**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO. 1088 OF 1971**

**PHILLIPS, HARRISONS &**

**CROSFIELD LTD.....PLAINTIFF**

**VERSUS**

**MANSUR B H KASSAM.....DEFENDANT**

**RULING**

This is an application to amend the plaint, in two respects:

a) by substituting Squibb Middle East SA represented by Phillips, Harrisons & Crosfield Ltd as their agents in East Africa, for Phillips, Harrisons & Crosfield as agent's for Squibb, Beirut; and b) by adding a paragraph to the effect that the debt (an absolute acknowledgment of which was pleaded as the sole cause of action in the original plaint filed on July 23, 1971) in fact arose in respect of the trade-in value of the plaintiff's motor vehicle during the year 1969. The written acknowledgment in question was dated February 23, 1971.

Thus I have to consider the provisions and applications of 2 separate provisions in the Civil Procedure Rules, namely Order I rule 10 and Order VIA rule 3, but it seems to me that the guiding principles in respect of both these rules are that the application should be allowed if it is necessary for the purpose of determining the real questions in dispute between the parties; for Order I rule 10(1) expressly says so and in one of the leading cases in East Africa dealing with the principles of amendment; *British India General Insurance Co v Parmar* [1966] EA 172, Sir Clement de Lestang VP quoted with approval a dictum of Jenkins LJ in *Baker v Medway Building Ltd* 1958 3 ACR 540, to this effect (see page 176 of the EA report, letters E to F).

But, and this is very important, in respect of an amendment in the text of the pleading (as distinct from the title), it is clear that it should be freely given if it can be made without injustice to the other side and that that side can be compensated in costs: (Sir Kenneth O'Connor P in *Eastern Bakery v Castelino* [1958] EA 461 where the case of *Tildesley v Harper* (1878) 10 Ch D 393 (See page 622 of the 1963 White Book) is referred to).

Accordingly, the tenor of the decisions is that amendments, at any rate, ought to be allowed if they can be done without injustice, because it would in many cases be exceedingly inconvenient and expensive to force the party who has, by reason of his own error or otherwise, the misfortune to seek leave to amend, to bring a fresh suit, a course which itself may cause injustice to him. It is therefore from this standpoint that I approach these applications and I propose, so far as is possible, to deal with them together.

Before coming to the respective submissions of Miss Ohanga (for the plaintiff/applicant) and of Mr AB

Shah (for the defendant/respondent) I think it right to make one further reference to the *British India Insurance* case (supra), in which the Court of Appeal made it plain (as does sub-rule (5) of the new Order VIA rule 3) that amendments may be approved even though they raise new causes of action, provided they are not of a different character to or inconsistent with the original cause of action and stem from the same transaction: (see *Simonian v Johar* [1962] EA 336). A similar provision is made by sub-rule (3) of Order VIA rule 3 in relation to an amendment to correct the name of a party, even if it involves substituting a new party, if the mistake was genuine and not misleading, or such as to cause any reasonable doubt as to the identity of the person intending to sue. In the *British India General Insurance* case, the Court of Appeal allowed an appeal from the judge's refusal of leave to amend, holding that he was not bound by the earlier case of *Khan v Rosham* [1965] EA 289 (which merely decided that the court would not interfere with the exercise of the judge's discretion) and that in any event, the amendment sought involved an alternative rather than an inconsistent ground of defence.

The first point taken by Mr Shah was that under sub-rule (3) of rule 10 of Order I, the new plaintiff's consent must be obtained before it can be added. Miss Ohanga says in reply that only applies in cases of adding, not of substitution. I do not agree. The principle is that no person can be made plaintiff in an action without his consent in writing thereto, whether by addition or substitution, for it is manifest that to become a plaintiff in an action may entail serious financial and other consequences. Nevertheless the matter can, as Miles J said in *Lombard Banking Kenya Ltd v Bhagwanji* [1960] EA 969 at p 972, very easily be rectified by allowing the applicant to file a written consent: (see the *Duke of Buccleuch* case, 1892 p 211, cited at page 346 of the 1963 WhiteBook). So if I were otherwise of the view that the amendment sought should be granted, I would not regard this first objection as fatal to the application.

Neither do I think that Mr Shah's second point as to the variation in the name of the new proposed plaintiff company (in the course of which he touched on the quite separate question on misnomer) has any validity, at least not so as to defeat the application, because, I cannot, at this stage at least, see any prejudice to the defendants: by describing them as "Squibb Middle East SA" instead of "Squbb Beirut", as they originally appeared as ancillary to the plaintiff in the title to the action.

