



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 663 OF 2012**

**AEXCEL AUTO SPARES LIMITED.....PLAINTIFF**

**VERSUS -**

**SIYAMA COMPANY LIMITED.....DEFENDANT**

**RULING**

1. The application before me was brought by the defendant, which is seeking leave to amend its defence. The defendant, **SIYAMA COMPANY LIMITED**, did annex to its application the Draft Amended Defence.
2. Apart from seeking leave to amend the defence, the defendant also requested the court to order that the Draft Amended Defence be deemed as having been filed.
3. Thirdly, the defendant requested the court to order that the costs of the application be in the cause.
4. The reasons why the defendant believes that it was necessary to amend the defence, include;
  - a. The fact that their previous advocate had not noticed that the claims in the plaint did not relate to the defendant;*
  - b. The duplication and the multiplication of the plaintiff's claims, which was intended to deceive the court;*
  - c. The plaintiff's intention to enrich itself through a fraudulent claim;*
  - d. The need for the defendant to put forth their full answer to the claims.*
5. When canvassing the application, Miss Odera advocate submitted that the proposed amendments to the defence would bring out the whole answer to the plaintiff's claims.
6. Miss Odera added that the plaintiff would not be prejudiced by the amendments, as the plaintiff would have right to file a Reply to Defence.
7. If anything, the proposed amendments were described as a tool that would enable the trial court arrive at a just and fair decision.
8. In answer to the application, the plaintiff, **AEXCEL AUTO SPARES LIMITED**, submitted that it

was too late in the day to allow the amendment. Mr. King'ori, the learned advocate for the plaintiff, submitted that because the case had already been certified as being ready for trial, an amendment to the defence would now lead to delay in the hearing and determination of the case.

9. It was pointed out that the defendant had previously filed another application for leave to amend the defence. However, that earlier application was later withdrawn by the defendant.

10. Furthermore, the defendant is said to have been guilty of inordinate and un-explained delay in bringing the present application. Therefore, the plaintiff sees the application as an afterthought, which was simply meant to derail the just and expeditious disposal of the case.

11. In any event, the plaintiff believed that the draft Amended Defence cannot be deemed to have been filed as it fell short of the requirements of Order 8 Rule 7 (1) of the Civil Procedure Rules.

12. In determining this application, I deem it necessary to summarize its brief history.

13. The plaint was filed in court on 18<sup>th</sup> October 2012. Thereafter, the defendant entered appearance on 21<sup>st</sup> November 2012. They did so through the Law firm of Godfrey Mutubia & Company Advocates.

14. On 3<sup>rd</sup> December 2012 the defendant filed its Defence.

15. On 25<sup>th</sup> April 2013, the case was placed before the court for Pre-Trial conference. On that date, the defendant failed to attend court, although it had been duly notified about the Pre-Trial conference.

16. The Learned Judge noted that the defendant had failed to take any steps to comply with the provisions of Order 11 of the Civil Procedure Rules. The court directed the plaintiff to either set down the suit for trial or to seek summary judgment.

17. The record shows that on 14<sup>th</sup> November 2013, the advocates for the two parties appeared at the Court Registry, where they fixed the case for Hearing on 3<sup>rd</sup> February 2014. However, neither of the parties attended court on 3<sup>rd</sup> February 2014.

18. After failing to attend court, the plaintiff's advocates attended the Registry and fixed a date for the trial. The said new date was 29<sup>th</sup> May 2014.

19. Meanwhile, the defendant filed a Chamber Summons on 19<sup>th</sup> March 2014, through which it sought leave to amend the defence.

20. When that application came up for hearing, the plaintiff pointed out that it was defective.

21. Havelock J. allowed the defendant an opportunity to bring a fresh application, if it was still minded to seek leave to amend the Defence.

22. The defendant withdrew the first application through a Notice of Withdrawal dated 27<sup>th</sup> May 2014.

23. On the very next day, the defendant filed the current application.

24. By taking the action of withdrawing the first application and then bringing the current application, the defendant was exercising the election to which Havelock J. put them. Therefore, it would be wrong to condemn the defendant for doing the very thing which this court gave it an opportunity to do.

25. In this case, the debate as regards the issue about whether or not the pleadings have been closed, was irrelevant. I say so because if pleadings had not yet closed, the defendant would have been entitled to amend the defence automatically. Order 8 Rule 1 (1) of the Civil Procedure Rules makes it clear as

follows;

*“A party may, without leave of the court, amend any of his pleadings once at any time before the pleadings are closed”.*

26. The very fact that the defendant has come to court, seeking leave to amend the defence, is a clear indication that the defendant acknowledges that the pleadings had already been closed. For, if pleadings were not yet closed, there would have been no need for the defendant to seek leave to amend the defence.

27. The fact that pleadings had closed is not, of itself, a bar to the amendment of pleadings. The close of pleadings only bars parties from being able to amend their pleadings without recourse to the court.

28. Pursuant to Order 8 Rule 3 of the Civil Procedure Rules;

*“(1) Subject to Order 1 rules 9 and 10, Order 24 rules 3,4,5 and 6 and the following provisions of this rule, 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 pleading”.*

29. In effect, pleadings may be amended at any stage of the proceedings, subject only to the specified rules.

30. Order 1 rules 9 and 10, and Order 24 rules 3, 4, 5 and 6 of the Civil Procedure Rules do not apply to the case before me. I so hold because the proposed amendments do not bring about any issues regarding;

*i. Misjoinder or non-joinder of parties; or*

*ii. Substitution or the addition of other parties; or*

*iii. The death of either a plaintiff or of a defendant; or*

*iv. The bankruptcy of a plaintiff.*

31. The application may have been brought about 18 months after the Plaintiff was filed, but it was before the trial commenced. Therefore, if the defence was amended at this stage, the plaintiff would not be prejudiced. The plaintiff would have the right to file a Reply to Defence, and to thereafter put together all such documentation as it may need, to answer to the amended defence.

32. At this stage, the court is not called upon to assess the strength or weakness of the proposed amendments. If the said amendments were said to provide a complete answer to the plaintiff's claim, that would imply that a consideration of the case spelt out in the amended pleadings would enable the trial court to effectively determine the matters in issue between the parties.

33. The plaintiff may feel that the proposed amendments did not add anything substantive to the defence, but that would not be reason enough to reject the defendant's request for leave to amend the defence.

34. In my considered view, if indeed the proposed amendments did not add anything substantive to the defence, that should be a source of joy for the plaintiff, as the claim would not be faced with a strong defence.

35. I find no reason, in law or in fact, for denying the defendant the opportunity to amend its defence. I do therefore grant leave to the defendant to amend the pleadings in the manner reflected in the draft annexed to the application.

36. The defendant has fourteen (14) days from today to file the Amended Defence.

37. As regards the costs of the application, the same shall be borne by the defendant in any event. The

failure by the defendant's original advocate, to include the whole defence at the first instance, cannot be blamed on the plaintiff.

38. Accordingly, the costs of the application seeking to remedy that original failure cannot be passed on to the plaintiff. It is for that reason that the defendant will meet the costs of its application.

**DATED, SIGNED and DELIVERED at NAIROBI this 6<sup>th</sup> day of October 2014.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

..... for the Plaintiff.

..... for the Defendant.

Mr. C. Odhiambo, Court clerk.