



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

Civil Case 422 of 2003

**TRINITY PHARMA LIMITED.....1ST
PLAINTIFF**

**KHUSHI KANT SOLANKI.....2ND
PLAINTIFF**

**KUSUM SOLANKI.....3RD
PLAINTIFF**

VERSUS

**GIRO COMMERCIAL BANK LIMITED.....
.....DEFENDANT**

R U L I N G

This is the plaintiff’s application for leave to amend the Plaint. It is the plaintiff’s case that the proposed amendments were necessary for purposes of correcting some defect in the proceedings, so as to enable the trial court be in a position to determine the real question in controversy.

The plaintiffs say that they were not seeking to substitute the original cause of action. They also contend that if the proposed amendment were allowed, it would not prejudice the defendant.

In response to the application, the defendant contends that the plaintiff failed to point out the alleged defects which they wished to correct.

In that regard, it is to be noted that in the proposed amendments, the following changes are introduced.

- (a) The original paragraph 1 of the plaint is re-cast, so that a portion of it becomes the new paragraph 4. To my mind, that proposed change amounts to no more than a re-structuring of the content of the plaint.
- (b) At paragraph 3, the plaintiff proposes to describe the defendant’s role as a provider of banking and financial services in Kenya.

In my view, that proposal could not prejudice the defendant at all, for if it was inaccurate, the defendant need only say so.

- (c) It is at paragraph 5 of the plaint that the bulk of the amendments are proposed to be effected. In

my understanding, the only real change is the style of presentation, which changed from a narrative format, to a table. There were also two additional sums of US Dollars 26,318.67, instead of US Dollars 26,042/54; and a new entry of KShs.2,441/40. And finally, on that paragraph, the claim was changed from U.S. Dollars 519,911.04, to KShs. 50,851,973/=

I find nothing in the proposed changes which could possibly prejudice the defendant.

(d) At para 9, the proposal is to replace the phrase “**lengthy discussions and correspondence**”, with a specific period of 117 days.

Again, I would say that those proposed amendments could not prejudice the defendant.

(e) Paragraph 11 in the draft Amended Plaintiff is new. It states that the defendant had no legal right to hold the U.S. Dollars 90,984.00 in a trust account without lawful instructions from the plaintiff. The plaintiffs therefore seek a declaration that they were entitled to interest on that sum.

Given the fact that the preceding paragraph had already alleged the retention of U.S. 90,984, by the defendant without authority, I hold the view that by introducing the new paragraph, the plaintiffs were only stating the consequences of something that had already been pleaded. I cannot see how a request for a declaration that the plaintiff was entitled to interest at prevailing market rates would be prejudicial to the defendant, as they can state their response thereto, in a defence to the Amended Plaintiff, if this court were to grant leave for the proposed amendments.

(f) Paragraph 14 of the draft Amended Plaintiff is another new pleading. It seeks a declaration that all interest charged to the plaintiffs’ account from 10th September 2002, be reversed, written off and expunged from the plaintiffs’ banking records. That declaration is sought on the grounds that the defendant’s conduct had been most unethical and contrary to accepted best banking practice.

To my mind, if the plaintiffs were able to prove the assertions at paragraphs, 9, 10, 11, 12, 13, 15, 16, 17 and 18 of the plaintiff, they would have shown the defendant to have been unethical or to have acted in a manner that was inconsistent with the best banking practice. Therefore, by inserting the new pleading, the plaintiffs, were merely summarising what their case against the defendant is perceived to be, by themselves. The said new pleading would not therefore prejudice the defendants. And in any event, the defendant would have an opportunity to rebut it.

Having compared the original Plaintiff to the draft Amended Plaintiff I have formed the considered opinion that the plaintiff was not trying to introduce any new cause of action against the defendant. Basically, the plaintiffs do not propose to introduce new facts, but they have restructured the content of the Plaintiff and also asked for consequential declaratory relief, which ought to flow from the findings, if the same were favourable to the plaintiffs.

