



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 7 OF 2017**

**ST. PATRICK'S HILL SCHOOL LIMITED.....PLAINTIFF/ APPLICANT**

**-VERSUS-**

**BANK OF AFRICA KENYA LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

**1. The plaintiff filed** an application dated 19<sup>th</sup> September, 2018 filed under a Notice of Motion brought under Sections 3A and 100 of the Civil Procedure Act, Cap 21 Laws of Kenya, order 8 Rules 3 and 5, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Article 159 of the Constitution of Kenya (2010) and all other enabling provisions of the law. In support of the application are facts and evidential material as deponed in the affidavits by learned counsel Mr. RIGORO and the plaintiff's director Mr. Kangethe respectively. In a rejoinder and opposition to the motion the defendant also filed, the replying affidavits and the rebuttal thereto urging this court not to allow the amendments. The Application seeks the following Orders:

- a) *That the Honourable Court be pleased to grant the Plaintiff leave to amend the Plaintiff.*
- b) *That the annexed draft of the amended Plaintiff be deemed as duly filed upon payment of the requisite fees.*
- c) *That costs be in the cause.*

**2.** The application is premised on the following eight factual grounds:

- a) *That it is necessary to amend the Plaintiff to correctly address the issue in dispute of illegal debits which after examination of the Plaintiff's accounts by the Plaintiff's accountant as per the Honourable Judge's Orders, the illegal debits stand at Ksh. 42, 102, 106.44/=*
- b) *That for the purpose of determining the question in controversy between the parties this application for leave to amend the Plaintiff is necessary.*
- c) *That the Plaintiff is tainted with inadvertent defects, erroneous figures and typographical errors which need to be corrected for clarity purposes.*
- d) *That the present application has been filed on bonafide grounds and no prejudice will be caused to the Defendant's rights if the application is allowed.*
- e) *That the above matter is pending before this Honourable Court and is fixed for hearing on 21<sup>st</sup> September, 2018.*
- f) *That the present application for amendment does not introduce any new fact and is purely technical in nature.*
- g) *That if this application is not allowed, the Plaintiff will be occasioned substantial loss and hardship thereby suffering grave injustice.*
- h) *That this Application should be allowed to assist the Court to determine effectively the issues surrounding this suit on true substantive merits.*

**3.** The application is further supported by the affidavits of CHARLES MAKORI RIGORO, the Counsel for the Plaintiff, sworn on 23<sup>rd</sup> October 2018. Counsel avers that during the preliminary proceedings of this matter, this Honourable Court, being of the view that a majority of the issues arising from this matter are related to the Plaintiff's accounts held by the Defendant, ordered that a reconciliation of the same be

conducted so as to narrow down the issues and establish the real question in controversy between the parties. He stated that it was pursuant to the said order that the Plaintiff filed an Account's Report, Digest and Affidavit all establishing that as at 1<sup>st</sup> December 2017, the Defendant had debited the Plaintiff's accounts with illegal debits in excess of Kshs.42, 102, 106.44/=.

4. It was deponed that according to the Plaintiff dated 15<sup>th</sup> May 2017, the Plaintiff had prayed for special damages under prayer (i), however, an exact amount had not been indicated since the Plaintiff had also prayed for taking into account of accounts under prayer (d) which if granted, would have assisted the Court to ascertain the specific amount due to the Plaintiff or the Defendant, as the case may be.

5. Further that the order of the court for reconciliation of accounts fulfilled prayer (d) of the Plaintiff and thus the special damages claimed by the Plaintiff are discernible from the Accountant's evidence on record and it is for this reason, as provided for under law and equity, that the Applicant herein seeks leave to amend the Plaintiff. According to the deponent, the application herein was filed in good faith and it only seeks to amend the Plaintiff so as to narrow down the real question in controversy between the Parties. Further, he is of the view that the right to amend pleadings is exercisable at any stage of the proceedings if it is in good faith and does not prejudice the opposing party, thus there are no set timelines for parties to abide by the same.

