



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS: COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO 280 OF 2010**

**HARIT SHETH AND RICHARD KARIUKI T/A**

**”HARIT SHETH ADVOCATES”..... PLAINTIFFS**

**Versus**

**NIC BANK LIMITED..... DEFENDANT**

**RULING**

**Leave to amend plaint**

[1] On 3.2.2014, Sarvia, counsel for the Applicants, argued the application dated 10/12/2013. The application seeks leave of court to amend the plaint. The Draft Amended Plaint is annexed to the application. There are several amendments being proposed; some are small but the major one relates to pleading of the particulars of special damages which counsel submitted were not disclosed in the plaint at the time of filing the suit. The reason for that omission is that, although the loss had been pleaded in the Plaint, the specific particulars of the items constituting special damages could not have been quantified at the time of filing suit. Facts of the particulars of the loss were not known to them at the time. The amendment sought is simply a quantification of what they have already pleaded. Counsel submitted, therefore, that these amendments are not introducing anything new, and relied on the principle set out in the cases of; **See TIMOI FARMS [2013] e KLR and EASTERN BAKERY V CASTELINO [1958] (EA 461 (CAK))**. According to counsel for the Applicant, the court should be guided by the principle that; amendments should be freely allowed if no prejudice will be suffered by the defendant. There has been no inordinate delay in bringing the application. They are, thus, not negligent pleaders as it was submitted by the Respondents. The Applicants further contended that there is no defence that will be defeated by the proposed amendment. The Applicants hold the view that the case of **JAMES OCHIENG ODUOR** was decided before section 1A and 1B of the Civil Procedure Act. That case was based on an attempt to repair a case which had no cause of action which is not the case here. They instead laid emphasis and relied on the **TIMOI FARMS (Supra)** to support their said argument. On that basis, the application should be allowed.

**Respondent opposed application**

[2] **Mr Muhindi**, counsel for the Respondent opposed the application. He relied on the grounds of objection filed. He fastened a quarrel; that the application was brought too late in the day, i.e. four years after the filing of the suit. The matters being relied upon are not new facts as they were and have been within the knowledge of the Applicant all along; only that they simply were not

pleaded by the Applicants. The amendment being sought, therefore, is aimed at aiding a negligent pleader. See the case of **JAMES OCHIENG ODUOL v RICHARD KULOBA [2008] eKLR**. Counsel contended that the Applicants are trying to defeat the Respondent's defence i.e. that there was no loss incurred. Moreover, he argued, there are no exceptional circumstances in this case which would warrant the amendment being allowed. Costs will compensate the Respondent and so, the court should dismiss the Application.

### **COURT'S RENDITION**

[3] The power to order amendment of pleadings is discretionary power. Albeit wide, it is exercised upon defined legal principles. Judicial decisions on this matter are legion beginning with **MBOGO & ANOTHER v SHAH [1968] E.A. 93**. I do not wish to rehash them except that this court had occasion to express itself in the case of **NBI HCCC NO 442 OF 2013 AAT HOLDINGS LTD v DIAMOND SHIELDS INTERNATIONAL LTD**, that

*[6] The general power of the court to amend pleadings draws from section 100 of the Civil Procedure Act (hereafter the CPA). Parties to the suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. I agree with counsel for the Defendant that the discretion should be exercised judicially. Section 100 of the CPA and Order 8 rule 3 of the CPR, provides a broad criteria which should guide the court in the exercise of discretion that; 1) the amendment should be necessary for purposes of determining the real question or issue which has been raised by parties; and 2) is just to do so. Case law has then broken down these broad requirements into biteable and defined principles of law which circumscribe the exercise of discretion in an application for amendment of pleadings. The principles were set out by the Court of Appeal in **CENTRAL KENYA LTD v APPEAL NO 222 OF 1998** as shown below:-*

