



**REPUBLIC OF KENYA**

**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO.112 OF 2002**

**LONRHO MOTORS E.A. LTD**

**(IN RECEIVERSHIP)**

**T/A FARM MACHINERY DISTRIBUTORS:.....PLAINTIFF**

**VERSUS**

**MARK KIPTARBEI TOO:.....DEFENDANT**

**RULING**

This is an application expressed to be brought under the provisions of Order VIA Rule 3(1), 5,7 and 8. Sections 95 and 3A of the Civil Procedure Act and all other enabling provisions of the Law. The Defendant is the applicant and seeks leave to amend his defence. The main reasons for the application are that the Defendant's former Advocates did not give due consideration to certain documents when they filed the defence sought to be amended and that the proposed amendments will enable the Court to fully determine the real issues in dispute between the parties. It is further stated that the proposed amendments will not occasion any prejudice to the Plaintiff.

In support of the application Counsel for the Defendant relied on the Defendant's affidavit sworn on 11th May 2004 and the exhibits annexed to the said affidavit. Counsel argued that the annexures suggest that the Defendant does not owe anything to the Plaintiff. Reliance was placed on the decision in Eastern Bakery – v- Casterlino (1958) E.A.461 for the proposition that amendments to pleadings sought before 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. The same principle has been applied in various cases including Omar –v- E.A. Cargo Handling Services Ltd (1985) KLR.837 and Julia Akelo Kunguru – v- Seth Lugonzo & 2 others (un reported).

Counsel therefore urged that the Defendant's application for leave to amend his defence be granted.

No submissions were made for the Plaintiff. I will however determine this application on the basis of known principles. The defendant is seeking the exercise of the Court's discretion in his favour. It is our Law that amendments may be allowed even if the effect would be to introduce a new cause of action. It is also settled that amendments may be allowed at any time before judgment provided that the damage which may arise as a result of the amendment can be cured by way of costs. In my view this is a case where the leave sought should be allowed for the purpose of finally determining the real issues in dispute between the parties to these proceedings. I am satisfied that the Plaintiff will not suffer any prejudice if leave is granted. The Defendant's application dated 11th May 2004 is therefore allowed in terms of prayers 1,2,3 and 4 thereof. Prayer 2 is granted subject to the requisite fees being paid. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2004.**

**F. AZANGALALA**

**AG. JUDGE**

**Read in the presence of:-**