6. It was also averred that this particular case, the trial is still ongoing in that the Plaintiff has not closed its case and the Defendant is yet to open its case and therefore, there cannot be any prejudice to the Defendant's Defence and Counterclaim in the suit as claimed in paragraphs 13(c), (f) and (g) of the Replying Affidavit. Counsel further contend that the amendment sought by the applicant herein touching on illegal debits, is in line with the existing cause of action and does not raise a new one and therefore its sets out a legally valid claim and it is purely technical in nature.

7. The deponent also argued that the Notice of Motion herein is not an abuse of court process because it facilitates to make the function of the court effective in that a court is effective when it determines cases on true substantive merits and not upon hypothesis. Further that the applicant's constitutional right of fair hearing and/or also includes the right to amend its pleadings and adduce evidence in support of its case. The deponent dismissed the Respondent's assertion that the Notice of motion would defeat the defense and counterclaim if allowed, saying that the same is false and lacks any legal basis.

8. The deponent also respondent to paragraphs 5,6,8 and 10 of the Replying Affidavit, the Plaintiff's first witness, Mr. George Kangethe, firmly denies the assertions that he was asked and failed to respond on whether the alleged sum in excess of Kshs.42, 102, 106.44/= was pleaded in the plaintiff. The witness asserted that an application for amendment of the pleadings would be made by the Plaintiff in due time and that in any case, all those averments are without merit and are irrelevant to an application for the amendment of pleadings by the Applicant. The deponent denied the Respondent's allegations that the Applicant intentionally delayed in filing and serving the Notice of Motion so as to scuttle the hearing of the suit on 21<sup>st</sup> September 2018, is totally false and misleading to this Honourable Court. In the deponent's view, the Respondent's Replying Affidavit is a deliberate attempt to shut off the Plaintiff from advancing its case and amounts to a denial of a fair hearing and/or trial. He urged the court to find that the Replying affidavit filed by the Respondent is evidential and argumentative and was not properly filed before the court and by that it is fatally defective. It was further asserted that the matter herein is an issue between the bar and the bench and therefore the deponent of the Replying Affidavit is not qualified to swear the affidavit since he is not an Advocate and the same renders the said affidavit totally defective and should accordingly struck out.

9. It was asserted that the settled principles of the law in regard to amendment of pleadings are underpinned on the sacred and sacrosanct principles of fairness, equity, equality, reasonableness, lawfulness, good conscience and morality. According to the deponent, the import of the Applicant's Notice of Motion is to achieve the aforementioned principles and the Respondent's Replying Affidavit is a contemptuous attempt to deny the Applicant justice.

10. In addition, it was deponed that the Replying Affidavit lacks substance, is misconceived, bad law and an abuse of the court process. He therefore, prayed that the Honourable court grants the Applicant leave to amend the Plaintiff dated 15<sup>th</sup> May, 2017 as prayed in the Notice of Motion dated 19<sup>th</sup> September, 2018.

11. The applicant's case was further buttressed by its submissions dated 23<sup>rd</sup> October 2018 where the counsel for the applicant found the issue for determination herein to be whether the Applicant's Notice of Motion for leave to amend has merit and ought to be entertained. The applicant's answer to that is in the affirmative. In support of its claim, the applicant resorted to eminent thinkers and jurists of ancient and recent times like Plato, Aristotle, Confucius, Mahatma Gandhi, Budha and Dalai Lama. According to the Counsel for applicant the aforesaid thinkers are unanimous that justice is underpinned on the sacred and sacrosanct principles of fairness, equity, equality, reasonableness, lawfulness, good conscience and morality and the same is in essence the foundation of the enduring doctrines of doctrines of equity upon which any judicial system finds its foundation. The Applicant in reiteration of its argument relied on article 10(2)(b) which lays down the national values and principles of governance, article 25 (c) and 50(1) which provides for the right to a fair hearing/trial and Article 159 (2)(d) which recognizes the essence of substantive justice shall be dispensed without undue regard to procedural technicalities.

