



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 284 of 2003

KOMASSAI PLANTATIONS LIMITED.....PLAINTIFF

VERSUS

BANK OF BARODA (K) LIMITED.....DEFENDANT

RULING

When further affidavits need to be filed by parties in interlocutory application either in support or in opposition, parties ordinarily consent to such filing without much acrimony. In the present case the plaintiff wished to rely on a further affidavit in reply to the defendant's replying affidavit, that application was opposed.

The plaintiff filed an application by Notice of Motion brought under Order 50 Rule 16 (1) and (2) of the Civil Procedure Rules seeking an order that: -

**“That the plaintiff be allowed to file and refer to the supplementary affidavit of SOBHAJYACHAND POPATLAL SHAH sworn on 10<sup>th</sup> day of April 2006 in support of the plaintiff's application for leave to amend the plaintiff date 19<sup>th</sup> May, 2003.”**

The affidavit the plaintiff seeks rely upon refers to matters of the value of the suit property and the claim of high interest charged by the defendant. Plaintiffs counsel stated that the further affidavit is necessary to enable the plaintiff meet the defendant's opposition to its application to amend plaint.

The defendant opposed the application and in so doing relied on the replying affidavit by Mukhtiar Singh. That affidavit fails to respond to the plaintiff's application for leave to file and refer to the further affidavit, instead that reply goes into the merit or demerits of the plaintiff's application for amendment of the plaint. The defendant's counsel also submitted that the plaintiffs application to rely on a further affidavit relied on the self same affidavit that plaintiff was seeking leave to rely on. Defendant said that that means that the plaintiff has already filed the affidavit without the leave of the court. The defendant's counsel did also in her submission deal with issues that relate to the application for leave to amend plaint and the court will, therefore, not consider those submissions. The defendant did not in its submission indicate what, if any, prejudice it would suffer if the plaintiff was allowed to rely on the affidavit. In my view when a party wishes to file a further affidavit, so long as that affidavit complies to the rules on affidavit, such application ought to be allowed subject to the opposite party not suffering any prejudice.

The defendant having failed to show such prejudice the court will accede to the application. The court has power to deem an affidavit already filed as though filed with the leave of the court.

The orders of this court are: -

**(1) That the plaintiff is granted leave to refer to the supplementary affidavit of SOBHAJYACHAND POPATLAL SHAH.**

**(2) That the said affidavit of SOBHAJYACHAND POPATLAL SHAH dated 10<sup>th</sup> April 2006 is**

**hereby deemed to have been filed with leave which leave is hereby granted.**

**(3) That the plaintiff is granted costs of the chamber summons dated 1<sup>st</sup> Mach 2006.**

MARY KASANGO

**JUDGE**

Dated and delivered this 12<sup>th</sup> May 2006.

MARY KASANGO

**JUDGE**