*(i) That are necessary for determining the real question in controversy.*

*(ii) To avoid multiplicity of suits provided there has been no undue delay.*

*(iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.*

*(iv) That no vested interest or accrued legal rights is affected; and*

*(v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.*

*[7] It is quite clear from decided cases that the discretion of a trial court to allow amendments of a Plaintiff is wide and unfettered except [is] should be exercised judicially upon the foregoing defined principles. That is why the court has power to allow amendment of a plaintiff disclosing no cause of action. See the case of **MOTOKOV v AUTO GARAGE LTD. AND OTHERS [1971] E.A. 353**. Also, the court has power, in special circumstances, to allow amendment of a plaintiff, notwithstanding that the effect will be to defeat a defence of limitation, which is an accrued defence in law. On this see the case of **BARCLAYS BANK D.C.O. v SHAMSUDIN [1973] E.A. 451**. But can it be said that there was an accrued defence in the present case? Let me examine the circumstances of this case.*

[4] No doubt the amendments are necessary to enable the court to determine the real questions in controversy. Equally, there is no doubt that the amendments sought do not introduce a new cause of action. In addition, these are matters within the pleaded cause of action and are intended

to give the particulars of special damages allegedly suffered by Applicants. The right question to ask, therefore, is: Is there any prejudice which the Respondents will suffer if the amendment is allowed? Prejudice here is looked at in both the wider sense and also the special sense. The wide sense refers to the overall effects of the amendment to the general position of the Respondent as a party, and the special sense refers to the specific claim that the amendments will defeat an accrued defence. First, the Applicant had already pleaded loss of business and profits. That impleading was incomplete for it entailed an item for special damages but whose particulars were to be supplied during the hearing. The pleading is not the best of pleadings in that respect and in its current form the claim in that respect would fail. It is that omission which the Applicants want to fill up through amendment of the plaint. While I will consider all the factors present in this case, I do not think it is a reason at all to say that quantification of the special damages was not possible at the time of filing suit. A party is expected to plead all the particulars of claim except those- and are indeed rare- which may not be foreseeable at the time. The particulars of this claim relate to legal fees which the Applicants would have earned were it not for the alleged breach of bank-customer relationship when the Respondent wrongly dishonoured its cheque. And I agree that the Applicant simply did not plead those facts. But I am hesitant to base my decision on that finding alone. I need to consider two other fundamental matters; 1) whether the amendment will defeat its defence that, i.e. no loss was incurred; and 2) whether there are special circumstances in the case which will warrant amendment despite the defence.

### **No loss-suffered defence**

[5] The Respondent has pleaded in paragraphs 10 and 11 of the defence, albeit in very general terms, that; the Applicants are not entitled to prayers for special damages or other reliefs sought in the plaint; and that they suffered no loss or damages. The kind of defence pleaded, in my view, cannot be defeated by introduction of particulars of special damages. The amendment *per se* does not, therefore, defeat their said defence in any way. The defence is still feasible in spite the amendments. After all, the Applicant will have to specifically prove the loss to the required standard of proof. More fundamentally, I find that special circumstances exist in this case; the item for loss of business and profit has been pleaded and is inextricable to the overall claim for injury and damage to the Applicants as practising advocates. It is based on the allegation that the client account on which the dishonoured cheque had been drawn had credit balance of Kshs. 37,653,797/68-an amount in excess of the amount of the said cheque. All these factors relating to the nature of the claims and the necessity for the court to determine all issues in controversy constitute special or peculiar circumstance, which should be considered in this application for amendment. Despite the Respondent's claim that its defence will be defeated, it is only just, in the circumstances of this case, that the amendment should be allowed for the following reasons: One, the amendments will not introduce new or anything which is inconsistent with the cause of action herein. Indeed, as I have observed above, the claim for loss of business and profits is inextricable to the general claim in the plaint. Two, the amendments are necessary to enable the court to resolve the real questions in controversy completely and effectively. Three, the amendments do not occasion prejudice or injustice to the Respondent which cannot be properly compensated for in costs. Notably, the Applicants will still have to specifically prove the claim of special damages. Four, the Respondent's defence will not be defeated. Five, there are special circumstances in the case which preponderantly favour the granting of leave to amend the plaint. I make these observations fully aware that the application has been made three years after the filing of the suit but I choose to view the delay as excusable especially due to the foregoing reasons and in answering to the greater interest of justice; to serve substantive justice in accordance with Article 159 of the Constitution and the principle of overriding objective in sections 1A and 1B of the Civil procedure Act.

[6] The upshot is that the application for amendment dated 10.12.2013 is allowed with costs to the Respondent.

**Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of March, 2014**

**F. GIKONYO**

**JUDGE**