

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

Civil Case 932 of 2002

TWICTOR INVESTMENTS LIMITED..... PLAINTIFF

VERSUS

EURO BANK LTD AND ANOTHER.....DEFENDANT

RULING

This suit was instituted by a plaintiff dated and filed on 29.7.2002 against the 1st and 2nd defendants. The plaintiff was verified by an affidavit sworn by a director and shareholder of the plaintiff. On 30.10.2003 leave was granted to the plaintiff to amend its plaint and serve the amended version upon the 1st and 2nd defendants and the additional defendant – the 3rd defendant. The amended plaint was filed on 20.11.2003.

On 8.9.2005, the Advocates for the 1st defendant filed a Notice of Preliminary Objection stating that there is no affidavit in verification of the amended plaint and that the amended plaint was filed in contravention of Order 6A Rule 6 of the Civil Procedure Rules. It is this Preliminary Objection that came before me for consideration on 30.3.2006.

I have considered the objection and the submissions made to me by the Learned counsels. Having done so I take the following view of the matter. There is no dispute that the amended plaint was not accompanied by a verifying affidavit. Is the amended plaint incompetent on account of that failure? Order VII Rule 2 reads:

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments in the plaint.”

It is plain that this rule refers to a “**plaint**”. No where is “**amended plaint**” mentioned. As held by Ringera J as he then was in **Microsoft Corporation –vs- Mitsumi Computer Garage Ltd [2001] 2 EA 460**, Order VII Rule 2 does not require any verifying affidavit to accompany an amended plaint or any other pleading save the plaint originating the action. The Learned Judge considered the mischief that provoked the introduction of the requirement of a verifying affidavit. He endorsed the views expressed by Juma J extra judicially that the requirement was to prevent the “**hitherto unseemly spectacle of legal multi-representation of plaintiffs by advocates particularly in accident cases.**” Now of course verification of the contents of the plaint is a requirement in every action originated by a plaintiff. In the case at hand the amended plaint was filed pursuant to leave granted by the court. In my view the mischief intended to be prevented by the requirement of filing a verifying affidavit is absent. It is immaterial that an additional defendant has now been introduced to the suit and that other amendments have been made to the plaint.

The second point of objection raised is that as the order granting leave to amend did not specify the period within which the amendment was to be effected, the plaintiff was obliged to lodge the amended plaint within 14 days of the order granting leave and since the plaintiff filed its amended plaint on 20.11.2005, which was 7 days too late the order granting leave to amend had lapsed as provided under Rule 6 of Order VIA of the Civil Procedure Rules. Counsel for the plaintiff argued that the application to amend the plaint was made under Order 1 Rule 10 and 13 of the Civil Procedure Rules and Order VIA Rule 6 was not applicable. In counsel’s view there is no specified period within which an amended plaint under Order 1 Rule 10 and 13 should be filed. Counsel for the 1st defendant was of the view that as the

plaintiff went beyond amending by addition of the 3rd defendant, the amendment could only be effected under Order VIA and not Order 1 Rule 10 and 13 alone.

In my view the amended plaint necessarily went beyond mere addition of the 3rd defendant and could only be effected under Order VIA and Rule 6 of the said order clearly applies. The said rule however saves the power to extend the period within which the amendment may be effected. In the application at hand the impugned amended plaint was filed on 20.11.2003. The 3rd defendant has responded to the amendment. Indeed the 3rd defendant has not raised objection to the same. The plaintiff has filed its issues for determination and on 6.3.2006 my Learned brother Hon. Waweru J ordered that the trial court frames and settles the issues to be determined. Indeed the suit had been set for hearing on 30.3.2006. In the premises the order that commends itself to me is that the amended plaint filed on 20.11.2003 is deemed as having been filed with leave. In other words the time within which the amended plaint should have been filed is extended to 20.11.2003.

In the end the Preliminary Objection is overruled. As the same was altogether not without basis, I make no order as to costs.

Orders accordingly.

DATED AT NAIROBI THIS 11TH DAY OF MAY 2006.

F. AZANGALALA

JUDGE

11.5.2006

DATED AND DELIVERED ON 11TH DAY OF MAY, 2006.

M. KASANGO

JUDGE

11.5.2006