



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA DISTRICT REGISTRY**  
**CLAIM NO. 1 OF 2009**  
**CLAIMANT: NATIONAL CEREALS & PRODUCE BOARD**  
**DEFENDANT (S) THE OWNERS OF THE MOTOR VESSEL**  
**FONARUN NAREE**

**RULING**

1. The Application Notice dated 14th August 2014 is filed by the Defendants seeking an order that the Court do grant leave to Defendants to amend their Re-Amended Defence and Counter-Claim in terms of the draft annexed to the application.
2. That application is supported by the Affidavit of Kelvin Asige Advocate. In his affidavit he deponed that the leave to re-amend the Defence and Counter-Claim is due to information that was revealed during Arbitration with respect to the cause and extent of damage to cargo; and due to the Defendants wishing to do away with some aspects of the Counter-Claim. He further deponed that the application could not be made earlier because there was a pending Application Notice to stay the proceedings.
3. Learned Counsel Mr. Khanna in submission in support of the Application Notice stated that it is now trite law that amendments are allowed as a matter of law for the purpose of ensuring all the issues in controversy are determined. That this is the more, since the promulgation of Kenya's new Constitution and since the enactment of Sections 1A and 1B of the Civil Procedure Act Cap 21. Counsel relied on extract of White Book as follows-

**“In allowing the appeal in the case COBBOLD -Vs- GREENWICH LBC Peter Gibson L.J said (with Sedley L.J. Concurring): The overriding objective (of the CPR) is that the Court should deal with cases justly. That includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed.”**

Mr. Khanna further submitted that prejudice has to be looked at in both ways. Not to allow the amendment, Counsel added, would lead to Defendants suffering prejudice.

4. Claimant opposed the application on three grounds. On the first

ground Claimant's Learned Counsel Mr. Thiga submitted that Defendants had failed to provide evidence which warrant the amendment **sought**.

5. On the second ground Claimant argued that the amendment if

allowed would cause it prejudice. Learned Counsel however failed, in his submission, to set out the prejudice Claimant would suffer if amendment was allowed.

6. On the last ground Claimant argued that Defendants were guilty of

laches for which they had not offered an explanation. That the claim having been filed five (5) years ago and the initial Defence having been filed in the year 2009 that the Defendants were guilty of unreasonable delay in seeking to further re-amend their Defence in the year 2014. That although there was an outstanding application for stay of proceedings no actual stay had been granted to justify such a delay. Learned Counsel also referred to the White Book as follows-

**“An application for permission to amend a Defence will be refused if it is clear that the proposed amendment has no prospect of success .... The test to be applied is the same as that in Pt 24 (Summary Judgment) (Flexitallic Group Inc v T & N Ltd December 19, 2001, unrep., QBD). Thus, the Court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.”**

7. In my view the Court in entertaining an application for amendment will consider whether such proposed amendment will cause prejudice to the opposite party, which prejudice cannot be compensated by costs. The Court would also consider whether the amending party is seeking to raise facts that are self contradictory; and where an amendment is sought late in the day, such in the case where it is sought on the day of trial. I have had an opportunity to peruse the amendment sought to be introduced by Defendants and I cannot find any of above grounds being present. The Claimant will not in my view suffer prejudice that cannot be compensated in costs nor is the Defendants relying on contradictory facts in its amendment. The delay in bringing the application is sufficiently explained. Firstly the delay is due to the Defendant seeking to rely on matters that were raised in a recent Arbitration between the parties; and secondly there was a pending appeal in this matter and a pending application for stay of proceedings. The delay if any in view of that explanation is excusable. I am also well guided by the case decided by Justice F. Gikonyo, the case **AAT HOLDINGS LIMITED v DIAMOND SHIELDS INTERNATIONAL LTD [2014]eKLR** viz-

**“The amendment does not also cause any prejudice to the Defendant. See the recent decision of the Court of Appeal in the case of ELIJAH KIPNGENO ARAP BII v KENYA COMMERCIAL BANK LIMITED [2013]eKLR, in which it upheld its earlier case in JOSEPH OCHIENG & 2 OTHERS v FIRST NATIONAL BANK OF CHICAGO, CIVIL APPEAL NO. 149 OF 1991 where in citing with approval Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition, remarked, regarding amendment of pleading, as follows-**

**'... power to so amend can be exercised by the Court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action ....' ”**

8. In conclusion I will exercise my discretion in favour of Defendants as follows-

**(a) Leave is hereby granted to the Defendant to re-amend their Defence and Counter-Claim and file and serve within fourteen (14) days a re-amended Defence and Counter-Claim as set out in the annexure to the Application Notice dated 14th August, 2014.**

**(b) The Claimant is granted leave to file and serve any further Reply within fifteen (15) days of service of such re-amended Defence and Counter- Claim.**

**(c) The Costs of the Application Notice dated 14th August 2014 are awarded to the Claimant.**

It is so ordered.

**DATED and DELIVERED at MOMBASA this 6<sup>TH</sup> day of NOVEMBER, 2014.**

**MARY KASANGO**

**JUDGE**