed and which resulted in the consent order of 30<sup>th</sup> January, 2001. It will have to meet a much more expanded case than was originally pleaded, and it will have to summon again its witnesses to testify afresh. This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admissions made by the other party towards expeditious disposal of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted.

Having considered all matters placed before me, and in exercise of my discretion I will refuse the application. It is hereby dismissed with costs to the Defendant. Order accordingly.

**DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2006.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2006.**