



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI COMMERCIAL COURTS, NAIROBI

CIVIL CASE 2 OF 2005

MECHANIZED SYSTEMS LIMITED.....PLAINTIFF

-VERSUS

GUARDIAN BANK LIMITED.....DEFENDANT

R U L I N G

This application is brought by a chamber summons dated 20th May, 2005, and expressed to be made under O.VIA rules 3 and 5 of the Civil Procedure Rules and the inherent power of the court. It prays for orders-

1. THAT the application be certified urgent and in any event be heard before the plaintiff's application dated 3rd January, 2005.
2. THAT the plaintiff be granted leave to amend the plaint in terms of the annexed draft amended plaint.
3. THAT costs be provided for.

The application is supported by the annexed affidavit of JAMES SINGH GITAU, an Advocate of High Court having the conduct of this matter on behalf of the plaintiff/applicant. It is predicated on the grounds that;

- (a) To enable the court to determine the real question in controversy between the parties, it has become necessary to amend the plaint.
- (b) It is fair and just to allow the amendment to facilitate the determination of the real issues in question and, in any event, the defendant stands to suffer no prejudice.

On 23rd May, 2005, the defendant filed a long list of grounds of opposition. The application was canvassed before me on 23rd May, 2005, Mr. Gitau appearing for the plaintiff/applicant while Mr. Fraser appeared for the defendant/respondent. Mr. Gitau submitted that the plaint is no more than a skeleton mostly because the plaintiff was not, until after the filing of the plaint, in possession of certain material documents. The possession of those documents has made it possible for the plaintiff to raise facts relating to undue influence, duress and coercion, particulars of which could not have been given until those documents came to hand. The plaintiff also wishes to plead breach of a fiduciary duty which it could not have done without the documents it now has. Mr. Gitau further submitted that it will be fair and just to allow the amendment to bring out clearly the real question in controversy between the parties, and that

such an amendment will not give rise to any prejudice which cannot be compensated by costs. On the other hand, if the amendment is not allowed, the plaintiff will suffer irreparable loss.

Opposing the application, Mr. Fraser for the respondent said that he did not dispute the general principles as to granting amendments. But the court should consider whether it is fair and just that the amendment should be granted. The applicants obtained an ex parte injunction in January, 2005, and are still sitting on it. By seeking to amend the plaint, the applicants will further delay the hearing of the injunction application, and this is prejudicial to the plaintiff. On January 28th, 2005, the defendants sought particulars from the plaintiff, and some of the particulars sought have formed part of the proposed amendments, but not all the particulars have been covered. Counsel then submitted that the application was not bona fide as it was meant to delay the matter and should be dismissed.

In reply, Mr. Gitau submitted that the respondents had not shown what prejudice they will suffer if leave to amend is granted, and that counsel had conceded that costs are panacea for all inconveniences. If the amendment is not granted, the plaintiff will suffer more than the defendant as the amendments involve additions without removing anything from the plaint.

I have considered the application and the submissions of counsel. The principles governing the grant of leave to amend pleadings are well documented, and the courts have been very consistent in the application of those principles. Dating back to the 19th century in the case of *TILDESLEY v. HARPER* (1878) 10 Ch.D.393, Bramwell L.J. is on record as having said at pp396-397-

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that by his blunder he had done some injury to his opponent which could not be compensated by costs or otherwise.”

In my view, Lord Bramwell’s practice is a sound practice which the court ought to emulate whenever, in the circumstances, it is reasonably able to do so. It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made, as Jenkins L.J. said in *G.L. BAKER LTD. v. MEDWAY BUILDING & SUPPLIES LTD.* [1958] 3 All ER. 540 at p.546-

“...for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings.”

The above principles have been approved and adopted in our jurisdiction. In *EASTERN BAKERY v. CASTELINO* [1958]E.A.461, at p.462, Sir Kenneth O’Connor, the President of the then Court of Appeal for East Africa, had this to say-

“...amendments to pleadings 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.”

After going through a string of previously decided cases, his Lordship concluded that-

“The main principle is that an amendment should not be allowed if it causes injustice to the other side.”

In more recent times, all the above decisions were cited with approval and applied in *BRITISH INDIA INS. CO. LTD. v. G.M. PARMAR & CO.*[1966] E.A. 172. And quoting from Mulla in *KENYA COLD STORAGE (1964) LTD. v. OVERSEAS*

FOOD SERVICES (AFRICA) LTD. [1982] KLR 453 Sachdeva J. stated at pp.455-56 - “In a commentary on a similar Indian provision in Mulla: Code of Civil Procedure, 13th edition, Volume 1, at p.726, it is observed-

‘As a general rule, leave to amend will be granted so as to enable the real question in issue between the parties be raised on the pleadings, where the amendment will occasion no injury to the opposite party

except such as can be sufficiently compensated for by costs or other terms to be imposed by the order.

It does not matter whether the original omission arose from negligence or carelessness...

Broadly stating it, there is no injustice in granting the amendment if the opposite side can be compensated in costs. It is only when costs would not be adequate compensation that amendment will be refused. It is immaterial whether the error sought was accidental or not. There is no rule limiting amendments to accidental errors...’.”

Finally, there is a suggestion that applications for amendment of pleadings should be made without undue delay. The point was made by Spry, J.A., as he then was, in *MEHTA v. SHAH* [1965] E.A. 321, where he said-

“It is well settled that a person seeking to amend his pleadings should apply without delay...”

It seems, however, that even delay, per se, may not deny an applicant the opportunity to amend if the other side can be compensated by costs. Thus, in *CLARAPEDE v. COMMERCIAL UNION ASSOCIATION* [1883] 32. W.R. 262, Brett, M.R., said at p.263-

“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 made without injustice to the other side. There is no injustice if the side can be compensated by costs.”

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 & ORS v. 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 etc.

Applying these principles to the application before the court, counsel for the applicant submitted that it is fair and just that the plaintiff be allowed to amend its plaint in order to put forth more clearly its case against the defendant, and that the proposed amendment will enable the court to determine the real question in controversy between the parties. This is why the plaintiff sought to introduce breach of fiduciary duty. These assertions were not controverted in any material particulars. Counsel for the respondent, however, submitted that the application was not brought in good faith, that it was going to delay the hearing of the main application, and that such delay was prejudicial to the respondent. Considering the application in its entirety, I don’t see that there is any evidence of *mala fides*. While I agree with counsel for the respondent that the hearing of the main application may be delayed, I think that whereas this may be so in the short term, in the long term that delay will enable the plaintiff to put forth its case in such a manner as will enable the court to determine the real questions in controversy between the parties. At any rate, the defendant will be allowed to respond to the amended plaint and will also be compensated by an award of costs. In that way, the greater interest of justice between the parties will have been served.

By reason and wholly on account of the foregoing, the order sought in the application by chamber summons dated 20th May, 2005 for leave to amend the plaint in terms of the annexed draft amended plaint is hereby granted as prayed. The said draft should be filed and served within 7 days from today. The defendant is granted leave to file and serve an amended defence within 14 days of the date of service

of the amended plaint. The plaintiff will bear the costs of this application in any event.

Dated and delivered at Nairobi this 2nd day of June, 2005.

L. NJAGI

JUDGE