



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS, NAIROBI
HCCC NO. 630 OF 2004**

DAVID JONATHAN GRANTHAM.....1ST PLAINTIFF

WILLIAM KUNG’U KINYANJUI

INTEGRATED YMR PARTNERSHIP.....2ND PLAINTIFF

V E R S U S

NATIONAL SOCIAL SECURITY FUND.....DEFENDANT

R U L I N G

The applicant herein seeks the following orders from the court-

1. That the plaintiff/applicant be granted leave to amend the plaint.
2. That the draft amended plaint be deemed to have been duly filed.
3. That the defendant be granted leave to amend and file its amended defence within fourteen (14) days of the date of the orders herein
4. That the costs of this application be provided for.

The application is brought by way of a chamber summons dated and filed in court on 9th February, 2005. It is expressed to be brought under S.3A of the Civil Procedure Act and O.VIA rules 3,5 and 8 of the Civil Procedure Rules and any other enabling provisions of the law. It is based on the grounds that

- (a) It is necessary to amend the plaint for purposes of determining the real question in controversy between the parties.
- (b) There occurred an error in that a very crucial paragraph was inadvertently omitted during the typing of the plaint.
- (c) That the error was an oversight which should not be visited upon the plaintiff herein.
- (d) No prejudice will be occasioned to the defendant herein.

The application is also supported by the affidavit of MBUTHI GATHENJI, the advocate for the applicant.

In opposition to the application, the defendant has filed six grounds of opposition. These are that-

- (i) The application and affidavit evidence do not satisfy the legal requirements of the law for grant of the

amendment sought.

- (ii) The application is not made bona fide and is meant to cure certain fatal defects under the guise of amendments.
- (iii) The application is not supported by sufficient material to support the application (sic).
- (iv) The proposed amendments are not worthwhile, are already incorporated in paragraph 8 of the plaint and shall therefore not assist the court to determine the real issues in controversy in the case.
- (v) The proposed amendments shall deprive the defendant of substantial ground of defence without full disclosure and due process.
- (vi) That it is in the interest of justice that the amendments sought be declined.

Appearing for the applicant, Mr. Gathenji stated that the intended amendment is incorporated in paragraph 10A of the proposed amended plaint. Referring to the grounds of opposition, he submitted that the legal requirements for the grant of amendments are not stated and that all the applicant need do is to demonstrate why the amendment is required, and that this had been done. He further submitted that there was no affidavit evidence to show that the application was not made *bona fide*, but that there was full disclosure, and a copy of the demand notice had been attached as well as a draft amended plaint. He also submitted that the applicant would not oppose the amendment to the defence, and that the respondent had not advanced reasons as to why leave to amend should not be granted. He thereupon asked for orders as prayed.

In her response, Ms. Kitonyo for the respondent opposed the application and relied on the grounds of opposition. She submitted that an application for amendment should satisfy the conditions set out in **JOSEPH OCHIENG & ORS t/a AQUILINE AGENCIES v. FIRST NATIONAL BANK OF CHICAGO**, Civil Appeal No. 149 of 1991, and that the proposed amendment was immaterial, useless and merely technical. Counsel further submitted that the proposed amendment was in bad faith as the main motive was to cure a fatal defect in the verifying affidavit which does not specify by whom it was drawn. The plaintiff's intention is to file an amended plaint to be accompanied by a fresh verifying affidavit which would cure that defect. However, an amended plaint does not require a fresh verifying affidavit. Ms. Kitonyo then cited **MICROSOFT CORPORATION v. MISTUMI COMPUTER GARAGE LTD., & ANOR.** (Milimani) H.C.C.C. No.810 of 2001 as authority for that proposition. The defendant, she argued, can read only mischief as there is no legal requirement for introducing a fresh verifying affidavit, and this particular one is intended to cure the defective one. She finally submitted that the plaintiff had failed to meet the legal requirements for amendments, was acting in bad faith and that it was not in the interests of justice that the amendment should be allowed. However, should the court be minded to grant the proposed amendment, then the fresh verifying affidavit should not be allowed. Ms. Kitonyo asked for costs of the application as well as those of the amendment.

In reply, Mr. Gathenji reiterated his submissions for amendment of the plaint. He further submitted that the plaintiff does not seek to amend the verifying affidavit which, at any rate, is not defective as O.XVIII does not require that the drawer be indicated. He also submitted that O.VII rules 1 and 2 were not relevant, and that if the ruling in Microsoft's case is to the effect that an amended affidavit is not necessary, the defendant will not be prejudiced. He urged the court to grant the orders as prayed.

I have considered the application and the rival submissions of both counsel. In **JOSEPH OCHIENG & 2 ORS. t/a AQUILINE AGENCIES v. FIRST NATIONAL BANK OF CHICAGO**, Civil Appeal NO.149 of 1991, Shah J.A. summarised the principles governing amendments as follows-

“...amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that exact nature of the proposed

amendment sought ought to be formulated and submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantially of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical...

