



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE 19 OF 1999

TRUST BANK LTD.....PLAINTIFF

VERSUS

ABDUL ENTERPRISES LTD.....DEFENDANT

RULING

This is an application expressed to be brought under the provisions of Order VIA Rules 3 and 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The applicant mainly seeks leave to amend the plaint as shown in a draft annexed to the supporting affidavit. The primary reason for the application is that the applicant seeks to correctly reflect the current legal position in which the suit has been brought which amendment will occasion the defendant no prejudice.

The application is supported by an affidavit sworn by one R. W. Ngunjiri, the Liquidation Agent of the Deposit Protection Fund Board which is the Liquidator of Trust Bank Limited appointed by the Central Bank of Kenya. It is deponed in the affidavit that since the appointment of the said Liquidator and the placing of the plaintiff in liquidation it has become necessary to amend the plaint to reflect those changes and that the amendment will not occasion the defendant any prejudice.

The application is opposed on the basis of Grounds of Opposition filed by advocates for the defendant. The primary ground is that the plaintiff's suit is fatally incompetent which incompetence cannot be cured by an *expost facto* event on the status of the plaintiff.

The application was canvassed before me on 31st March 2009. Counsel for the plaintiff substantiated the reasons for the proposed amendment and reiterated his client's position that the plaintiff had capacity to bring the proceedings and the proposed amendment has been necessitated by a subsequent change in the status of the plaintiff which change is now reflected in the intended amended plaint. On his part counsel for the defendant restated the position taken by his client in the Grounds of Opposition and submitted that the plaintiff could not sue in its original capacity and that the proposed amendment seeks to validate what was incompetent *ab initio* and should not be allowed.

I have considered the application, the affidavit in support, the Grounds of Opposition and the submissions of counsel. Having done so, I take the following view of the matter. This suit was filed on 22nd January 1999 when the plaintiff was under the Statutory Management of the Central Bank of Kenya. By Legal Notice No. 5836 published on 24th August 2001, the Central Bank of Kenya in exercise of powers given

it under Section 35 (1) of the Central Bank Act appointed the Deposit Protection Fund Board to be the Liquidator of the plaintiff. It is clear therefore that the appointment of a liquidator for the plaintiff occurred after institution of this suit and the status of the plaintiff occasioned by the appointment is what the plaintiff seeks to reflect in the proposed amendment.

The court has a wide discretion to allow a party to amend his pleadings under Order VIA (1) of the Civil Procedure Rules. Under sub-rule 4 of the said rule, an amendment to alter the capacity in which a party sues may be allowed where the party could have sued in the same capacity at the time of filing the plaint. The limitation in the sub-rule in my view would not apply where the capacity is altered by a statutory provision as seems to have happened herein. The statutory change cannot take away the rights the plaintiff had before the change. In any event the sub-rule is couched in permissive terms and is not an absolute bar to granting leave to amend where a party's capacity has changed. The Law on amendments to pleadings is that the same should be allowed freely if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs. (See **Eastern Bakery – v – Castelino [1958] EA 461**). The defendant has not demonstrated by evidence that if the leave sought is granted, it will suffer an injustice or injury which cannot be compensated by costs.

In the result, I allow the application dated 2nd April 1008 in terms of prayers 1 and 2 thereof.

The defendant is granted leave to file an amended defence if need be within 14 days of today. The defendant shall have the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Ouma holding brief for Odongo for the Respondent and Mr. Mwakireti holding brief for Wameyo for the Plaintiff/Applicant.

F. AZANGALALA

JUDGE

7TH MAY 2009