12. The applicant averred that the amendment is in line with the aforesaid principles of justices and the provisions of the constitution and on the evidence on record. It was the applicant's contention that the empirical evidence on record in court on illegal debits in excess of Kshs.42, 102, 106. 44/= existing on the Plaintiff's account operated by the Defendant is central and critical to the Plaintiff's claim against the Defendant. The evidence is in the form of the Accountant's report ordered by the Honourable Court; the Accountant's affidavit; the digest of that report and the evidence of the Director of the Plaintiff. Further that the accountant's oral evidence is expected to corroborate, confirm and assert the Plaintiff's claim of illegal debits in excess the abovementioned amount. In the plaintiff's view, the defendant's opposition to the amendment is a very clear attempt at stopping the Accountant from tendering his oral evidence and in effect seeking to deny the Plaintiff of a fair hearing of its case and undermines Article 50(1) of the Constitution. In the Plaintiff's view, the right to a fair hearing is a fundamental right, it is not a favour or some assumed grace and a denial of it would fundamentally undermine the Plaintiff's case. That would amount to gross injustice.

13. In opposition to the Applicant's Notice Motion herein, the Respondent filed a Replying Affidavit sworn by BEN MWAURA on the 5<sup>th</sup> October 2018. The deponent acknowledged the fact that the Honourable sought clarification on how the sum in issue was arrived at and

whether the same had been pleaded in the Plaintiff. According to the Respondent, it was mentioned that the clarification was to be given by the Plaintiff's Accountant. He also averred that after the adjournment of the case on 12<sup>th</sup> July 2018, the Plaintiff promptly filed an application to amend the Plaintiff before the next hearing on 21<sup>st</sup> September 2018 in light of the questions posed by the court as well as his advocates' during cross examination. Further that the Plaintiff delayed to file the said application until 19<sup>th</sup> September 2018, and served his Advocates' on 20<sup>th</sup> September 2018 at 3:40pm. In his view, the Plaintiff's action was a delay tactic aimed at scuttling the hearing of the case on 21<sup>st</sup> September 2018, which tactic worked as the case was adjourned for hearing of the case on 13<sup>th</sup> November 2018 and 14<sup>th</sup> November 2018.

14. It was further deponed that, the application herein should be dismissed because it is an abuse of the court process, it has been made in bad faith; it will prejudice the expeditious disposal of the matter; it does not set out a legally valid claim; it has aimed at aiding a negligent pleader to defeat an accrued defence and counterclaim; it has departed from the original pleadings and introduced a totally new claim and if the amendment is allowed, it will defeat the Defence & Counterclaim.

15. The Respondent relied on the case of *James Ochieng'Oduol T/A Ochieng Oduol & Co. Advocates v Richard Kuloba (2008) eKLR* where the Hon. Judge Bosire stated that it is quite clear from decided cases that a trial court has power to allow amendments of a plaint disclosing no cause of action (he referred to the case of *Motokov v Auto Garage Ltd and Another (1971) EA, 353*. Reliance was also made on the case of *Kassam v Bank of Baroda (2002) eKLR* the court upon putting into consideration the circumstances of that particular case, found it necessary to refuse the requested amendments pointing out that the same would be to facilitate abuse of court process. In that case, the Honourable judge went on to say that the power of amendment is to be jealously exercised in all the circumstances of each individual case so that a party may not turn his suit or defence into a gamble at the opponent's expense. Further reliance was placed on the cases of *Lawrence Owino Omondi v Kenneth Inea Muyera (2017) eKLR* and *John Mulwa Kang'atu v Pan African Insurance Co. Ltd (2015) eKLR* where in the latter case the court denied the request for amendments on the ground that the same would occasion great prejudice to the opposing party which could not be made good by costs.

### ANALYSIS DETERMINATION

16. I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law of the subject of amendments, I take the following view of the matter. My point of departure should be taking cognizance of the fact that during the preliminary proceedings of this matter, this court ordered for a reconciliation of accounts in of narrowing down the issue of illegal debits which I thought was a substantial issue herein and to enable parties ventilate the issues touching on accounts satisfactorily. Having said so, the accounts report in question is not novel in this case.

