



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 182 of 2006**

**RUAMBUZI LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JASPAL SINGH BIRDI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**GURDIP SINGH BIRDI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**R U L I N G**

The defendants seek leave of this court to amend their defence filed on 6<sup>th</sup> April 2005, and also to have the amended defence deemed as duly filed. The amendments seek to introduce a counter-claim in which the defendant claims special damages of Kshs.6,141,546/=, from the plaintiff arising from breach of a lease agreement between the defendant and the plaintiff, in respect of go-downs numbers 2, 3 and 4 on LR NO.1258/5 Enterprise Road in Nairobi.

In the supporting affidavit, Jaspal Singh Birdi, the 1<sup>st</sup> defendant, explains that he found it necessary to include the counter-claim to enable the issues raised in the suit to be adequately adjudicated upon and determined conclusively.

The plaintiff has objected to the application through a replying affidavit sworn by its Director P.V.S. Rao. The plaintiff contends that the application for leave to amend the defence and filed counter-claim, has been brought after an inordinate delay which is prejudicial to the plaintiff. It is further contended that the application is not brought in good faith, but is aimed at delaying the trial and determination of the plaintiff's claim. Finally, it is contended that the amendments proposed are an afterthought, scandalous, frivolous, vexatious and an abuse of the court process.

Ms JanMohamed who appeared for the defendant, submitted that the court has unfettered discretion to allow a party to amend its pleadings. She relied on the case of *Wamuyu vs Central Bank of Kenya [2002] I E A 319*, wherein it was held by Mbaluto J. that amendments to pleadings sought before the hearing should be freely allowed if no injustice is caused to the other part. However negligent and careless may have been the first omission, and however late the proposed amendment, if no injustice is occasioned the amendment should be allowed.

Ms JanMohamed submits that by allowing the amendments no prejudice will be suffered by the plaintiff, as discovery has not taken place, and no hearing date for the suit has been fixed. To the contrary both the main suit and the counter-claim will go for full trial. She dismissed the contention that the amendments sought to be introduced were scandalous and vexatious, arguing that there was no application for striking out pleadings.

Mr. Lilan who appeared for the plaintiff submitted that there was no evidence to support the contention

that the failure to file the counter-claim was due to an inadvertent omission. It was maintained that the counter-claim was an afterthought intended to delay the trial. Mr. Lilan relied on the case of *Kyalo v Bayusuf Brothers Limited [1983] K L R 229*, wherein the court of appeal held *inter alia*: -

**“1. Applications for amendment of pleadings should only be allowed if they are brought within reasonable time because to allow a late amendment would amount to an abuse of the court process. In this case the amendments came 6 years late.**

**2. Amendments that contain allegations completely inconsistent with the previous pleadings in the same suit cannot be allowed especially if they are late, as they would delay fair trial and prejudice the other party.”**

Mr. Lilan further submitted that the application for amendment ought not to be allowed as it seeks to change the character of the previous pleadings, by bringing in a new cause of action to the previous defence which was a general denial. Further, it was submitted that there was inordinate delay in bringing the application which delay had not been explained.

I have carefully considered this application. It is evident that under Order VI A rule 3 (1) of the Civil Procedure Rules, the court has discretion to allow amendment of pleadings at any stage of the proceedings. Further, the court has a general power to amend pleadings under Order VI A rule 5 of the Civil Procedure Rules, for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in the proceedings.

In this case it is evident that the counter-claim sought to be introduced by the amendment is based on the same lease which is subject of the plaintiff’s claim. While it is true that the counter-claim seeks to introduce a new cause of action, it does not derogate from the original defence which was a denial of the plaintiff’s claim, nor does it change the character of the previous pleadings, as it is still grounded on the lease subject of the plaintiff’s claim.

With due respect to Mr. Lilan, the case of *Kyalo vs Bayusuf Brothers Limited*, is distinguishable, as the amendment sought to introduce an amended defence which was a complete turnaround from the original defence, and the plaintiff was thereby put to prejudice. Secondly, unlike in this case where the application for leave to amend has come after a period of slightly less than 2 years from the time of filing the original defence, in the case of *Kyalo v Bayusuf Brothers Limited (supra)*, the application for leave to amend came after 6 years.

I am satisfied that in this case, the amendments ought to be allowed to enable the parties put all the issues before the court, to enable the court determine the real question in controversy, which is who has breached the lease agreement. In my view, no prejudice will be suffered by the plaintiff which cannot be adequately compensated by an order for costs.

Accordingly, I grant leave to the defendant to amend their defence in terms of the draft amended defence and counter-claim annexed to this application. The amended defence and counter-claim shall be filed and served within 15 days from the date hereof.

Costs of this application to the defendants.

***Dated, signed and delivered this 30<sup>th</sup> day of November 2007.***

**H. M. OKWENGU**

**JUDGE**