REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 684 of 2000

DIAMOND TRUST BANK …..……..………………………. PLAINTIFF

VERSUS

TCHUI DATA LIMITED ……...….………………….1ST DEFENDANT

MAURI ONYALO YAMBO ………….…………….… 2ND DEFENDANT

JOAN AKINYI YAMBO ……………..…………….. 3RD DEFENDANT

DIYALO TRUST LIMITED ……………..……….. 4TH DEFENDANT

RULING

The defendants are seeking to re-amend their Defence, as they say that when they were in the process of preparing for trial, new matters arose. It was thus deemed necessary to seek leave of the court to re-amend the Defence, as the defendants feel that the proposed amendments were necessary for the proper determination of the matters in dispute.

It is the defendants' case that if the Defence was to be re-amended, the plaintiff would not be prejudiced in any manner.

But the plaintiff feels that the defendants were undeserving of the orders sought, as the application was res judicata. The plaintiff pointed out that the defendants had previously sought and were granted leave to amend the Defence. Those orders were granted by the court on 22nd October 2004, with the consent of the plaintiff, who had, at that time, felt that it could not be prejudiced by the amendments which were sought at the said time.

However, as this current application was brought some two years later, the plaintiff feels that if it were allowed, simply because the plaintiff could be compensated by an award of costs, there would be no end to litigation.

It was the plaintiff's submission that by virtue of the doctrine of extended res judicata, matters which ought to have been pleaded should have been pleaded when the first application was made. It was said that parties should be denied opportunities to raise matters which they could have already raised.

Therefore, as re-amendment is a principle of amendment, which had already been dealt with, the defendants ought not to be allowed to seek it. So, even if they had omitted any part of the amendment, at the earlier stage, they should not be allowed to seek it now, said the plaintiff. To do so, would constitute

a violation of Order 2 rule 1 (2) of the Civil Procedure Rules, in the plaintiff's understanding.

Furthermore, the plaintiff faults the defendants for failing to demonstrate the alleged new developments which had necessitated this application.

Thirdly, the defendants are said to be guilty of inordinate delay, in bringing this application some six years after the suit was instituted.

Having given due consideration to the application, I note that the trial of the suit had been scheduled for 31st July 2006. However, the trial was put off because the parties had not yet formulated issues which would have been placed before the trial judge, for determination. Also there had been no discovery.

In **STANDARD CHARTERED BANK (K) LTD. –VS- MALINDI GENERAL ENGINEERING WORKS LTD. & 4 OTHERS MSA HCCC NO. 22/93,** the Hon. WAMBILYANGAH J., quoted with approval, the following words of BRETT M. R. in **Clarapede –vs- Commercial Union Association (1883) 32 W. R. 262;**

"**However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be done without prejudice to the other side. There is no injustice if the other side can be compensated by costs."**

The learned judge then went on to state that;

"the object of the court is to decide the rights of parties and not to punish them for the mistakes they make in the conduct of their cases."

Of course, those considerations are applicable to applications for leave to amend pleadings. That implies that delay per se, is not ground enough to deny a party leave to amend his pleadings.

In **MECHANISED SYSTEMS LTD. –VS- GUARDIAN BANK LTD., MILIMANI HCCC NO. 2 OF 2005,** the Hon. Njagi J, reviewed a long line of legal authorities on the issue of amendment of pleadings. He then expressed himself thus;

"From these authorities, it seems to be the law that an application for amendment of pleadings is always in the discretion of the court. Provided the application is made in good faith, and without undue delay, amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs. Even where there is delay, an amendment will be granted provided the other side can be compensated by costs.

These sentiments were sealed with approval in OCHIENG & OTHERS –VS- FIRST NATIONAL BANK OF CHICAGO, CIVIL APPEAL NO. 149 OF 1991, in which the Court of Appeal approved some excerpts from Bullen & Leake to the effect that the power of the court to allow amendments is intended to determine the true, substantive merits of the case; that amendments should be timeously applied for; that power to amend can be exercised by the court at any stage of the proceedings; and that as a general rule, however late the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side."

In this case, as the parties had not yet formulated the issues for determination at the trial, and also as there is yet no discovery, I find that the case is still at a tender stage of its life. It may have been around for six years, but it had not yet matured to a stage where it was ripe for trial. In that sense, it was still young.

As regards the contention of res judicata, I believe that the plaintiff has misapprehended it, for I have always known it to be the law that the parties to any proceedings are not limited to making amendments to pleadings only once. Therefore, just because the defendants herein had already amended their Defence once, did not preclude them from seeking a further amendment to the said Defence.

In my understanding, that which the defendants are seeking had not been sought before. I say so because what they had previously sought was not only granted, but had been given effect. So it is not being asked for again.

If the defendants were not permitted to re-amend their Defence, they would be unable to afterwards raise the intended issues in any other subsequent suit. It is for that reason that justice demands that leave be granted to the defendants, so that they can re-amend the Defence, to incorporate their whole Defence. After that is done, the trial court would have been enabled to substantively determine the real issues in dispute between the parties.

Accordingly, the defendants are hereby granted leave to re-amend the Defence in terms of the draft annexed to the application dated 21st August 2006. The requisite amendments are to be effected, and the re-amended Defence filed within fourteen (14) days from today.

I decline to order that the draft annexed to the application be deemed as filed and served. If I were to so order, it would imply that the draft somehow transforms itself into the actual re-amended Defence, which it cannot do.

The only proper mode of giving effect to amendments is by complying with the provisions of Order 6A rules 6 and 7 of the Civil Procedure Rules. In other words, after leave is granted to any party to amend his pleadings, he should proceed to do so within fourteen (14) days of the order, or within such other period as specified by the court. And, in the process of giving effect to the amendment, the party would be required to endorse the pleading with the date of the order allowing the amendment. Therefore, if the draft were said to have transformed itself into the amended pleading, it will be appreciated that unless it is duly endorsed with the date of the order allowing the amendment, it would be incomplete.

As regards the costs of the application, the defendants will bear the same, in any event.

Dated and Delivered at Nairobi this 29TH day of November 2006.

FRED A. OCHIENG

JUDGE