17. The issue for determination as far as this application is concerned is whether the Applicant's Notice of Motion for amendment has merit and ought to be entertained. The law as regards the grant of leave to amend are well settled. The general rule on this subject 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 there is no injustice if the other party can be compensated by costs. (*See Eastern Bakery v Castelino (1958) EA 461*). The main principle is that an amendment should not be allowed if it causes injustice to the other side (see "Chitale, P.BB"). On the same subject, in the case of *Abdul Karim Khan v 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. The principles upon which a court acts in an application to amend a pleading before/during trial are also well settled and succinctly stated in *Eastern Bakery v. Castelino, (1958) E.A.461 (U.) at p.462:*

*"It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.*

18. The same was later buttressed by *Bramwell, LJ in Tildesley v Harper (1878), 10 Ch.D. at p.296* stated as under:

*"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise."*

19. In *Budding v. Murdoch (1875) 1 Ch.D at p.42*, it was stated that the court will not refuse to allow an amendment simply because it introduces a new issue or case; in *Ma Shwe Mya v. Maung Po Hnaung (1921), 48 I.A. 214, 48 Cal.832* the court said that there is no power to enable one distinct cause of action to be substituted with another, nor to change by means of amendment, the subject matter of the suit; in *Raleigh v. Goschen, (1898) 1 Ch.73* it was also postulated that the court would refuse to grant leave to amend where the amendment would change the action into one of substantially different character. In *Weldon v. Neal (1887). 19 Q.B. D, 394* and *Hilton v Sutton Steam Laundry, (1946) K.B, 65; (1945) 2 ALL E.R. 425, (Crawshaw, J.A, Forbes. V.P and Gould, J.A unanimously agreed)*; it was also asserted that where the amendment would prejudice the rights of the opposite party existing at the date of the proposing amendment, for instance by depriving him of a defence of limitation accrued since the issue of the writ.

20. Further, in the case of *Simonian v Johar, (1962) EA.336 (K.)*, the court approved amendment to a plaint which raised new causes of action because they were not of a different character from or foreign to or inconsistent with the original cause of action but stemmed from the same transaction.

21. A wider footage on the same issue was given in a more recent case of *Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991* the court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is 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.

22. The above mentioned parameters are not exhaustive as far as the grant of leave to amend is concerned. What that means is that the court has a very wide berth in granting leave to amend.

23. Applying the principles laid down above to the circumstances of this case, as I have mentioned above, the fact that this court should remember is that the expert Accounts Report that the Applicant/Plaintiff is seeking to include as evidence in support of its case through amending their plaint came about as per this court's order during the pretrial conference: That a reconciliation of accounts be done by a qualified accountant or expert in this subject loan account. The court was of the view that the issue of illegal debits which the Plaintiff alleged needed some kind of ascertainment to help the court narrow down all the other issues emanating from that dispute. Thus the expert accounts report is expected to feature at the trial of this case.

24. The Respondent contends that this application is an abuse of court process, it has been made in bad faith, it will prejudice the expeditious disposal of the matter, it does not set out a legally valid claim, it has departed from the original pleadings and introduced a totally new claim, it is aimed at aiding a negligent pleader to defeat an accrued defence and counter claim and lastly, if it is allowed, it will defeat the defence and the counter claim. On the other hand, the Applicant contends that the amendment should be allowed for the purposes of determining the real question in controversy between parties in this case, that the application has been filed on bona fide grounds, no prejudice will be caused to the Defence, the application does not introduce any new fact and is purely technical in nature and that if the amendment is not allowed, the Plaintiff will be occasioned substantial injustice.

25. It is clear from the above principles laid down in the cases I endeavored to import into this case that an amendment of pleadings in general should be allowed before the final judgement is delivered. The instant case is still at its hearing stage and the Plaintiff has not even closed its case. I take the view that both parties must answer to the issue of illegal debits. That explains why this court needed the Accounts Reports in question and as a result, the same is necessary as far as the circumstances of this case are concerned. Thus one cannot boldly say that the amendment sought herein is vexatious and/or frivolous.

