



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI**

CIVIL CASE 321 OF 2003

KENYA OIL CO. LTD PLAINTIFF

VERSUS

FLEUR INVESTMENTS LTD DEFENDANT

RULING

By this Chamber Summons Application the Plaintiff Kenya Oil Company, Limited seeks leave of this Court to amend its Plaint in the manner set out in the draft amended Plaint annexed to the supporting affidavit of George Njoroge Mwangi, the Plaintiff's Assistant Managing Director. The primary grounds for the Application are that:

- (1) The claim is for damages for breach of contract and as General Damages are normally not awarded for such breach, the Plaintiff had to quantify the same before trial hence this Application for leave to amend the Plaint.
- (2) The proposed amendment is necessary for the proper determination of the question in controversy between the parties.

In the supporting affidavit of George Njoroge Mwangi aforesaid sworn on 18th April, 2005, it is deponed that the reliefs sought by the Plaintiff include a permanent injunction and damages which were not quantified at the time of institution of the suit. The same have now been ascertained and may only be introduced by an amendment. It is further deponed that the proposed amendment is necessary for the proper determination of the real question in controversy between the parties in this suit.

The Defendant has filed no Replying Affidavit to controvert the facts contained in the said supporting affidavit. There are however, Grounds of Opposition filed by the Defendant's Advocates.

The Application was canvassed before me on 7th July 2005 by Mr. Oyatsi, Learned Counsel for the Plaintiff and Mr. Rakoro, Learned Counsel for the Defendant. Counsel for the Plaintiff reiterated the grounds in the Chamber Summons and added that the Defendant will suffer no prejudice if the leave sought is granted. Reliance was placed on my decision in **National Social Security Fund Board of Trustees –v- Dr Sally Kosgei and Another: HCCC No.714 of 2003 (UR)** in which after considering various decisions of the High Court and the Court of Appeal, I allowed an Application for leave to amend the Plaint and observed that the primary consideration in determining an application for leave to amend is whether the leave can be made without injustice to the other side.

Counsel for the Defendant on his part, in opposition to the Plaintiff's application relied on the Grounds of Opposition filed and in substantiation thereof argued that the application offends the provisions of Order L Rule 15(2) of the Civil Procedure Rules and was therefore bad in law. Counsel

further submitted that the Application had been filed too late in the day and should be dismissed.

I have now considered the Application. As regards the Objection raised on the Plaintiff's failure to endorse at the foot of the Chamber Summons the warning of the consequences of non-attendance, I am of the view that the omission to endorse the warning is not fatal to the Plaintiff's Application since the Defendant responded to the application by filing Grounds of Opposition and being represented at the hearing of the Application. In my view it is not open to a Respondent who has been served with a motion or summons and has duly attended in response thereof to object to the motion or summons on the ground that it did not bear the warning in Rule 15(2) of Order L of the Civil Procedure Rules.

The other substantive objections raised in the Ground of Opposition are that the orders sought are likely to prejudice the Defendant and if granted will infringe the Defendant's rights to a fair hearing. The Defendant would have been on firmer ground if it had filed a replying affidavit with facts supporting the allegation of the likely prejudice and infringement of the Defendant's right a fair hearing. Bare allegations in the Grounds of Opposition cannot suffice.

The rest of the Grounds of Opposition do not address the factors that have to be taken into consideration in deciding whether or not to allow amendments to pleadings. The granting or refusal of leave to amend any pleading is a matter for the discretion of the Court. That discretion is a judicial one and like all judicial discretions should be exercised rationally and on well settled principles. In **Eastern Bakery -v- Castelino (1958) E.A.461**, the Court of Appeal held 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 party can be compensated in costs." This is codified in Order VIA of the Civil Procedure Rules. Indeed as Rule 5 of the said order indicates, the object of allowing, amendments to pleadings is to facilitate the determination of the real question in controversy between the parties. Other treatises confirm this position as evidenced in Bullen and Leake 4th Edition at page 124 which reads:-

"The guiding principle of cardinal importance on the question of amendment is that generally speaking, all such amendments ought to be made for the purposes of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings. The Rule of conduct of the Court is that, 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 other side can be compensated for by costs but if the amendment will put the other side into such a position that they must be injured it ought not to be made."

I have perused the proposed amended plaint and the supporting affidavit of George Njoroge Mwangi. I have also evaluated the submissions made. Having done so I am of the view that the proposed amendments are not only relevant but also pertinent to the determination of the real questions in controversy between the parties hereto

. In the result, I grant the Plaintiff leave to amend its Plaint as prayed and order that the amended plaint annexed to the application dated 18th April, 2005 be and is hereby deemed to be duly filed and served on payment of the requisite court fees.

The Defendant is at liberty to file amended defence if necessary within fifteen (15) days from the date hereof.

The Plaintiff will bear the Defendant's costs of this application in any event.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY, 2005.

F. AZANGALALA

JUDGE

Read in the presence of :-