

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

Civil Case 496 of 2004

FARMLANDS CO. LIMITED PLAINTIFF

VERSUS

CAPTAIN WAWERU THUKU1ST DEFENDANT

MUTHONI GICHOHI2ND DEFENDANT

RULING

The Plaintiff has moved this court by a chamber summons dated 5th May, 2006. The same is brought under Order VIA Rule 3(1) (4) and 5(1) of the Civil Procedure Rules. The Plaintiff seeks that leave be granted to it to further amend the Plaintiff. The draft amended Plaintiff was filed by the Plaintiff prior to this application. The background of this matter is that the Plaintiff filed this action on 8th November, 2004. After service upon the defendant, the Defendant filed on 14th January, 2005 a defence and counterclaim. The Plaintiff on 1st February, 2005 filed a reply to defence and counterclaim. The Plaintiff further without leave of this court filed after the close of pleadings a further amended Plaintiff. In response to that further amended Plaintiff filed without leave the Defendant filed a Chamber Summons dated 8th February, 2006 seeking to strike out that further amended Plaintiff. On 24th May, 2006 the Plaintiff filed the present application belatedly seeking leave to file the further amended Plaintiff. The Plaintiff in support of the application stated that it filed this action against the defendant seeking the delivery of a motor vehicle which had been unlawfully taken from it by the Defendant. Subsequently to this action being filed, the Plaintiff realized that the motor vehicle had been sold. The Plaintiff said that the further amended Plaintiff was seeking an alternative claim against the Defendants for damages and an order for costs. The Plaintiff therefore, sought that it be granted leave to file a further amended plaintiff. The Defendant opposed the Plaintiff's application on the basis that the Plaintiff was abusing the process of the court in that it now seeks leave to regularize that further amended Plaintiff which had been filed without leave. The Defendant was of the view that the Plaintiff's action to file the present application was in bad faith. The Plaintiff in support of its application quoted portions relied on in the case of **Mechanized Systems Limited v Guardian Bank Limited HCCC 2 of 2005** as follows:

“In a commentary in Mulla Code of Civil Procedure, 13th edition, volume 1, at p. 726, it is observed

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‘As a general rule, leave to amend will be granted so as to enable the real question in issue between the parties be raised on the pleadings, where the amendment will occasion no injury to the opposite party except such as can be sufficiently compensated for by costs or other terms to be imposed by the order. It does not matter whether the original omission arose from negligence or carelessness...

Broadly stating it, there is no injustice in granting the amendment if the opposite side can be compensated in costs. It is only when costs would not be adequate compensation that amendment will be refused. It is immaterial whether the error sought was accidental or not. There is no rule limiting amendments to accidental errors...’.”

Other than that which can be compensated by an award of costs the defendant has not shown what prejudice it will suffer if the amendment that is sought by the Plaintiff is granted. Having regard to the provisions of Order VIA of the Civil Procedure Rules and having regard to the now accepted principles on amendments that amendments would be allowed freely subject to prejudice to the defendant, I find that the Plaintiff has made out a case for orders to be granted as sought. It is however, only right that the further amended Plaintiff which was filed without leave of this court be struck out with costs to the Defendant. Further since the granting of the orders as sought will make the defendants application dated 8th February, 2006 to be superfluous the court is of the view that the Defendant is deserving in an award of costs in that regard since the filing of that application was necessitated by the actions of the Plaintiff in filing a further amended plaintiff without leave. The orders of the court in summary are as follows:-

1. **That the further amended Plaintiff filed on 9th February, 2005 is hereby struck out.**
2. **That the Plaintiff is granted leave to further amend its Plaintiff in terms of the one filed on the 9th February, 2005 within 14 days.**
3. **The costs of the Chamber Summons dated 5th May, 2006 and 8th February, 2005 are awarded to the Defendant in any event.**

MARY KASANGO

JUDGE

Dated and delivered this 23rd October, 2006.

MARY KASANGO

JUDGE