In the original plaint filed in court in this matter, paragraph 8 thereof reads-

“8. By the plaintiff’s advocates letter of 27th May, 2004 the plaintiff demanded the payment of Ksh.55,400,000.00 from the defendant in respect of work done and/or services rendered.”

It is now proposed to amend the plaint by adding paragraph 10A which states as follows-

“10A. That despite the demand and notice of intention to sue having been given by the plaintiff to the defendant it has refused, failed and/or neglected to pay the said sum of Ksh.85,425,026 and/or any part thereof.”

The plaint was filed in court on 22nd November, 2004 and the defence followed on 18th January, 2005. The application for amendment of the plaint was itself filed on 9th February, 2005, which was shortly after the close of the pleadings. In my view, the application was filed timeously and there was no delay. At any rate, even if the application for leave to amend was made much later in the day, provided it was made in good faith, it would still be entertained. The words of Shah J.A. in OCHIENG’S CASE (SUPRA) are very clear. The learned judge of appeal said, inter alia-

“...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...”

As observed earlier on, this application was made timeously. In case of EASTERN BAKERY LTD. v. CASTELLINO [1958]E.A. 461, O’Connor P. said at P.462-

“It will be sufficient for purposes of the present case to say that amendments sought before the hearing should be freely allowed 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.”

In paragraph 8 of the plaint, all that is stated is that the plaintiff’s advocates demanded the payment of a certain sum of money in respect of work done and/or services rendered. It does not give the response to that letter. The demand could have drawn a blank, or the payment could have been effected either partly or in full. If it was effected in full, there probably would be no need to resort to court action. The very fact that the plaintiff has resorted to such action implies that full payment was not made. The proposed amendment clarifies the point beyond dispute by stating expressly that in spite of the demand alluded to in paragraph 8, and notice of intention to sue having been given, the defendant has refused, failed and/or neglected to pay the amount in dispute. Whereas the failure and or refusal to pay may be implicit from fact of filing the action, it is a lot better when it is explicit for the avoidance of any doubt. There is no harm, in my view, in the inclusion of the proposed amendment to the plaint, nor does the proposed amendment, *per se*, prejudice the defendant.

My assessment of the entire situation is that what incensed counsel for the defendant most is not the proposed introduction to the plaint of paragraph 10A by itself, but rather, the introduction of a fresh verifying affidavit. The original verifying affidavit is, according to her, defective inasmuch as it does not state by whom it is drawn. The defendant was banking on raising this point as a preliminary objection at the hearing of this suit. By amending that affidavit and stating by whom it is drawn, the plaint thereby cures the defect in that affidavit under the guise of amending the plaint. Counsel for the defendant urged the court to disallow the amended verifying affidavit.

I agree with defendant’s counsel that an affidavit cannot be amended in the same way as a plaint or

defence by striking out in red ink all deleted words... and by underlining in red ink all added words as prescribed in O.VIA rule 7 (2) of the Civil Procedure Rules. The only way by which an affidavit can be amended is by filing a fresh affidavit. The draft amended plaint is accompanied by a fresh verifying affidavit which indicates by whom it is drawn. The original affidavit does not indicate by whom it is drawn. To the extent that the new verifying affidavit contains some additional words which were not on the original one, then it constitutes an amendment to the original one. Mr. Gathenji for the applicant submitted that the applicant did not seek to amend the verifying affidavit. He also said the original was not defective as O.XVIII does not require that the person drawing an affidavit be indicated. If counsel genuinely held that view, then why did he take the trouble to indicate the person who drew the new verifying affidavit? Although Mr. Gathenji further submitted that O.VII rules 2 and 3 are not relevant to this application, I think they are relevant insomuch as they do not require an amended or re-amended plaint to be accompanied by a verifying affidavit. The accompaniment by a verifying affidavit is the preserve of the original plaint, and the privilege does not extend to amended and re-amended plaints. I share the sentiments of RINGER J., as he then was, in **MICROSOFT CORPORATION v. MITSUBISHI COMPUTER GARAGE LTD & ANOR.**, Milimani HCCC NO. 810 of 2001 when he said that such an affidavit "... is definitely an unnecessary surplusage."

In the instant case, the plaintiff seeks leave to amend the plaint. The plaint and the verifying affidavit are entirely different documents altogether, and leave to amend the plaint does not incorporate leave to amend the verifying affidavit. In the circumstances of this case, an amendment to the verifying affidavit would enable the plaintiff to steal a march on the defendant in whom has vested a right to challenge it in its original form. In any event, according to counsel for the applicant, the original verifying affidavit is not defective. If that be so, then there is no purpose amending it, and, at any rate, there has been no application for leave to amend that affidavit.

For the above reasons, the court makes the following orders-

1. That the plaintiff/applicant be and is hereby granted leave to amend the plaint.
2. That the draft amended plaint be and is hereby deemed to have been duly filed.
3. That the defendant is hereby granted leave to amend and file its amended defence within fourteen (14) days of the date hereof
4. That the amended verifying affidavit is hereby struck off
5. That the plaintiff will meet the costs of this application as well as the costs of the amendments.

Dated and delivered at Nairobi this 14th day of April 2005

L. NJAGI

JUDGE