



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 270 of 2002

**ISAAC RUGA MWAMBURA.....
.....PLAINTIFF**

VERSUS

**NATIONAL BANK OF KENYA LTD.....1ST
DEFENDANT**

**P. K. KIBERA.....2ND
DEFENDANT**

**MARGARET NJENGA T/A CHESTEM ENTERPRISES.....3RD
DEFENDANT**

RULING

By an application dated 8th June 2006 brought under **order VIA rules 3(1) and 8** of the **Civil Procedure Rules**, the plaintiff prayed for leave to amend his plaint in terms of a draft amended plaint that was annexed to the said application. In the earlier plaint the plaintiff had sought judgment against the defendants jointly and severally and the prayers sought included a declaration that the sale and transfer and eviction of the plaintiff from a parcel of land known as **L.R. NYANDARUA/KAHURU/290** to the second defendant by the first and third defendants was fraudulent, illegal, null and void. He also sought an injunctive order, general damages and special damages. However, the particulars of loss and damages had not been set out. In the draft amended plaint the special damages sought amounted to Kshs.242,338,328/-. In his affidavits in support of the application the applicant stated that he had been advised that the failure to specifically plead the particulars of special damages was fatal to his case. He therefore urged the court to allow him to amend the plaint so that he could bring out his specific claim on account of special damages.

The application was not opposed by the second and third defendants. The first defendant opposed the application and swore an affidavit through Samuel O. Odiyo, its Branch Manager at Nakuru. He stated that the suit was filed in the year 2002 and the plaintiff had not offered any explanation as to why the amendment sought were not made in the initial claim. He further stated that the plaintiff's intention was to vex the first defendant with unnecessary costs based on the claim which the plaintiff intended to bring. He also stated that the plaintiff was producing new causes of action that were statute barred. If the court deemed it necessary to allow the plaintiff's application, the first defendant urged the court to not only order payment of additional court fees but also order the plaintiff to furnish security for costs in the sum

of Kshs.1 million.

Mr. Mugambi for the applicant and Mr. Kiburi for the first respondent made brief submissions in support of their respective client's affidavits.

I have considered the submissions that were made by both counsel and the affidavits filed by the plaintiff and the first defendant. It is trite law that amendments to pleadings can be allowed at any time before delivery of a judgment. It is important that all the real issues in controversy are determined and such determination cannot be made if a party is denied the opportunity to bring the issues before a court. However, in exercising its discretion to allow or refuse an application for amendment of pleadings, a court has to consider whether the respondent is likely to suffer any prejudice if the application is allowed. The court should also consider the reasons advanced by an applicant in bringing the application for amendment of pleadings. It is not in dispute that the plaintiff did not set out the specific claims which he was advancing for special damages in the initial plaint. His counsel may have been negligent in filing such a claim but that is not sufficient reason for this court to shut out the plaintiff from rectifying his plaint before commencement of the hearing. The defendant will not suffer such prejudice as cannot be compensated by an award of costs. The first defendant did not draw the court's attention to any particular new cause of action that was going to be introduced by the plaintiff and which time barred.

While I agree that the amendment sought by the plaintiff will have the effect of increasing litigation costs in this matter that will be the case to both the plaintiff and the defendants. I cannot, in the absence of any application for provision of security for costs, make an order directing the plaintiff to provide security for costs to the first defendant. While the first defendant's views on the issue of costs seem to be well founded, it has to move the court if it desires the plaintiff to provide such security as it desires. I therefore allow the plaintiff's application for amendment of his plaint but on condition that he pays such additional court fees as will be assessed to be appropriate. He should file and serve the amended plaint within fifteen days from the date hereof. Thereafter the defendants will be at liberty to file their amended defences. The plaintiff will bear the costs of this application.

DATED, SIGNED and DELIVERED at Nakuru this 12th day of October, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Kurgat holding brief for Mr. Mugambi for the applicant and Mr. Gathaiya holding brief for Mr. Kiburi for the respondent.

D. MUSINGA

JUDGE