REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(NAIROBI LAW COURTS)

CIVIL SUIT NO. 548 OF 2004

KANYOTTA HOLDINGS LTD...……...…..……PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LTD. ……... DEFENDANT

RULING

On 13.05.2005, I granted leave to the Defendant to amend its Defence in the form of the draft Defence annexed to its application dated 15.04.2005, and reserved my reasons for doing so. I now set out my said reasons.

The application was premised upon the provisions of Order VI rules 3 (1), 5, 7, (3) and 8 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and all enabling provisions of the law. The Application was supported by the Affidavit of Andrew Wandabwa learned Counsel for the Defendant and the grounds that the proposed amendments will enable the Court to determine the real question in controversy between the Defendant and the Plaintiff, additional material facts have come to the notice of the Applicants Advocates on record since taking over the matter, and that the Defendant/Applicant stood to suffer prejudice if the application was not granted. In opposition to the Application, the Plaintiff/Respondent filed the following grounds of opposition – (1) the application is incurably defective as it offends Order XVIII of the Civil Procedure Rules, (2) the application is vexatious and an abuse of Court process (3) the amendment as sought is prejudicial to the fair trial of this mater,

I will now consider each of learned Counsel's submission. Mr. Andrew Wandabwa learned Counsel for the Defendant/Applicant submitted that Order XVIII rule 3, permitted or allowed an affidavit in interlocutory proceedings to contain statements of information and belief showing the sources and grounds thereof. This means that matters which are not within one's knowledge can be deponed by Counsel, provided that there were no contentious issues of fact. Otherwise of course an Affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove.

For these submissions, learned Counsel for the Defendant/ Applicant relied upon two cases (1) East African Foundry Works (K) Ltd. –vs- Kenya Commercial Bank Ltd., Nairobi, Milimani Commercial Courts HCCC No. 1077 of 2002, (unreported) and Misc. Appl. No. 141 of 1998 In The Matter Of The Law Society Of Kenya And The Matter Of Judicial Commission Of Inquiry Into Tribal Clashes In Kenya in which ore found dicta by Ringera J. (as he then was) and Hayanga J. (as he then was)that it is competent for an Advocate in an interlocutory application to depone to matters of information and believe showing the sources and grounds thereof. This was the very first ground of attack by the Plaintiff that the application was incurably defective because it offended Order XVIII rule 3(1) of the Civil Procedure Rules to which I have already referred, that an Affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove, except in interlocutory proceedings. The current application is such an interlocutory proceeding. I have studied the Affidavit sworn by Andrew Wandabwa, learned Counsel

for the Defendant/Applicant.

He depones that he is the Advocate acting for the Defendant, and is as such competent to swear the supporting Affidavit, that the Defendant entered an appearance, filed a Defence, is desirous of Amending the Defence, and seeks the Court's leave to amend the Defendant's Defence on the terms of the draft amended Defence, and depones from his own knowledge and belief save as to matters of information the sources whereof have been specified.

Learned Counsel for the Plaintiff told the Court that the amendment will prejudice the fair trial of this matter. He did not say how and why it would so prejudice the fair trial. He also said in his grounds of opposition that the application for amendment to be vexatious and an abuse of the process of Court. The application ought not to be granted on the basis of the Applicant/Defendant's Advocates Supporting Affidavit. Indeed Court's would be horrified at the prospect of Counsel being called upon to the witness box to be cross-examined on contentious matters he has deponed upon as an Advocate.

Where this is found to be so, offending parts of the Affidavit will be struck out as happened in the East African Foundry Works (K) Ltd. –vs- Kenya Commercial Bank Ltd. (supra). At times. "failure by a deponent to disclose with particularity the sources of the information he has deponed to has the effect of weakening the probative value of the information and even render it valueless. It does not ….. render the relevant paragraph defective." (per Bosire J. in the) East African Packaging Industries Ltd. –vs Zaeb Alibhai Civil Appeal No. 124 of 1996 (unreported).

I cannot see what is contentious in the matters deponed to by Andrew Wandabwa, learned Counsel for the Defendant. I therefore reject the first ground of opposition in the Application. As to the second and third grounds of opposition, the Plaintiff did not show why the application is either vexatious and an abuse of the process of Court, or why the amendment sought is prejudicial to the fair trial of this matter. For the application to be vexatious, the Plaintiff must show that the Defendant is trivializing the Plaintiff's claim, that the Defendant is seeking to amend its defence without sufficient or any grounds at all for the purpose of causing trouble or annoyance to the Plaintiff, the sole purpose of which is to toss the Plaintiff about in the pursuant of its claim.

An application or pleading is an abuse of the process of Court if the process of Court is not used in a bona fide and proper manner. The Court will not allow its process to be abused, and will be in a proper case summarily prevent its machinery from being used as a means of vexation and oppression in litigation. A matter is said to be prejudicial "if it is shown that it gives a preference or advantage to the other party.

The Rule that the Court is not to dictate to parties how they should frame their case that ought always to be preserved sacred. But that rule, is subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass, and delay the trial of the action, it then becomes a pleading which is beyond his right". (per BOWEU L. J. KNOWLES –VS- ROBERTS [188] 38 Ch. D. 270).

The current application is brought under the provisions of Order VI, rules 3(1) 5, 7, (3) and 8 of the Civil Procedure Rules. Rule 8 merely provides that applications under the Order shall be brought by way of a Chamber Summons. This being the first amendment, reference, to rule 7 (3), should I think be to rule 7 (2) – amendment to be underlined in red. The rule in issue is rule 5 (1), that for the purposes of determining the real question in controversy between the parties or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such a manner as it directs and on such terms as to costs or otherwise as are just.

What matters is the Defendant introducing into the case? It is part an answer and counter claim to the Plaintiff's claim that it did some work for which it was not paid in full. The Defendant says, you did some work under the contract between us but in fact you were overpaid for the work you did was not worth the amount paid to you. As Defendant we want to claim some of the money paid to you for the measured

works do not justify that whole payment to you. That to me is the issue in controversy between the parties, hence the counter-claim. The Plaintiff may indeed find it embarrassing at this stage, it is however a legitimate issue of controversy between the parties as the Plaintiff by its suit claims payment for works and/or services rendered and for which it was not paid in full.

This suit was filed on 12.10.2004. The defence thereto was filed on 11.11.2004, and a Reply to Defence filed on 24.11.2004. The application to amend the Defence was made on 18.04.2005, just under five months after the close of pleadings, and can be said to have been brought reasonably early in the life of the suit. I think it also brings out the question in controversy between the parties. In those circumstances, rule 5 (1) of Order VIA empowers the Court either of its own motion or on application as in this instance, to order any documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

On the above understating, I granted leave to the Defendants to amend the Defence herein in the form annexed to the application the subject of this Ruling and serve the Amended Defence within 7 days upon the Plaintiff, and the Plaintiff to file its Reply to Defence and Defence to Counter claim within 15 days, and that costs would be in the cause. I reiterate and confirm those orders, for the reasons set out above. There shall be orders accordingly.

Dated and delivered at Nairobi this 17th day of May 2005.

ANYARA EMUKULE

JUDGE