26. On the contention by the Respondent that if the amendment sought, substantial injustice will be occasioned on them and the same would defeat its defence, this court finds to the contrary. As I have mentioned earlier, the amendment sought herein is not a novel issue and it's not at all introducing a new cause of action which is substantially different from the already existing one. The case by the plaintiff and reliefs sought against the defendant is expressly pleaded in the plaint. Whether during the subsistence of the mortgage contract the defendant debited the plaintiff account with illegal charges, tariffs, debits, interest etc. can only be decided in this forum and no other trial court is seized of the issue. In my view, this amendment is purely a technical objection by the defendant since the contents of the Accounts Report which the Applicant is seeking to include came about as per the court's request and the court had discerned that the issue of the alleged illegal debits could not be left unanswered. Both parties herein are aware of the said order by this court that sought for a reconciliation of Accounts. Furthermore, this case is still at the trial stage and the Plaintiff has not even closed its case. In that regard I don't see how the Respondent herein will be prejudiced if the amendment is allowed and how the same may defeat the Respondent's defence. In that regard I turn to provisions of Order 18, rule 10 of the Civil Procedure Rules provides that:

***'The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.'***

27. Further that, Section 146 (4) of the Law of Evidence Act provides that:

***"The court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination, and if it does so, the parties have the right of further cross – examination and re – examination respectively."***

Although the defendant has a remote concern as to the timing of the amendment coming after closure of a pre-trial conference or close of pleadings emphasis is on right to a fair trial being accorded a litigant by the court. Its non derogable right under Article 50 of our constitution. Further the court has inherent power under section 3A of the civil procedure Act to permit a party to amend his or her pleadings any time before judgement. I find inspiration for this legal proposition in the case of **J.C. Patel V D. Joshi 1952 19 EACA12**. Where the court stated as follows: ***"The rule of conduct of the court in such a case is that however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side."***

27A. Whether or not the plaintiff is entitled to leave to amend his plaint in accordance to the rules is a discretion to be exercised by the court within the ambit of the principles of natural justice. Lord Denning as he then was put it this way in **Reg V Gaming Board Ex. Benalim 1970 2 QB 417** as follows; ***"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply nor as to their scope and extent. Everything depends on the subject matter."***

The thrust of this principle is that in judicial proceeding like in the instant case ordinary people would reasonably expect that a decision that will affect rights of a litigant be made fairly so as not to deprive him or her the opportunity to be heard on a key issue before final judgement.

28. Thus the Respondent will not be prejudiced in any manner since the above provisions of law offers a chance to it to recall witnesses for further examination, cross examination and or re-examination so as to get to the bottom of issues raised in the amended claim in the suit. That alone drastically reduces the probability of prejudice on the part of the respondent and by the same token allowed parties to be on equal arms so that their case can be heard on merits rather than letting the same be decided by procedural technicalities. The drafters and framers of the constitution in Article 159 (2) (d) of the Constitution stated that:

***“in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.”***

29. In the case of **Republic vs. District Land Registrar, Uasin-Gishu & Anor (2014) eKLR** where Justice Ochieng held that:

***“.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.”***

30. This power, envisaged in the provisions of **Order 18 rule 10** of the **Rules** and **section 146** of the **Evidence Act**, is intended to ensure that each party is afforded a fair trial guaranteed under **Article 50 (1)** of the Constitution. But a fair trial does not exist in a vacuum, it is governed by rules which by themselves ensure that each party is given the opportunity to present or defend his case fairly. That is the purpose of a trial court. It must make sure that the parties are given ample opportunity to ventilate the issues arising from their case. What the said rules must not do is to become an end in themselves and impede a fair trial and that is why **Article 159(2) (b)** of the Constitution provides that justice shall be administered without undue regard to technicalities. When a case is decided in accordance with substantial justice as depicted under the above mentioned article, justice will not only be seen but will be seen to have been done.

