



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL CASE NO. 289 OF 2012**

**CHIDHYA (KENYA) LIMITED.....PLAINTIFF**

**VERSUS**

**AFRICAN EQUIPMENT AND ENGINEERING SA.....DEFENDANT**

**RULING**

[1] The Notice of Motion that is the subject of this Ruling is the one dated **30 May, 2016**. It was filed herein by the law firm of **M/s Lubulellah & Associates** on behalf of the Plaintiff/Applicant for orders, inter alia, that leave be granted to the Plaintiff to further amend its Amended Plaintiff; and that the draft Amended Plaintiff annexed to the application be deemed to have been duly filed and served. The application was brought pursuant to **Sections 3 and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, and Order 8 rules 3(1) and (5); and 5(1) as well as Order 51 Rule 1 of the Civil Procedure Rules, 2010**.

[2] The grounds set out in support of the application are that the proposed amendments are intended to bring before the Court the real matters in dispute between the parties in order to have a just and final determination thereon. It was further averred that the proposed amendments will not occasion any prejudice to the Defendant. In a bid to justify this second application for amendment, the Plaintiff relied on the Supporting Affidavit sworn by its Director, Susan Flanagan on **30 May 2016**, in which it was deponed that since the filing of the Amended Plaintiff on **17 May 2013**, there have been new and important developments in the matter, which need to be brought to the Court's attention. The new developments were set out in the draft Amended Plaintiff annexed to the Supporting Affidavit and marked Annexure "SEF". The Court was therefore urged that it was in the interest of justice to allow the application and grant the orders prayed for in the Plaintiff's instant application.

[3] The Defendant opposed the application and to that end, relied on the Grounds of Opposition filed herein on its behalf by the law firm of **Hamilton Harrison & Mathews** on **14 July 2016**. Those grounds are:

[a] That the Plaintiff has not complied with **Order 8 Rule 7 of the Civil Procedure Rules** in failing to show the original amendments made on **15 May 2013** in red as required by **Rule 7(2)**; and in failing to show that the amendments are sought to the name of the Defendant in the heading, to paragraphs 1, 2, 4 and in prayers b, c, e, f, g, i and j. It was further contended that the Plaintiff had failed to show all of the amendments sought in a colour other than red as required by **Rule 7(3)**.

[b] That the proposed Further Amended Plaintiff fails to disclose dates for much of the matters, in particular in paragraphs 6, 27, 29, 30, 32, 35 and 36; and that such amendments should be refused as raising matters which are already time barred and the amendment would defeat a defence of limitation which is open to the Defendant. In the alternative, it was posited that leave to amend should only be granted on terms that preserve any defence of limitation which was available to the defendant at the date of amendment.

[c] That the amendments are sought after the case had been fixed for hearing on two occasions namely **31 March 2014** and **23 June 2014** when the case was adjourned at the request of the Plaintiff; and therefore, if the amendments are to be allowed, the Plaintiff should be ordered to pay all costs thrown away including the getting up for two hearing dates and the costs of the application.

[4] I have considered the application, the averments in the Supporting Affidavit, including the draft Further Amended Plaintiff and the Grounds of Opposition relied on by the Defendant. I have similarly perused the written submissions filed herein, including the authorities cited therein by Learned Counsel. The key enabling provision cited by the Plaintiff in support of the application is **Order 8 Rule 3(1)** of the Civil Procedure Rules, which stipulates thus:

**"(1) ...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..."**

[5] In addition to the foregoing, the Plaintiff relied on **Rule 5(1) of Order 8, Civil Procedure Rules** which stipulates that the court may order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just if the amendment is necessary for the purpose of determining the real question in controversy between the parties, or for correcting any defect or error in any proceedings. This provision is in tandem with paragraph 76 of *Halsbury's Laws of England, 4<sup>th</sup> Ed. (re-issue), Vol. 36(1)*, in which it is stated thus:-

***"...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion...The person applying for amendment must be acting in good faith...If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side..."***

[6] Thus, the general principle is that amendments to pleadings should be freely granted, especially if sought before the commencement of the hearing. This principle was explicated in the case of **Eastern Bakery vs. Castelino [1958] EA 461** thus:

**"...amendment 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 side can be compensated by costs..."**

[7] The Plaintiff has explained that the proposed amendment has been necessitated by new and important developments that occurred after **17 May 2013** when the Amended Plaintiff was filed, and that it is necessary to have these brought to the attention of the Court to enable and effectual determination of the matters in controversy between the parties. There was no rebuttal by the Defendant of the averments in the Plaintiff's Supporting Affidavit; and having perused the draft Further Amended Plaintiff, it is evident that the proposals are pertinent. A careful consideration of the Grounds of Opposition reveals that the Defendant's concerns have more to do with form, as opposed to substance, and since the Court is not obliged to accept the draft as it is, the concerns can be addressed before the filing of the Further Amended Plaintiff.

[8] Perhaps the only point requiring consideration is the argument by the Defendant that the proposed

amendment raises matters which are already time-barred and that the amendment would defeat a defence of limitation which is open to the Defendant. It is noteworthy however that in **Rule 3(2) of Order 8, Civil Procedure Rules**, it is recognized that:

**"Where an application to the court for the court for leave to make an amendment such as is mentioned in sub-rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do."**

[9] Sub-rule (3) provides for amendments to correct the name of a party, which is one of the proposed amendments herein; sub-rule (4) is in connection with amendments to alter the capacity in which a party sues; while sub-rule (5) provides that 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. In particular, sub-rule (3) reads thus:

**"An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued."**

[10] The Court is therefore satisfied that the proposed amendments are warranted; and that the reasons given in support of the application, which reasons are uncontroverted, are plausible and far from being just a stratagem to overreach the Defendant; an aspect that was well explained by **Bowden LJ in Cropper Vs Smith (1883) 26 C Division. 700** at page 711 thus:

**"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 the mistakes they make in the conduct of their cases by deciding otherwise than in accordance 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 amendments as a matter of favour or grace..."**

[11] In the premises, I find merit in the Plaintiff's application dated **30 May 2016**. The same is hereby allowed and leave granted as prayed in terms of prayer (1) thereof. It is further directed that:

- a. The Further Amended Plaint, incorporating the concerns raised by the Defence in the Grounds of Opposition, be filed and served within 14 days from the date hereof.**
- b. The Defendant be at liberty to further amend its Defence if need be, within 14 days from the date of service.**
- c. Costs of the application to be in the cause.**

It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF APRIL 2017**

**OLGA SEWE**

**JUDGE**

**DATED, COUNTERSIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF APRIL, 2017**

**RACHEL NG'ETICH**

**JUDGE**