



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 266 OF 2003

OMAR SHARIFF T/A KEMCO AUTOPLAINTIFF

VERSUS

1. FREIGHT FORWARDERS LIMITED

2. CONSOLE BASE LIMITED.....DEFENDANTS

RULING

1. The plaintiff has made an oral application for leave to amend paragraph 8 of the plaint and prayer (a) thereof to read USD85,246.50 instead of USD 85,000/=.

2. The Defendant has opposed the application citing the fact that it is made too late in the day after the parties have closed respective cases and filed submissions and that it would be prejudicial to their case.

3. The power of the court to order amendment of any pleadings is intended to help the court determine the real issues in controversy or to correct defect or error in the proceedings. The power is very wide and unfiltered in that even without an application by the parties the law permits the court to act suo sponte.

4. Having taken the evidence of the parties in this matter, I am aware that there were documents produced at the trial and I take the view that the amendment to correct the sum claimed by adding some USD 246.50 even after production of evidence on both sides will not occasion any prejudice to the defendants. I so say because that amendment will not add or subtract from the evidence led by both sides. It is to this court an allegation, as all pleadings are known to be, which must be proved by evidence. May be it would present a different scenario if it was an application to amend by a side who has not closed his case and intends to amend and lead evidence not hitherto contemplated by the opposite party. However even in such a scenario, the party who has closed its case may still be cushioned from prejudice by being allowed to itself amend and re-open its case. To this court an application to amend may only be refused if it has the effect of defeating a vested interest like where a defendant has pleaded limitation of actions and the amendment is targeted to defect such. In *Central Kenya Ltd vs Trust Bank Ltd [200] & E.A. 365* the Court of Appeal laid the principles in amendment of pleadings as follows:-

“A party is allowed to make such amendments as may be necessary for the determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued right is affected and that the amendment can be allowed without injustice to the other side”.

5. When the statute provides that amendment may be made to correct a defect or error, the object is to give the court the power to proceed on the correct footing of relevant facts and not upon some false hypothesis - See *Institute for Social Accountability and Anor vs Parliament of Kenya [2014] eKLR*.

6. On the opposition that the application was made too late in the day, as said before, an amendment is allowable even at the appeal stage provided no prejudice is visited on the opposite party. See *Bullen and Leake & Jacobs Precedents of Pleadings 12th Editor*. The other consideration even where prejudice very result is whether costs can compensate the other side.

7. Taking the foregoing principles into account, I am persuaded that no prejudice will be occasioned to the defendant and therefore I do allow the amendment sought but the costs thereof shall be to the defendants in all events.

Dated and delivered at Mombasa this 4th day of October 2018.

P.J.O. OTIENO

JUDGE

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FURTHER RULING AND DIRECTIONS

1. It follows that every time an amendment is ordered the opposite party has the right to respond to that amended pleading. I do agree with Mr. Hayanga that if all parties agree to an amendment by consent then the court, in a situation where the amendment is only on the figures, may only insert the new figure and the matter proceeds.
2. Before me here there is no consent and the defendants insist on taking instructions and responding to the amendment. That I think is what fair hearing connotes and I cannot take it from defendants.
3. The effect is that the highlights cannot be offered today but must await the formal amendment by filling a plaint with the amended sum claimed and the defendants getting the right to choose whether to reply thereto or to rely on the defences already on record. For that reason I order that the amended plaint be filed within 7 days from today and served within the same period.
4. On leave to appeal, my reading of Order 43 Rule 1 (1) f is that no leave is required.
5. By way of case management this matter is now stood over to the 28/11/2018 for highlighting of submissions whether or not the defendants shall have opted to file amended statements of defence.
6. Costs in the cause.

Dated and delivered at Mombasa this 4th day of October 2018.

P.J.O. OTIENO

JUDGE