Next, the point of limitation, which is double significance in this case (a) because the plaintiff's claim is now revealed to have arisen in 1969 and (b) because the defendant's counterclaim, being presumably founded on tort, would be defeated by limitation, the arrest having occurred on September 18, 1971. As to the first aspect, it has been accepted, I think, since *Mabro v Eagle, Star and British Dominions Insurance Company Ltd* [1932] 1 KB 485, and prior to the passing of the new Civil Procedure Rules, that an amendment would be refused where, if it were allowed, a defence of limitation would be defeated. This case was quoted in *Mehta v Shah* [1965] EA 321, to which Mr Shah referred in support of his submission on limitation. *Mehta v Shah*, was concerned with the substitution of the personal representative of the deceased plaintiff, for whom he had originally instituted proceedings when the latter was of unsound mind. The case turned partly on the supposed period of limitation under Order XXIII rule 3, but the court of Appeal nevertheless reversed the judge's Order allowing the amendment mainly for the reason that the applicant had been guilty of undue delay. Spry JA as he then was, said:

> "It is well settled that a person seeking to amend his pleadings should apply without undue delay, yet in this case Manilal delayed for well over a year after the provisions of Order XXI had expressly been drawn to his attention by the appellant, and he only appears to have pursued this course when he saw that his application under Order XXIII rule 3, was likely to be rejected.
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> An application for amendment is always in the discretion of the court and in my view the court would not have been justified in exercising its discretion in a case where there had been negligence and delay and where the effect of allowing the application would have been, if not to defeat a vested right, at least to defeat a prima facie defence of limitation."

Miss Ohanga has submitted, however, that the difficulty as to limitation no longer applies, for by Order VIA rule 3(2) the court is specifically empowered to grant leave to amend even though the application is made after any relevant period of limitation current at the date of filing the suit has expired. I agree with her that this provision is probably intended to, and does, overcome the difficulty that previously existed,

certainly so far as the plaintiff's case is concerned. But can it avoid the difficulty as regards the counterclaim set up by the defendant? I doubt whether it can. If the defendant is left without a counterclaim by reason of the substitution of a new plaintiff, I am of the opinion that he could not rely on that provision if he brought a fresh suit.

Having fully considered the matter, I think that the passage I have quoted from the judgment of Spry JA covers the situation here. The plaintiffs were put on their guard by the nature of the defence pleaded, leaving aside the question of the counterclaim. Yet what did they do? On October 19, 1971, they filed a comprehensive reply including, *inter alia*, paragraph 3 which stated:

> "In answer to paragraph 3 of the defence, the plaintiff will object to the allegation that there is and was no debt due by the defendant to the plaintiff or that the admission of the debt by the defendant was without consideration and without any lawful basis and that the admission or acknowledgement is void."

They then filed a notice to admit facts on January 11, 1974 to which they received answers similar to the contentions raised in the defence. Then a summons for directions was filed by the plaintiffs on March 26, 1974 and a very full affidavit of documents on May 3, 1974. Not content with that, there was an application for judgment on admission of facts on September 19, 1975; and it was this notice, I assume, which was withdrawn before Platt J on November 10, this year, when counsel for the plaintiff, for the first time so far as I can discover, indicated that there would be an application to substitute.

Thus the counterclaim or set off could there subsist against the plaintiffs other than the person wrongly joined but there is no provision for it to subsist against him. It is possible that the reason for this is that if there were a counterclaim against the wrongly joined co-plaintiff, the addition or, possibly, the substitution would not have been permitted. However that may be, we have, as far as I can discover, no similar provision in Kenya, and in the instant case the counterclaim is particularly directed against the original plaintiff. As Mr Shah points out, it may well be that Mr Mcknight who swore the affidavit upon which the application for arrest before judgment was founded, has no position or *locus standi* in the Squibb Company. I do not know. But if that is so, then the defendants would, if the substitution were allowed, be left with a sterile counterclaim and be forced to bring a separate claim.

In the circumstances, for the reasons given, I dismiss the concurrent applications to substitute a new plaintiff and to amend the plaint in the manner indicated. I also order that costs of the applications shall go to the defendant in any event.

**Dated and delivered at Nairobi this 9th day of December, 1975.**

**A.R.W Hancox**

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**JUDGE**