



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 588 OF 2015**

**FOTON EAST AFRICA LIMITED.....PLAINTIFF**

**-VERSUS-**

**NAIROBI CITY COUNTY GOVERNMENT....DEFENDANT**

**R U L I N G**

1. **FOTON EAST AFRICA LIMITED**, the Plaintiff seeks by the Notice of Motion, dated 23<sup>rd</sup> November 2017, to amend its Plaintiff. The application is opposed by **NAIROBI CITY COUNTY GOVERNMENT**, the Defendant.

2. In the original Plaintiff the Plaintiff averred that the Defendant on 24<sup>th</sup> February 2015 awarded it tender for delivery of 18 customized 4X4 (pick up) vehicles. The tender price was Kshs. 82,800,000.00. The Plaintiff accepted the award and delivered the vehicles. The Defendant failed to pay the tender price.

3. The Plaintiff in seeking to amend its Plaintiff to include the claim for another supply of vehicles, to the Defendant, pursuant to tenders awarded in January 2015. The Plaintiff through its director, Da Li deponed that the tenders to be included in the amended Plaintiff were almost contemporaneous with the tender the subject of this suit.

4. The Defendant's opposition to the amendment is based on the fact that the tenders were awarded at different times for supply and delivery of different motor vehicles. The Defendant opposed the amendment on the ground that it would introduce new or inconsistent cause of action.

**ANALYSIS AND DETERMINATION**

5. As a general rule amendment should be freely allowed at any time, before judgment, unless the court is of the view that the party applying is acting *mala fide*, and if the amendment can be made without injustice to the other party. Lord Bowen in **CROPPER V SMITH (1883) 26 CH.D 700** at pp, 710-711 succinctly set out the general principle of amending pleadings:

***“It is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in according with their rights... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace.... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right.”***

6. The Plaintiff was awarded two separate tenders by the Defendant, to supply the Defendant vehicles. The Plaintiff alleges non-payment for those vehicles.

7. In my view, bearing in mind the general principle on amendment the application is merited.

8. Accordingly the Plaintiff's notice of motion dated 23<sup>rd</sup> November 2017 is allowed and the costs thereof shall be in the cause. The Plaintiff shall file and serve the amended Plaintiff within 14 days of today's. The Defendant may file an amended defence within 14 days of service of the amended Plaintiff.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 15<sup>TH</sup> day of MAY, 2019.

MARY KASANGO

JUDGE

*Ruling Read and Delivered in Open Court in the presence of:*

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT