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

Civil Case 482 of 2005

RAMJI HARIBHAI DEVANI LIMITED…….....……..
PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED….....…….DEFENDANT

R U L I N G

This suit was instituted by a plaint dated and filed on 30.8.2005. The defendant entered appearance on 12.9,2005 and on 26.9.2005 it delivered its defence. On 30.9.2005 the plaintiff filed an amended plaint and on 18.10.2005 the defendant delivered its amended defence. A reply was filed on 25.10.2005.

On 6.2.2006 an interlocutory application for injunction was disposed of by my Learned brother Ochieng J.

On 22.5.2006 the defendant filed an application by way of Chamber Summons expressed to be brought under Order 6 Rule 13(1) (b) and (d), Order 6A Rule 7(1) and Section 3A of the Civil Procedure Act. The application seeks to strike out the amended plaint on the grounds that the plaint is fatally defective, null and void as it does not comply with the mandatory provisions of Order 6A Rule 7(1) of the Civil Procedure Rules and that the plaintiff is legally obligated under the various legal charges it executed to compensate the defendant on a full indemnity basis for all costs incurred in defending itself.

The application is supported by an affidavit sworn by the defendant's relationship manager who depones that he has been advised that the amended plaint is fatally defective, null and void as it does not comply with the provisions of Order 6A Rule 7(1) of the Civil Procedure Rules.

The application is opposed and there is a replying affidavit sworn by a director of the plaintiff who depones that he is advised by counsel for the plaintiff that the omission to indicate the order pursuant to which the amendment to the plaint was made is not fatal and the amendment is not an abuse of the court process neither is it scandalous, frivolous or vexatious.

The application was canvassed before me on 12.6.2006 by Mr. Gichui Learned counsel for the applicant/defendant and Mr. Nyaencha, Learned counsel for the plaintiff/respondent.

I have fully considered the application and the submissions made on behalf of the parties herein. The point for determination here is a short one. It is whether or not the omission to endorse the amended plaint with the number of the rule in pursuance of which the amendment was made is fatal to the amended plaint. According to the defendant the requirement for the same which is provided under Order 6A rule 7(1) is fatal as the language of the said rule is mandatory. Several cases were cited in support of that

proposition. I will refer to some of them in this ruling.

The plaintiff on the other hand is of the view that the omission to endorse the rule under which the amendment was made was a mere irregularity which should be overlooked. It is further submitted for the plaintiff that the irregularity if it may not be ignored can be cured by an amendment for which leave was at the same time being sought.

Reliance was also placed upon several cases for that proposition. I have read the cases but will not refer to all of them in this ruling.

I have carefully considered the application in the light of the affidavits on record and the arguments of counsel. I have given due consideration to the cases cited by counsel. Having done so, I take the following view of the matter. Order 6A Rule 7(1) of the Civil Procedure Rules reads:

"**7(1) Every pleading and other document amended under this order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made."**

The rule seems to be couched in mandatory terms and hence the applicant's submission that, non-compliance thereof is fatal to the amended plaint in this case. The defendant indeed furnished direct authority on that view. My Learned brother Ochieng J was of that view in **Wilfred Dickson Katibi – vs – Barclays Bank of Kenya and 2 others: HCCC No.259 of 2005 (UR):** The Learned Judge found support in the case of **Alice Wanjiru Njihia – vs – John K. Rukunga and Another: HCCC No. 1835 of 1999** which was a decision of Ringera J as he then was and in **Stockman Rozen Kenya Ltd – vs- Da Gama Rose Group of Cmpanies Ltd [2002] 1 KLR 572** which was a decision of my Learned brother Mwera J. Mwera J, took the same position in the case of **Pan African Bank Ltd (In Liquidation) - vs - Abrahim Kipsang: HCCC No.106 of 1997 (UR)**. Mutungi J was also of the same view in **Giro Commercial Bank Ltd –vs- Sam Nyamweya: HCCC No.1391 of 2000 (UR).**

Counsel for the plaintiff freely admitted that the amended plaint flouted the provisions of Order 6A Rule 7 (1) but submitted that the omission to endorse the number of the rule pursuant to which the amendment was made was not fatal and should be ignored and if not ignored, leave should be granted for the amendment as the omission has caused no prejudice to the defendant. Counsel had his own set of authorities in support of his view. The most direct one is the case of **Milestone Engineering Ltd and Another – vs – Cooperative Merchant Bank of Kenya and Another: [851] of 2000 (UR).** That was a decision of Onyango Otieno J as he then was. The Learned Judge said the following about the rule:-

"**In my humble opinion this omission is minor and I will allow the plaintiff to further amend the plaint to include the rule under which the amendment is made. I do this because I note that it has not prejudiced the Respondent as it is an amendment to cover a matter which the Respondent is already aware of and it is being made before the defence is filed."**

In counsel's view the use of the word "***shall"*** in Order 6A Rule 7(1) should not be interpreted as being mandatory but directory. For the proposition, reliance was placed upon the case of **Standard Chattered Bank Ltd –vs – Lucton (Kenya) Ltd: HCCC No.462 of 1997 (UR)** in which Ringera J as he then was said:

