REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO 113 OF 1988

PETER S LEROKA ……..…….. PLAINTIFF

VERSUS

MIDDLE AFRICA FINANCE COMPANY LTD…..…….. DEFENDANT

RULING

This is an application by way of Chamber Summons under Order VIA Rules 1,3,5 and 8 of the Civil Procedure Rules. It is also expressed as being under "all other enabling provisions of the law".

The applications seeks the following orders-

1. That the Plaintiff be given leave to amend his plaint as per the draft amended plaint annexed hereto.

2. That the draft amended plaint annexed hereto be deemed to have been duly filed and served.

3. That the costs of this suit be costs in the cause.

4. That such other or further orders be made as this honourable court may deem fit and just to grant in the circumstances of this suit.

Mr Machira, who represents the plaintiff herein, referred the court to the provisions of Order VIA and observed that the purpose of the intended amendments is to remove unnecessary averments from the plaint and include all relevant averments and remedies sought by the plaintiff to enable the court to determine the real question in controversy between the parties. He contended that even if he had not made the application for amendment, the court could have of its own notion ordered amendment if satisfied that such amendments would enable it to determine the real matters in controversy between parties.

To support the above submissions, Mr Machira relied on the judgments and decisions in the cases of *Eastern Bakery vs Castelina* [1958] EA 461, *Hagod Jack Simonian vs S K Johar and others* [1962] EA 336 and *Sabayaga Farmers' Cooperative Society Ltd vs Mwita* and observed that it was an established principle of the courts that amendments should be freely granted or ordered unless the other side would be prejudiced. He lastly observed that the respondent had not shown that it would be prejudiced by the amendments and as such the plaintiff should be granted leave to amend his plaint as per the proposed amended plaint annexed to the current application.

Mr Murage for the defendant, opposed the application vigorously. He filed long grounds of objection covering two full scap pages but did not file a replying affidavit. He argued that the application did not

show the reasons for the proposed amendments and as such should not be allowed. Mr Murage also argued that the proposed amendments appeared to raise the issue of the amendments and variations to the guarantee upon which the suit is based and such, were new issues and should not be allowed as they amounted to a new cause of action, which would prejudice the defendant. He also observed that the proposed amendment was being sought 21/2 years after the filing of the suit and to grant it, would prejudice the defendant seriously as it may involve the parties in further expenses as new defence, directions and issues may have to be filed and / or reached. By way of approach, I would respectfully adopt the following statementfrom the decision of Bramwell LJ in *Tildeslay v Harper*, 10 Ch D 396 as quoted in the judgment of Crawshaw JA in *Hagod Jack Simonian vs Johar* (supra) at page 341, letter G thus –

"An amendment ought to be allowed if thereby 'the real substantial question can be raised between the parties' and multiplicity of legal proceedings avoided."

The main issue in this application is if the intended amendments in the event of being allowed would enable the court to determine the real substantial questions between the parties and avoid multiplicity of suits. With great respect to Mr Murage, in this case, the fact that the intended amendments introduce new issues and that they are likely to occasion the filing and/or the framing of new issue cannot be used *per se* as bars to the grant of leave in the absence prejudice to the defendant. In this regard, I would do no more than quote a passage from the judgment of Sir Kenneth O'Connor, President of the Court of Appeal for Eastern Africa (as he then was) in the case of *Eastern Bakery and Castalino* [1958] E A 461 at page 462 letter c in which he refers a host of authorities:

"It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs; *Tildeslay vs Harper* (1) (1878), 10 Ch D 393, *Clarapede vs Commecial Union Association* (2) 1883, 32 WR 262. The court will not refuse to allow an amendment simply because it introduces a new case: *Budding vs Murdoch* (3) (1875), 1 Ch D 42. but there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of an amendment, the subject matter of the suit: *Mashwe Mya vs Maung Po Hnaung* (4) (1921), 48 I A 214; 48 Cal 832. The court will refuse leave to amend where the amendment would charge the action into one of substantially different character: *Raleigh vs Gasehan* (5) [1898] 1 ch 73, 81 or where the amendment would prejudice the rights of the opposite party existing at date of the proposed amendment e.g by depriving him of a defence of limitation accrued since the issue of the court: *Weldon vs Neal* (6) (1887), 19 QBD 394; *Hilton vs Suttan Steam Laundry* (7) [1946] KB 65. The main principle is that an amendment should not be allowed if it causes no injustice to the other side. Chitily p 1313".

I would also refer to the following statement of Crawshew JA as he then was in the aforesaid case of *Simonian* at page 344 letter I, last paragraph made after considering a lot of authorities.

"I fail to see what injustice could result to the respondents or any of them by allowing the amendments. The trial has not started. Amended pleadings in defence would be no more onerous than pleading to a new suit. Abortive pleadings to date can be compensated in costs. The mere fact that the plaintiff may succeed on the amended pleadings where he would have failed on the original pleadings is not "an injustice" to the defendants. As to convenience it seems to me that there would be no greater convenience to the respondents in filing amended written statements of defence than in filing defences to a new suit".

In the current case, the suit relates to liability on a guarantee. The proposed amendments merely seek to introduce further grounds particulars on which the guarantee should be held unenforceable or satisfied or discharged.

They arise from the same transaction and could have been in the same suit. In the circumstances the proposed amendments would not only bring out all the substantial issues in dispute between but would also avoid multiplicity of suits.

I have not had the advantage of being made aware by way of affidavits, the injustices or prejudices which

the defendant would suffer if the amendments were allowed. I find that it will be entitled to file an amended defence and to frame further issues. I also find that inconveniences if any are capable of being compensated by costs. I am therefore of the view that the defendant would not suffer any injustice not compensatable by costs if this application was allowed.

On costs of this application, I find that the usual practice on such applications is for defendant to be paid as the plaintiff is deemed to be the author of the inconveniences. I see no reason to depart from this usual practice. The fact that the defendant opposed the application is not in my view sufficient to enable this court to depart from its usual practice. In fact in my view, the defendant would have failed in his duty if he had allowed the matter to proceed by default. In any case, he only exercised his rights as given by the Civil Procedure Rules.

For the aforesaid reasons, and proceedings on the usual principles of this court, I allow this application as prayed. The defendant shall however have the costs of this application occasioned by the amendments hereby allowed in any event. I also give the defendant 14 days from the date hereof to file an amended defence, if any.

Orders accordingly.

Dated and Delivered at Nairobi this 26th Day of July, 1990

G.P. MBITO

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JUDGE