



**REPUBLIC OF KENYA**

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

**Civil Suit 32 of 2005**

**NATIONAL CEREALS & PRODUCE BOARD..... PLAINTEIFF**

**VERSUS**

**DUBAI BANK KENYA LTD..... DEFENDANT**

**RULING**

By an Application dated 2.04.2005, the Plaintiff herein seeks to Re-Amend its Complaint in the manner set out in the draft Re-Amended Complaint annexed to the Supporting Affidavit of Nyawara Otieno Joshua and the grounds set out in the Application. By his Affidavit, Nyawara Otieno Joshua sworn on 3.03.2005, learned Counsel for the Plaintiff deposes that he inadvertently omitted to comply with the dictates of Order VIA rule 7(1) which requires the Applicant do endorse on the Complaint the rule under which the amendment was made in the Amended Complaint. Counsel deposes that this was an error on the part of the Advocate, and that Counsel should be given leave to effect the amendment to bring the Amended Complaint within the Compliance of the rules by way of a Re-Amended Complaint.

Mr. Kiplangat, learned Counsel for the Defendant objected to the application to the amendment, and filed both grounds of Opposition dated 14.05.2005 as well as raised a Preliminary Objection dated 18.04.2005. I ruled that the Preliminary Objection be urged together with the grounds of opposition. The Defendant's objection and grounds of opposition are based upon what interpretation should be conferred upon the provisions of Order VIA rule 7 (1) and (2) of the Civil Procedure Rules. The said rules require that – every pleading and other documents amended under this order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made (7(1)), and all amendments shall be shown by striking out in red ink all deleted words, in such manner as to leave them legible, and by underlining in red ink all added words.

Learned Counsel for the Defendant submitted that these provisions are mandatory in nature, and failure to comply with them renders the Amend-Complaint herein incurably defective and an incurable defect is incapable of being cured even by amendment. Counsel relied upon the cases of **MUTUKU & 3 OTHERS –VS- UNITED INSURANCE CO. LTD.** [2002] 1 K.L.R.251 (a decision of Mwera J.), **STOCKMAN ROZEN KENYA LTD. –VS- DA GAMA ROSE GROUP OF COMPANIES LTD** [2002] 1 K.L.R. 572 **MACFOY –VS- UNITED AFRICA LTD.** [1961] 2 ALL ER 1169 and the unreported case of **GIRO COMMERCIAL BANK LTD. –VS- SAM NYAMWEYA** (HCCC No. 1391 of 2000) all of which cases held that failure by the Plaintiff to endorse on the amended Complaint the number of the rule in pursuance of which the amendment was made, was fatal and the amended Complaint would be struck out. The other point to note about those cases is that they were decided upon pursuant to applications to strike out.

The current application is different. The Defendant seeks to strike out the Plaintiff's application to amend that Amended Complaint which the Plaintiff or as in this case the Plaintiff's Advocate quickly discovered was non-compliant with the provisions of Order VIA rule 7 (1). Should the Defendant be allowed to have the Plaintiff's entire suit struck out even when the Plaintiff's acknowledges an inadvertent omission which it sets to correct? The Defendant's Counsel, says that the Plaintiff's amendment should not be allowed because it would prejudice the Defendant whose Defence was predicated upon that omission. I do not think so. Firstly the Defendant has an opportunity to amend his defence, because that would be his vested right once an order is made allowing amendment of the Complaint.

Secondly, there are other reasons for allowing an amendment such as the one sought by the Plaintiff. I think Counsel and the Courts are too much pre-occupied with technicalities of procedure, and we have elevating some of these rules to a level where they have become mistresses and no longer handmaidens of justice. We are no longer ruling on the substance of justice, but on mere technicalities of procedure which often even the most experienced of Counsel tend to overlook, and quite often inadvertently. Indeed I would endorse and myself agree with the view expressed by my brother Visram J. in **AGIP (K) LTD vs. JIMMY KOMU T/A KIAMBU STORES**, that once an irregularity is discovered in an application the proper procedure is for the offending party to seize the opportunity to apply for amendment once the irregularity has been pointed out, or as in this case, the Plaintiff has itself through its Advocate realized the omission and the irregularity. The irregularity herein is not in my view fundamental nor does it in any way prejudice the Defendant.

A long line of authorities stretching from the case of **EASTERN BAKERY vs. CASTELINO** [1958] EA 461, provide that 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" to the case of **D.T. DOBIE & COMPANY KENYA LTD VS. MUCHINA** [1982] K.L.R. 1, where it was held **inter alia** in Obiter (per Madan J.A),

**“..... the Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it could not be struck out.”**

Adverting therefore to the application at hand, the operative provisions is not rule 7(1), but rule 5(1) which empowers the Court either for the purpose of determining the real question in controversy between the parties or of correcting any defect or error in any proceedings, either of its own motion or on application of any party to order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

The amendment sought here is not to bring out any question in controversy between the parties, but rather to correct a mechanistic defect brought about by the requirements of rule 7(1) of Order VIA. There can be no prejudice upon the Defendant for allowing such an amendment.

In the circumstances therefore, I dismiss the Defendant's Preliminary Objection dated and filed on 18.04.2005. I grant the Plaintiff's application dated 2.03.2005 in terms of prayer I, but the Plaintiff shall pay the Defendant's costs occasioned by the said Application. It is so ordered. The Plaintiff will also pay the necessary Court filing fees.

Dated and delivered at Nairobi this 23rd day of May 2005.

**ANYARA EMUKULE**

**JUDGE**