



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NUMBER 248 OF 2006**

**CHEVRON KENYA LIMITED.**

**(FORMERLY CALTEX OIL KENYA LIMITED. ....PLAINTIFF**

**VERSUS**

**MUVIR HOLDINGS LIMITED. ....1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI. ....2<sup>ND</sup> DEFENDANT**

**RULING**

The 1<sup>st</sup> Defendant, Muvir Holdings Limited sought leave of court to amend further its Amended 1<sup>st</sup> Defendant's Defence and the Counter-claim, so that it could also enjoin one total Kenya limited as the 3<sup>rd</sup> Defendant in the Counter-claim. It was noted the said 1<sup>st</sup> Defendant had from time to time during the Plaintiff's case, warned that it might at the close of the Plaintiff's case, apply to seek amendments for the purpose of enjoining the said Total Kenya Limited as a party, particularly to the Counter-claim.

At or towards the close of the Plaintiff's case, the 1<sup>st</sup> Defendant filed and served the draft of the proposed amendments which incidentally, were also served upon the said Total Kenya Limited. The latter instructed Mr. Alex Thangei of the firm of Waruhiu, Kowade & Ng'ang'a Advocates to represent them.

By a consent signed by the Plaintiff's the Defendants and the intended 3<sup>rd</sup> Defendant to the Counter-claim, Total Kenya Limited, dated 4<sup>th</sup> October, 2014, the said Total Kenya Limited was enjoined into this case as the 3<sup>rd</sup> Defendant to the Amended Counter-claim. The Amended 1<sup>st</sup> Defendant's Defence was also by said Consent and leave of court, further amended as shown in the Draft amendments.

This court and the parties were accordingly satisfied that the said amendments and joinder of the 3<sup>rd</sup> Defendant to the suit was necessary for the purpose of enabling the court to determine finally the really questions or issues in controversy between the parties now in the suit. The amendment, accordingly was within the principle stated by the Court of Appeal in **Central Kenya Ltd Vs Trust Bank Ltd & Others [2000] 2EA, 365**, wherein it expressed was that all amendments should be freely allowed and at any stage of the proceedings, provided the amendment or joinder, as the case may be, will not result in prejudice or injustice to the other party which cannot be compensated for in costs. Needless to say, in this case each party was satisfied that no such prejudice existed, hence the basis for allowing the amendment with the parties' consent.

The amendment however provoked the issue that the new party who had recently been served with the Counter-claim required sufficient time to enter defence thereto and file all the now relevant documents, bundles, statements of evidence and other material to enable it fully and properly participate in the trial with a fair opportunity to defend itself against the claim from the 1<sup>st</sup> Defendant. Both sides left the issue to this court after addressing it in their brief submissions.

I have carefully considered the matter. I have no doubt in my mind that the 3<sup>rd</sup> Defendant should be given adequate opportunity and time to enter defence to the Counter-claim and file all the necessary documents for the trial and in particular, for its defence. It sought a period of 30 days. The 1<sup>st</sup> Defendant submitted however, that seven days were adequate in the circumstances of this case. Those circumstances as the court understands them from the submissions made by the parties are and include the facts that Total Kenya Limited is and has all along during the trial, been aware of the facts and evidence on the record. That, that is because the two witnesses who so far gave evidence for the plaintiff were both employees and servants of the 3<sup>rd</sup> Defendant. That through the said witnesses, Total Kenya Ltd claimed to have ceased to exist on being purchased and/or taken over by total marketing Kenya Limited who is already a party – the 2<sup>nd</sup> Defendant in this suit. And that in any case, the 1<sup>st</sup> Defendant herein from time to time during the Plaintiff's case, warned the Plaintiff that Total Kenya Limited might and would be joined as party in this suit since the separate existence of the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the Counter-claim was more likely to be the truth than otherwise.

I have considered the above circumstances after taking into account the provisions of Order 1 rule 7 and Rule 10; Order 7 Rules 10 and Order 8 Rules (2) and (5). In the view of the court, the 3<sup>rd</sup> Defendant is in reality not a new party to these proceedings and the evidence already on the record in particular. This is because the Plaintiff's witnesses who are the source of the evidence on record may likely be the ones, if necessary who are going to testify for the 3<sup>rd</sup> Defendant. Furthermore, the Plaintiff posture in this case, was that the Defendants in the Counter-claim who include the 3<sup>rd</sup> Defendant were one and same company in the sense that each one company was taken over or wholly purchased by the other until the present Plaintiff came into being.

Finally, in view of the fact that the trial of this suit is about half completed and that it was being heard on priority basis as old case which should be cleared off our shelves, it is my decision nevertheless that the 30 days sought for entering defence and preparing the defence case, are not too many. On the other hand, the question of treating the entry of the 3<sup>rd</sup> Defendant as a totally new practical occurrence and seeking for fresh trial cannot be granted in the circumstances tabulated above.

The result then is as follows: -

- 1. The 3<sup>rd</sup> Defendant shall file its defence to the Counter Claim within 7 days without extension.***
- 2. The Defendants in the main suit shall file a reply, if any within 7 days of service of the Defence of the 3<sup>rd</sup> Defendant.***
- 3. The 3<sup>rd</sup> Defendant shall file its witness statements, witness list, bundles and documents within 7 days after service of replies to defence.***
- 4. A second Pre-trial shall take place 7 days of the filing of the Documents under Order II.***
- 5. Further hearing and the defence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants together with their Counter-claim case evidence shall start on 9<sup>th</sup> & 10<sup>th</sup> December, 2014 which shall be about 7 days after the close of pleadings to Counter-claim.***
- 6. The costs of the amendments shall be in the cause.***

Orders accordingly.

**Dated and Delivered at Nairobi this 10th day of November, 2014.**

.....

**D A ONYANCHA**

**JUDGE**