



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL COURTS**

**MISC CIVIL APPLICATION NO 125 OF 1999**

**NYARI INVESTMENTS (1998) LIMITED**

**Versus**

**THE DELPHIS BANK LIMITED & 2 OTHERS**

October 12, 2000 T Mbaluto, deliver the following ruling. The plaintiff has brought this application under section 100 of the Civil Procedure Act and Order VIA rules 5 and 8 of the Civil Procedure Rules for leave of this court to amend its Chamber Summons as indicated in the draft amended Chamber Summons annexed to the application. The reasons or grounds upon which the application is grounded are stated in the body of the Chamber Summons as:-

1. That the proposed amendments are required for the purpose of determining the real questions in controversy and/or issue between the parties hereto.
2. That as a result of disclosures made by the Defendants, the present Chamber Summons has been over taken by events which necessitates the said amendments and said Further Affidavit.

The respondents who oppose the application have, through an affidavit, sworn by Francis H J Barnes advanced several grounds in support of the position they have taken. Firstly they contend that the application is incompetent and an abuse of the process of the court as no evidence has been adduced by way of affidavit in support of the application. They also claim that the disclosures alleged in ground two of the application having not been disclosed to them, the said ground is embarrassing to them as they cannot respond thereto.

Mr Barnes also depones that neither he nor anybody else at the 1st and 2nd defendants has communicated with the plaintiff that the property, the subject matter of the suit was sold by private treaty. He also claims that the suit was settled by the parties through a consent letter executed on June 17, 1999 and therefore there are no issues left for trial. In any event, he further contends, the amendments sought by the plaintiff disclose a distinct and separate cause of action which cannot be introduced into the suit for determination after the consent aforesaid.

To deal with the last matter raised by the respondents first, it must be observed that the application seeks leave to amend a Chamber Summons and not the plaint. That Chamber Summons seeks certain injunctive prayers and does not seek to amend the plaint. It is therefore clearly incorrect to claim that the Chamber Summons introduces a new cause of action. Regarding the lack of an affidavit in support of the application, it is correct to say that applications are generally supported by affidavits containing the evidence upon which the application is based. However there are certain applications where affidavits are not required; an example is an application under Order VI rule (3) (a) of the Civil Procedure Rules. Where affidavits are mandatory, the Civil Procedure Rules so provide – for example see

As far as I can see, under Order VIA of the Civil Procedure Rules an affidavit is not a mandatory requirement particularly where the reason for the amendment is self evident. The relevant rule (rule 8) simply provides that “applications under this Order shall be made by summons but the court may nevertheless hear and determine an oral application made in court.” Since such an oral application can only be made through an oral request to the court, I am unable to see the basis of the respondent’s objection that evidence would be adduced from the bar contrary to procedural rule. The rules expressly permit that to be done. Order VIA rule 5 of the Civil Procedure Rules which provides that:-

“For the purpose 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 manner as it directs and on such terms as to costs or otherwise as are just.”

gives this court very wide powers to amend. It empowers this court either of its own motion or on the application of any party to order amendment of any document.

On the basis of what is stated in the application as well as in the draft amended Chamber Summons annexed to the application, I am satisfied that the proposed amendment will bring out the real question in controversy between the parties. It is therefore necessary to effect the amendments for that purpose. For those reasons, I allow the application as prayed. The costs of this application will be in the cause.  
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Delivered on October 12, 2000

**T Mbaluto**

**judge**