



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**MISCELLANEOUS APPLICATION NO. E176 OF 2018**

**IN THE MATTER OF UNITED ENGINEERING SUPPLIES LTD**

**AND**

**IN THE MATTER OF SECTION 863 OF THE COMPANIES ACT OF 2015**

**AND**

**IN THE MATTER OF THE RECTIFICATION OF THE COMPANY REGISTER OF MEMBERS**

**SANJAY RAMESHBHAI PATEL.....APPLICANT**

**AND**

**DINKAR RAMBHAI PATEL.....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF COMPANIES.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant, **Sanjay Rameshbhai**, filed an application dated 19<sup>th</sup> November 2020 seeking the following orders: -

**1. Spent.**

**2. THAT this honourable court be pleased to grant leave to the applicant to amend his originating Notice of motion herein dated 12<sup>th</sup> February 2010 to correct the error on the figure reflected at prayer 2 in terms of the amended Originating Notice of Motion**

**3. THAT the annexed amended Originating Notice of motion be deemed duly filed upon payment of filing fees**

**4. THAT the costs of this application be provided for.**

2. The application is supported by the applicant's affidavit and premised on the grounds that: -

**a. That the applicants Originating Notice of Motion dated 4<sup>th</sup> December 2018 has an inadvertent mistake at prayer 2 whereby it is indicated that the shares to be struck out are 154,454 shares as shown to be held by Sanjay Rameshbhai Patel but the correct number of shares currently held by Sanjay Rameshbhai Patel are 265,546 and the figure of 154,454 was erroneously indicated.**

**b. That the applicant therefore seeks to amend this erroneous figure to reflect the correct figure of 265,546 which he has stated at paragraph 17 of his supporting affidavit dated 4<sup>th</sup> December 2018 whereby he has indicated as his current shareholding in the Company.**

**c. That the purpose of the amendment is to help this honourable court in determining the real question in controversy between the parties and to reflect the correct position.**

*d. That error arose from an inadvertent mistake when drafting the application and does not prejudice the respondent since the applicants supporting affidavit had already indicated that the current shares held by Sanjay Rameshbhai Patel is 265,546.*

*e. That on the 25<sup>th</sup> June 2020 the applicants advocate had sought to orally apply for the said amendment when the respondents Advocate indicated before this Honourable court that that they would not have an issue with the same, save they requested for a letter from the applicants advocate to enable them to revert.*

*f. That upon writing to the respondent's advocate on 30<sup>th</sup> October 2020 they responded on the 17<sup>th</sup> November 2020 when they purported that the amendment touches on a substantive issue and requested the applicant to file a formal application.*

*g. The applicant therefore filed the present application for amendment to enable the court determine the same and note that the amendment sought is a minor typographical error that does not alter the substance of the application whatsoever, especially since paragraph 17 of the supporting affidavit clearly captures the share numbers.*

*h. That in view of the hearing of the matter scheduled for 25<sup>th</sup> November 2020, it is therefore extremely urgent that this honourable court certifies that application urgent and grants hearing for 25<sup>th</sup> November 2020 to enable the Honourable court to deal with the application on the same date.*

*i. That it is in the interest of justice that the applicant be allowed to amend the Originating Notice of motion dated 4<sup>th</sup> December 2018 in terms of the annexed amended Originating Notice of Motion.*

3. The 1<sup>st</sup> respondent opposed the application through the Grounds of Opposition dated 25<sup>th</sup> November 2020 wherein he states as follows: -

*1) The applicants claim is based on 154,454 shares has repeatedly consented to by the applicant, hence is stopped from claiming an amendment on the amount.*

*2) The Appellant has not laid a basis for the proposed amendment to seeking to reflect the shares held by him to be 265,546 as opposed to 154,459.*

*3) The amendment of the number of shares held by the applicant in the company is not a minor alteration but the amendment goes to the very root of the suit.*

*4) The application is incompetent and a total abuse of the process of this honourable court the same being made after years of the applicant representing that he owned 154,454 shares*

*5) That the proposed amendment would be prejudicial to the 1<sup>st</sup> respondent*

*6) The application in its entirety is brought in bad faith and should be dismissed with costs.*

4. The application was canvassed by written submissions. The applicant submitted that the 1<sup>st</sup> respondent would not suffer any prejudice as the application for amendment as done before the hearing had proceeded. It is further submitted that the amendment sought is a minor typographical error that does not alter the substance of the application.

5. The respondent submitted that the applicant purported amendment from 154,454 to 256,546 shares was not a minor alteration because it goes to the very root of the suit. It was further submitted that the 1<sup>st</sup> respondent would greatly suffer injustice as the amendments would change in the distribution of the assets upon liquidation of the Company. The respondent stated that there was an inordinate delay in bringing the application as the suit was filed in December 2018 and the present application was filed in 19<sup>th</sup> November 2020 with no explanation for the inordinate delay.

6. I find that the main issue for determination is whether the Applicant's application for amendment has merited.

7. Order 8 Rules 3 and 5(1) of the Civil Procedure Rules stipulates as follows: -

*(3) (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4,5 and 6 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.*

*3(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.*

**General power to amend**

*5(1) 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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.*

8. The applicant argued that the basis of the amendment was to correct a typographical error on the Originating Notice of Motion that arose in drafting the application. The respondent on the other had observed that the applicant had not laid a basis for the amendment and that he would suffer prejudice as the amendment would change the shareholding.

9. In *Ochieng and Others vs First National Bank of Chicago Civil Appeal Number 147 of 1* (unreported) as cited with approval in *St Patrick's Hill School Ltd vs Bank of Africa Kenya Ltd [2018] eKLR* the Court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings as follows: -

- a) *The power of the court to allow amendments is intended to determine the true substantive merits of the case;*
- b) *The amendments should be timeously applied for;*
- c) *Power to amend can be exercised by the court at any stage of the proceedings;*
- d) *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;*
- e) *The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.*

10. Further in *Abdul Karim Khan vs Mohamed Roshan (1965) EA.289 (C.A)*, the court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and entirely alters the nature of the defence or plaint.

11. In the case of *Daniel Ngetich & Another vs KREP Bank Limited [2013] KLR* the court stated that; -

***“Normally the Court should be liberal in granting leave to amend pleadings. But it must never grant leave if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a devise to abuse the process of the court.”***

12. From the foregoing cited cases, it is clear that the general rule is that 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 party can be compensated by costs.

13. In the present case, the applicant seeks to amend the Originating Notice of Motion so as to reflect the correct number of the shares. I have perused the affidavit in support of the Originating Motion I note that the same number of shares sought to be amended is captured in the said affidavit. I am therefore convinced that the mistake was a typographical error which does not alter the substance of the application. I also find that the amendment sought will not prejudice the respondent as he will still be at liberty to amend his response to the motion.

14. Consequently, I make the following final orders: -

- a. *The Notice of Motion Application dated 19<sup>th</sup> November 2020 is hereby allowed and the draft Originating Notice of Motion is hereby deemed as duly filed and served upon the respondent*
- b. *The respondent is at liberty to file a reply with regard to the amended originating Notice of Motion within 14 days from the date of this ruling.*
- c. *The applicant shall file and service a supplementary affidavit, if need be, within 7 days from the date of service with the replying affidavit.*
- d. *The cost of this motion to abide the outcome of the main suit.*

Dated, signed and delivered via Microsoft Teams at Nairobi this 15<sup>th</sup> day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.

W. A. OKWANY

JUDGE

**In the presence of:**

Mr. Thuo for the Applicant.

Ms Kadma for Lubano for 1<sup>st</sup> Respondent.

Court Assistant: Sylvia.