The reason why I decided to give consideration to the potential effects of the proposed amendments is to be gleaned from the decision by the HON. RINGERA J. (as he then was) in the authority which was relied upon by the defendant herein, being, **JANE WAMBUI MACHARIA V GIRO COMMERCIAL BANK LTD, MILIMANI COMMERCIAL COURTS HCCC NO. 739/03**. In that case, the learned judge had occasion to deal with an application for leave to amend the plaintiff. He held as follows:

“..... leave to amend will be granted even if it is necessitated by negligence or carelessness on the part of the party seeking to amend so as to enable the right question to go to trial unless the party applying was acting mala fide or by his blunder he had done some injury to his opponent which could not be compensated by costs or otherwise.”

I believe that the kind of injury which the learned judge had in mind is what most other judges have described as prejudice.

Now, in this case, I have come to the conclusion that the proposed amendments would not occasion

prejudice to the defendant. Meanwhile, I also note that the defendant did not as much as suggest, that the plaintiffs were motivated by mala fide, in bringing this application.

In **EASTERN BAKERY V CASTELINO [1958] E.A. 461 at page 462**, SIR KENNETH O'CONNOR P stated as follows:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be allowed freely, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs. The court will not refused to allow an amendment simply because it introduces a new case..... but there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit

The main principle is that an amendment should not be allowed if it causes injustice to the other side.”

In this case the defendant says that there would be an injustice as the defendant shall be called upon to call for totally new evidence.

First, I have already held that the facts which have been cited in the draft Amended Plaintiff were not new. Secondly, this case has not yet gone to trial. Therefore, all the evidence which the parties herein will adduce at the trial would be new, in any event.

Meanwhile, the defendant did not demonstrate to the court that any right that had accrued to it would be affected by the proposed amendments.

But, there is no doubt that there has been some considerable delay, on the part of the plaintiffs in bringing this application. The Defence was filed on 20th August 2003, and thereafter the Reply to Defence was filed on 16th September 2003. Pursuant to the provisions of Order 6 rule 11 of the Civil Procedure Rules, pleadings closed on 1st October 2003.

Therefore, the plaintiffs could have brought this application, for leave to amend the Plaintiff, soon after they were served with the Defence. However, it must be appreciated that if the plaintiffs did not then appreciate the need to amend the Plaintiff, they would have had no reason to seek to amend it.

It would appear that it was not until after the plaintiffs changed their advocate, on 19th December 2005, that the pleadings were reviewed. That would explain why this application was filed on 19th May 2006. But that still begs the question whether the delay could defeat the application.

In **CENTRAL KENYA LTD V TRUST BANK LTD [2002] E.A. 365**, the Court of Appeal unanimously held as follows, at page 369 – 370:

“Mere length of proposed amendments is not a ground for declining leave to amend. The overriding consideration in applications for leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

Bearing in mind those considerations, I hold that the proposed amendments herein would not prejudice the defendant to an extent which could not be compensated in costs. I also hold that the said proposed amendments are necessary for the determination of the real issues in dispute in this suit.

Finally, I have taken into account the fact if the plaintiff was not amended, the plaintiffs would be

precluded from raising, in a subsequent suit, any issues which might have been omitted from the original plaint herein. Here, I have in mind the three declaratory reliefs, including the discharge of the debenture dated 16th December 2004.

For all the foregoing reasons, I am satisfied that the plaintiffs have made out a case to warrant leave to amend the Plaint. I do therefore grant leave to the plaintiffs to amend the plaint in accordance with the draft annexed to the affidavit in support of this application. The Amended Plaint shall be filed within the next fourteen (14) days from today. It should thereafter be served upon the defendant within fourteen (14) days of filing.

Meanwhile, the plaintiffs will pay the costs of the application dated 18th May 2006, in any event, as they could not possibly hold the defendant responsible for the manner in which the original plaint was drawn up. The responsibility for the inadequacies of the original plaint rests squarely on the shoulders of the plaintiffs and their earlier legal advisors.

DATED and DELIVERED at Nairobi, this 28th day of September 2006.

FRED A. OCHIENG

JUDGE