31. Indeed, in the Court of Appeal case of **Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR, Apaloo J.A.** recognized that:

***“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.***

32. In the foregoing, I have no reason to depart for the above authorities, this court intends to allow parties herein to be on equal arms and allow the dispute touching on accounts to be decided on merits. In that regard I wish to wholly associate myself with the decision in the case of **G.L. Baker Ltd v Medway Building and Supplies, Ltd, (1958) 3 All ER. 540, Jenkins**, after quoting the old O.VI, r. 18 of the Rules of the Supreme Court in England p.546, stated as follows:

***“There is no doubt whatsoever that it is a guiding principle of Cardinal importance on this question that, generally speaking, all such amendments ought to be made as may be necessary for the purpose of determining the real questions in controversy between parties”***

33. The Respondent herein brought to the attention of the court a number of judicial authorities that are depicted in its case which includes the cases of **Lawrence Owino Omondi v Kenneth Inea Muyera (2017) eKLR and John Mulwa Kanqáatu v Pan African Insurance Co. Ltd (2015) eKLR**. In that respect, it is trite law that each case must be heard its own merits. Thus most cases have their own peculiar circumstances and that renders the Respondent's anchorage on the said judicial authorities non-responsive as far as this case is concerned. The circumstances of this case are very clear substantially different from those depicted in the said cases hence the Respondent's reliance on the same does not hold water. The proposed amendment so heavily attacked by the defendant fortunately as I have indicated on the strength of the plaintiff's evidence and the guidance from the authorities cited there is nothing amiss in this application that would warrant denial of the amendment to the plaintiff.

34. As much as I sympathize with Mr. Wawire's predicament, where he championed the cause of his client relying on various legal authorities under review in providing a basis that an amendment does not lie in this case, but broadly speaking no exceptional material facts have been disclosed to deny a party right to a fair hearing and due process under Article 50 of the constitution.

35. In order to ensure equality before the law under Article 27 (1) of the constitution when the rights and duties of any person are being determined by the court or any independent tribunal, that person shall be entitled to a fair hearing. Such being the nature of the obligation to argue that the defendant has an existing right which will be prejudiced by the amendment is to take away the fundamental right to a fair hearing. So what is the prejudice, that the defendant would be asked to provide an answer in rebuttal to the alleged illegal debits? Does it introduce a completely new cause of action from the original primary suit against the defendant? Will the defendant have an opportunity to set the facts straight on the claim? Will the defendant be prejudiced by the amendment that harm would be occasioned in a manner that cannot be compensated by damages or costs? With respect to counsel will an interim adjournment of a case to permit an amendment of pleadings to expose the real issues in the claim be said to run contrary to the statutory provisions?

36. I have carefully considered the defendants counsel submissions and affidavits none has attempted to answer these questions to convince me to come to a contrary conclusion that the amendment sought lacks merit. I do not think decisions of the court exist in a vacuum the relevant facts of each specific case underpins the legal principles.

37. The upshot of this matter is that in the greater interest of Justice I intend to allow the amendment so that the suit can be heard on merits. I'm satisfied that the application was made bona fide and could cause no prejudice to the respondent hence there is no good reason to refuse the Applicant leave to amend its plaintiff. The same argument transcends the Respondent's objection.

**ORDERS**

38. My final orders; in the circumstances of this case and by way of disposal are as follows:

a) The Notice of Motion Application dated 19<sup>th</sup> September, 2018 and the amendment of the Plaintiff is hereby allowed. The draft plaintiff be deemed as duly filed. The same be served upon the defendant forthwith. A reply to defence of the amended claim be filed by the plaintiff simultaneously upon being served with the defence on the amendment.

b) In the interest of justice and pursuant to the Constitutional dictates and any relevant laws in respect of the principles of fair trial, I'm of the conceded view that the Respondent's objection to the amendment lacks merit and is hereby dismissed.

c) The Respondent to file a defence in respect of the Amended Plaintiff within five (5) days from today's date.

d) The hearing of the main suit to proceed on the 13<sup>th</sup> and 14<sup>th</sup> of November 2018 as per the Court's earlier direction.

e) As a case management protocol under the provisions of section 1A, B and 3A of the civil procedures Act this suit having commenced and evidence taken no party to this suit is allowed to file any further interlocutory application save with leave of the court.

f) The cost of this motion to abide the outcome of the main suit.

It is so ordered.

**Dated, delivered and signed in open court at Kajjado this 8<sup>th</sup> November, 2018.**

.....

**R. NYAKUNDI**

**JUDGE**

**Representation**

Mr. Waweru Karanu for Wawire for the Respondent – present

Mr. Musyoka for the Plaintiff - present