



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

**Civil Suit 671 of 2005**

**MUGOYA CONSTRUCTION & ENGINEERING LTD.....  
.....PLAINTIFF**

**VERSUS**

**BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND.....DEFENDANT**

**RULING**

The plaintiff when it instituted this suit sued BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND.

The defendant in its defence denied its description in the plaint.

By an application dated 5<sup>th</sup> April 2006 the defendant sought to strike out the plaint and one of the grounds supporting that application was that **“the plaint as filed discloses no reasonable cause of action as the defendant is not an entity known in law capable of being sued or suing.....”**

Before that application, filed by the defendant, could be heard the plaintiff filed an application to amend the plaint. The application is brought under Order 1 Rule 10, Order 6 Rule 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The plaintiff seeks leave to amend the plaint by deleting the present defendant’s name with the name NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES. That is the only amendment sought

Plaintiffs counsel argued that the amendment only related to description of the defendant where a mistake was initially made by the plaintiff’s counsel in incorrectly stating the defendant’s name.

Defence opposed the application on the basis that it was an after thought, that it lacked merit and lacked bona fide and that granting the orders would prejudice the rights conferred on defendant by limitation of Action Act.

Defence relied on the case HCCC No. 1264 of 2002 (UR) SIETICO (IX) – V – FORTUNE COMMODITIES LTD, where the court rejected an application to amend on the basis that it was brought under the wrong order and on the basis that the applicant, by that application was trying to steal a match.

I have considered the plaintiff’s application the affidavit in support of the application and the defendant’s grounds of opposition. It is now accepted as law that leave to amend will generally be granted subject to there being no prejudice to the opposite side. The defendants were heard to argue that if

the amendment is allowed it would disallow the defendant to rely on the defence of limitation. The court is not of the view that the defendant sufficiently proved to the court that it would suffer prejudice, which cannot be compensated with costs.

The only amendment sought is the change of name. On close scrutiny the name sought to be added is exactly the same as one appearing in this pleadings, as the defendant. It is only that the names have been arranged differently. Essentially if one was to sue someone by the name Peter John, but later found that the arrangements of the names of the defendant are John Peter I am of the view that there cannot be a reason enough why an amendment sought to rearrange the name of such a person should be refused. After all there would, to my mind be no confusion as to who the name related to. That is exactly the position in the plaintiffs case. Indeed the defendant was not confused as to who the title of the defendant related to for the defendant proceeded to file a detailed defence to the plaintiff's claim. I therefore find that the defendant will not suffer any prejudice if the amendment is allowed. I am not persuaded by the finding in HCC NO. 1264 OF 2002, SIETICO (I X) LTD V FORTUNE COMMODITIES & ANOTHER. The fact that the defendant has a pending application to strike out the plaint is not reason to refuse the application sought. The court's moto in any case is to always attempt to sustain action and not to easily remove a party from the judgement seat without a hearing.

For the reasons stated hereof the orders granted are: -

- (1) That the plaintiff is granted leave to amend its plaint within 7 days from todays date.**
- (2) Such amended plaint shall be served upon the defendant hereof within 7 days from todays date and the defendant may file an amended defence within 7 days from the date of service of the amended plaint.**
- (3) The defendant is granted costs of the chamber summon dated 2<sup>nd</sup> May 2006.**

**MARY KASANGO**

**JUDGE**

Dated and delivered this 11<sup>th</sup> day of July 2006.

**MARY KASANGO**

**JUDGE**