"**There appears to be a common belief by many in these courts that the use of the word "*shall*" in a statute makes the provision under construction a mandatory one in all circumstances. That belief in my discernment of the law is a fallacious one. As I understand the canons of statutory interpretation, the use of the word "*shall*" in a statute only signifies that the matter is prima facie mandatory. The use of the word is not conclusive or decisive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only."**

Further reliance was placed upon the case of **Nyamogo – vs- Kenya Posts & Telecommunications corporation: [1993] LLR 5018 (UR)** in which Hayanga held that non-compliance with Order 6A Rule

7(2) was not fatal. The Learned Judge ordered the offending amendment withdrawn and rectified. Waki J as he then was held the same view in **Ajit Singh Bhogal and Another –vs – Notco (Mombasa) Ltd and Another: HCCC No.212 of 19995 (UR).** The Learned Judge dealt with an amendment which did not comply with Order 6A Rule 7(3). Leave to further amend the pleading was granted.

So, I am faced with two rival submissions each supported by persuasive authority of this court. Ringera J as he then was in his characteristic lucid manner in **Standard Chartered Bank Ltd – vs – Lucton (Kenya) Ltd (Supra)** came to the conclusion that "***shall"*** in a statute only signifies that the matter is prima facie mandatory but the use of the word is not conclusive or decisive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only. The Learned Judge received guidance from "***Principles of Statutory Interpretation"*** by G. P. Singh, a former Chief Justice of Madhya Pradesh High Court in India who expressed himself at page 242 as follows:-

"**The use of word "*shall*" raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other consideration such as object and scope of the enactment and the consequences flowing from such construction. There are numerous cases where the word "*shall*" has, therefore, been construed as merely directory."**

Being so guided the Learned Judge determined that the use of the word "***shall"*** in Section 5 of the Oaths and Statutory Declarations Act Cap.15 Laws of Kenya was not mandatory but directory. That decision was made on 19.11.2002. It is a later decision to the decision of the same Judge in **Alice Wanjiru Njihia – vs – John K. Rukunga & Another (Supra)** which was one of the decisions that persuaded, my Learned brother Ochieng J in **Wilfred Dickson Katibi – vs – Barclays Bank of Kenya and 2 others (Supra)** to decide that an amendment which failed to comply with the provisions of Order 6A rule 7(1) of the Civil Procedure Rules was a nullity and he struck it out. That decision was made on 31.1.2006. It would appear that the later decision of Ringera J in the **Standard Chartered Bank Case (Supra)** was not brought to the attention of Ochieng J. I have not read the entire ruling of Ringer J in the case of **Alice Wanjiru Njihia – vs - John K. Rukunga & Another (Supra)** save for the portion quoted by my Learned Brother Ochieng J in the **Wilfred Dickson Katibi Case.** I would hazard a view that the opinion held by Ringera J in the Alice Wanjiru Njihia case changed with time hence the Learned Judge's decision in the **Standard Chartered Bank case.**

It further appears as if my Learned brother's (Ochieng J) own decision in **Paul Kipkemoi Melly –vs – The Permanent Secretary Treasury: HC MISC. APPL, No.1179 of 2003** was not brought to his attention when considering the **Wifred Dickson Katibi case**. In the earlier case the Learned Judge agreed with the observation made by Ringera J in the **Standard Chartered Bank Limited case (Supra)** with respect to the interpretation of the word "***shall"*** in statutes.

In the light of the above I most respectfully agree with the interpretation given by Ringera J to the use of the word "***shall"*** in a statute or a rule. Being of that persuasion, I am in respectful agreement with the decision of Onyango Otieno J in **Milestone Engineering Ltd and Another – vs – Cooperative Merchant Bank of Kenya and Another (Supra)** that the omission to endorse the rule under which the amendment was made in this case is a minor omission. In my view the use of the word "**shall"** in the rule is merely directory and not mandatory. I am fortified in this view by the fact that the omission has not occasioned any grave prejudice to the defendant. The defendant has indeed responded to the amended plaint and proceedings have continued on the basis of the amended plaint. To hold otherwise would lead to the unjust result of striking out the amended plaint with the consequence that the plaintiff's suit would stand struck out. That consequence in my view was not envisaged or even contemplated when the rule was made.

The upshot of this matter is that I find the omission to endorse the rule in pursuance of which the amendment to the plaint was made to be an irregularity of form which is not fatal. The same can be excused by the court in its discretion. As the plaintiff sought leave to further amend the plaint to incorporate the rule under which the amendment was made, I grant the leave sought. Such further amended plaint to be filed and served within 7 days of today.

With regard to the costs of the application I am of the view that as the same was not altogether without merit I award the same to the defendant in any event.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3rd DAY OF JULY, 2006.

F. AZANGALALA

JUDGE

3.7.2006

Read in the presence of:-