



REPUBLIC OF KENYA

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

**Civil Case 160 of 2003**

**EAST AFRICAN DEVELOPMENT BANK ..... PLAINTIFF**

**VERSUS**

**APOLLO INSURANCE CO. LTD ..... 1<sup>ST</sup> DEFENDANT**

**CMC MOTORS GROUP LTD..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

Delay in preparation and delivery of this ruling has been caused by my recent illness, hospitalization and long recuperation. The same is regretted.

On 29<sup>th</sup> July, 2004 this court (Emukule, J.) allowed an application by the then Third Party, CMC Motors Group Limited, to be joined in the proceedings as a defendant in the suit. The order upon which the third party notice had been served was also discharged. The Plaintiff had opposed the application. Upon the aforesaid joinder, it was necessary under sub-rule (4) of rule 10 of Order 1 of the Civil Procedure Rules, unless the court otherwise directs, for the plaint to be amended in such manner as may be necessary and amended copies of the summons and of the plaint to be served on the new defendant and, if the court thinks fit, on the original defendant. The court did not otherwise direct. The Plaintiff has now come to court by notice of motion dated 22<sup>nd</sup> December, 2005 seeking an order that the time for so amending and serving the plaint be extended. It is brought under Order 6A, rule 6 and Order 49, rule 5 of the Civil Procedure Rules. The grounds of the application given on the face thereof are that the Plaintiff was dissatisfied with the said order of 29<sup>th</sup> July, 2004 and filed an appeal in the Court of Appeal and that it now wishes to comply with the said order so that it may prosecute its case. There is no supporting affidavit annexed to the application.

The Defendants have opposed the application upon the grounds of objection dated 17<sup>th</sup> January, 2006. Those grounds are:-

***“a) The Plaintiff elected to appeal against the order and the appeal process was instituted. The appeal process has not been abandoned.***

***b) The application has been made after a most inordinate delay. No explanation for the delay has been made.***

***c) The application is vexatious and without any basis.***

I have considered the submissions of the learned counsels appearing. I have also perused the ruling of Emukule, J. of 29<sup>th</sup> July, 2004 in which the order for joinder of CMC Motors Group Limited was made. Emukule, J. did not give any time limit within which the Plaintiff had to amend the plaint and serve the amended plaint and amended summons. It is to be noted that under sub-rule (4) of rule 10 aforesaid amendment of the plaint is a necessary consequence of an order to add or substitute a defendant. That amendment is not by leave of court. It is also to be noted that the said sub-rule does not give a time limit within which amendment of the plaint should be made and service thereof as well as amended summons should be effected. So, it would have been desirable for Emukule, J. to impose a time limit within which the plaint should have been amended and the same together with amended summons served. As there

was no such order the Plaintiff has been at liberty to amend and serve the amended plaint at any time, subject, perhaps, only to rules pertaining to issuance, service and validity of summons generally. The court would be required to consider such rules if an application were made in that regard. It would also consider such rules in an appropriate application to strike out the plaint for unreasonably failing to comply with sub-rule (4) of rule 10 aforesaid in order to enable the suit to proceed to hearing. There are no such applications before me. I must emphasize that the amendments in this case were not by leave of court under Order 6A, in which event rule 6 thereof would have come into operation. The amendments were consequential under sub-rule (4) of rule 10 of Order 1 upon the order to add the 2<sup>nd</sup> Defendant made under sub-rule (2) of the same rule. Likewise rule 5 of Order 49 is also irrelevant as there was no limited time fixed by sub-rule (4) of rule 10 of Order 1 or by the court for amendment of the plaint and service of the same together with amended summons.

I have said enough to show that the present application is wholly misconceived. I will strike it out. It is so ordered. Regarding costs, the Defendants have opposed the application upon inappropriate grounds. I will award them only half of their costs of this application. It so ordered.

**DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2006.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2006.**