



Editorial Note

CIVIL PROCEDURE

Pleadings

Amendments

- Allowed in order to determine the real issues between the parties
- Exception to disallow are immaterial amendments
- where there is bad faith or dishonesty
- abuse of court process
- prejudice or injustice to the other party.

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(NAIROBI LAW COURTS)
CIVIL CASE NO 933 OF 2003**

KEN VINCENT KAUNDA PLAINTIFF/APPLICANT

VERSUS

WILFRED DAVID KIBORO ... 1ST DEFENDANT/APPLICANT

NATION MEDIA GROUP

LIMITED 2ND DEFENDANT/APPLICANT

RULING

This is an application for leave to amend the statement of defence on record. The application is expressed to be brought under S 3A and S 100 of the Civil Procedure Act and O VIA Rules 3,5,6,7 and 8 of the Civil Procedure Rules and all other enabling provisions of the law.

The grounds are set out in the body of the application and in two affidavits the first sworn by Kamau Karori on 10th February 2004 and the second being a further affidavit sworn by the first defendant on 20th February 2004. In reply there are two affidavits both sworn by the plaintiff on 19th February 2004 and 11th February 2004 respectively. It is not clear why the second one could not have been filed earlier.

I have read all the affidavits in support and in reply and the main point raised in support of the application to amend is that the proposed amendments will assist the court to determine the true substantive merits of the case and that there will be no injustice or prejudice to the respondent and that whatever prejudice may be compensated by the usual order on costs ie the thrown away costs.

Phrased differently the main point is that both the Civil procedure Rules and all relevant commentaries and cases establish a well settled rule that all amendments should be permitted as may be necessary for the purpose of determining the real questions in controversy between the parties unless by permitting the amendment injustice may result to the other side. The applicants contend that there is no such injustice as contemplated by the rule in the circumstances of this case. It is also contended that the

proposed amendments as per the draft amended defence fall within the relevant rules and are relevant to the cause of action or necessary defence.

For the respondent the main points are that the application is not in good faith and that it is an afterthought calculated to prevent the course of justice and that the respondent would suffer substantial prejudice because there is a pending application to strike out the defence and that this application is a knee jerk reaction to the said application. And that injustice and prejudice would be suffered by the respondent in that the intended amendments comprise 17 new paragraphs which would necessitate the respondent's advocate to be reinstructed afresh introducing further delays and expenses and prejudicing the claim.

The substance of the suit is alleged breach of a contract of employment and libel.

At the outset and before I consider the cases cited by the learned counsels I consider it important to guide myself on what the relevant procedural law states so as to use it as a compass in navigating this area of law which is extremely fertile in terms of the case law in nearly all jurisdictions for example the UK, India and this jurisdiction as per the cases cited. The compasses are:-

1. Order VIA r 3(1) reads:

“Subject to Order 1 rules 9 and 10 Order XXII rules 3,4,5 and 7 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct allow any party to amend his pleadings.”

2. S 100 of the Civil Procedure Act reads:-

“The court may act any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

It is quite evident that the court has been given very wide powers and discretion by the two provisions.

Although the provisions do not expressly say so all necessary amendments which may assist in determining the real issue may be allowed at any stage provided there is no injustice or prejudice to the other party and where there is prejudice the other party may be compensated by way of costs. A proposal of the draft defence reveals amendments substantially intended to amplify on what the defendants think the letter of appointment provides. These further amendments appear intended to lay before the court the real issues in controversy. The respondent has not satisfied the court that any delay which may result by allowing the amendments cannot be compensated by costs. Indeed the case has not been set down nor have issues been framed. There is no evidence or proof of bad faith in wanting to introduce the amendments. There is no evidence of dishonesty in wanting to bring the amendments. The fact that seventeen new paragraphs are intended is an inconvenience which can be surmounted by further amendments to the plaint or by filing a reply. Finally as this court has held elsewhere in *Biwot v Muite*, HCCC --- unreported I see no proof that the applicant intends to abuse the process of the court and I find no injustice to the respondent in this case. Whatever delay, expense and inconvenience can be compensated by way of costs. There cannot be any prejudice incapable of being compensated by way of costs in an unheard and pending application to set aside a defence because there are no vested rights in the application until it is heard and determined.

I do accept the following citation in **BULLEN & LEAKE** Chapter 11 derived from the ancient case of **CROPPER v SMITH (1884) 26 CD 700 Bowen L J** said:

“I think it is a well established principle that the object of courts is to decide rights of the parties and not to punish them for their mistakes ...”

An amendment ought therefore as a rule to be allowed if thereby the real substantial question in controversy can be raised between the parties and to avoid multiplicity of legal proceedings.

The purpose of the rules on amendments as is clear from some of the authorities on the point is to administer justice. The power to grant amendment of the pleadings is intended to serve the ends of justice and such power ought not to be limited by narrow considerations such as expense, compensable delay or the inconvenience of the respondent.”

Finally I am indebted to both counsels for their industry in assisting the court as per their respective list of authorities. Although not especially cited they have all been taken into account in enlightening the court. This is a well trodden path in legal circles and the facts are obviously different from those in the cited authorities.

Thrown away costs are hereby awarded to the respondents in any event.

The application is allowed as prayed.

It is so ordered.

DATED and delivered this 14th day of May 2004.

J G NYAMU

JUDGE