**CIVIL LITIGATION PRACTICE FOR COURT CLERKS, ADVOCATES’ CLERKS AND PARA-LEGAL STAFF**

**PLEADINGS**

**THE NATURE OF PLEADINGS**

**The Nature of Pleadings: Definition**

A pleading is a statement in a logical and legal form, of the facts which constitute the cause of action, or the ground of defence

Pleading are a formal presentation of claims and defenses by parties to a lawsuit. They are the specific papers by which the allegations of parties to a lawsuit are presented in proper form; typically they constitute the claim of the party who institutes the suit the response of the party sued and any additional responses to those papers that are authorized by law.

Section 2 of the Civil Procedure Act Cap 21 LoK defines pleadings inexhaustively

**“Pleadings’ include** a petition or summons and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant

Typical pleadings in our system are Plaint, Defence Petitions Originating summons Originating motions Chamber summons Notice of Motion Complaint References. Different tribunals have their own procedures of instituting and responding to processes under those tribunals. If Cap 21 applies to them, those procedures would constitute the pleadings. For example in the Employment and Labour Relations Court, proceedings are instituted by way of a ‘complaint’. In a criminal court the proceedings are instituted by way of a ‘charge sheet’, a ‘memorandum’ or ‘petition’ of appeal. In the Business Premises Tribunal, proceedings are instituted by way of a ‘reference’. In the Public Procurement Administrative Tribunal, the proceedings are instituted by way of a ‘request for review’

**The Nature of Pleadings: The fundamental principles of pleadings**

According to Bullen and Leake, ‘the machinery by which the system of pleadings operates is basically quite simple. It is founded upon the interconnection and the interweaving of three fundamental principles of pleadings, namely,

1. That each party must plead material facts on which he relies for his claim or defence
2. That the material facts stated in the preceding pleading will be deemed to be admitted if not expressly traversed or denied by implied joinder of issue
3. That any fresh matter must be specifically pleaded which makes the claim or defence in the preceding pleading not maintainable or which might take the opposite party by surprise or which raises issues not arising from the preceding pleading

The machinery works by requiring the parties to serve their respective pleadings on each other within the times specified for each party or any extended time’

**The Nature of Pleadings: The Purpose of Pleadings**

. The primary purpose of a system of pleadings is to guarantee the fundamental right to a fair hearing. Accordingly our system of pleading primarily designed

1. to clarify and identify the issues or issues with precision,
2. to give each party a fair notice of the case against them
3. to give each party a reasonable opportunity to respond to the case against them
4. to give each party a reasonable opportunity to prepare and present his case on the basis of the issues disclosed in the pleadings and no other

Accordingly our system of pleadings has been organized generally to serve four principal functions:

1. to give notice of the claim or defense;
2. to reveal the facts of the case;
3. to formulate the issues that have to be resolved (pleadings in a case define the issues to be adjudicated in the action) (; and
4. To screen the flow of cases into a particular court.

**The Nature of Pleadings: The object of pleadings** [[1]](#footnote-2)

1. To define with clarity and precision the issues or questions which are in dispute between the parties and fall to be decided by the courts
2. To require each party to give fair and proper notice of to his opponent of the case he has to meet to enable him frame and prepare his own case
3. To inform the court what are the precise matters in issue between the parties which alone the court may determine
4. To provide a brief summary of the case of each party, which is readily available for reference , and from which the nature of the claim or the defence may be easily apprehended, but also constitute a permanent record of the issues and the questions raised in the action and decided therein so as to prevent future litigation upon those matters already adjudicated upon between the litigants and those privy to them

Many systems of pleadings, ours included, use pleadings jointly with other procedural devices intended to streamline management of cases the such as discovery and verification of claims

**The Nature of Pleadings: The cardinal importance of pleadings**

Pleadings perform an important role in procedural due process. According to Jacobs,

‘pleadings do not only define the issues between the parties for the final decision of the court at the trial: they manifest and exert their importance throughout the whole process of litigation. They contain the particulars or the allegations on which further or better particulars may be requested or ordered, which help still further to narrow the issues or reveal more clearly which case each party is making. They limit the ambit or range of the discovery of documents and interrogatories that may be ordered. They show on their face whether a reasonable cause of action or defence is disclosed. They provide a guide for the proper mode of trial and particularly the trial of preliminary issues of law and fact. They demonstrate upon which party the burden of proof lies, and who has the right to open the case. They act as a measure of comparing the evidence of a party with the case which he has pleaded. They determine the range of admissible evidence which the parties should be prepared to adduce at the trial. They delimit the relief which the court can award. They provide the basis for the defence of res judicata in subsequent proceedings by reference to the record in earlier proceedings.[[2]](#footnote-3)

The drafting of pleadings is the equivalent of laying the foundation on which to build a claim or a defence[[3]](#footnote-4). Badly drafted pleadings, which are drafted in a hurried, shoddy, slipshod and unthinking manner, characteristically translate into weak claims or defences. By contrast well drafted pleadings, which are drafted with precision and clarity and completeness inevitably, translate into well prosecuted claims or defences. Cases are lost and won at the stage of pleadings.

In a sense the parties are assumed to have put forward the best case they can. Pleadings are therefore a powerful pointer to the merits and demerits of a claim of a defence.

**STYLES OF PLEADING**

**Styles of Pleading: Common law pleading**:

This was charecterised by straight jacket system of archaic pleadings then known as forms of action

**Styles of Pleading: Code pleading**:

This was a development to free the civil process from the complex and unforgiving common law system. Statute provided for specific items to be pleaded in a cause of action

**Styles of Pleading: Notice pleading**.

This simplified the process further by requiring no particular form . All that was required that adequate notice be given of the claim

**Styles of Pleading: Fact pleading**:

This was a further refinement which required that only material facts be pleaded

**Styles of Pleading: Alternative pleading**:

In alternative pleading, legal fiction is employed to permit a party to argue two mutually exclusive possibilities, for example, submitting an injury complaint alleging that the harm to the plaintiff caused by the defendant was so outrageous that it must have either been intended as a malicious attack or, if not, must have been due to gross negligence.

**FORMAL ASPECTS**

The formal aspects relate to the writing requirement, the format, the heading, the description or title of the document, paragraphing, the sequencing, amendment style, dating, endorsement and signature, presentation style etc

To ensure an orderly conduct of litigation, the rules of procedure require that pleadings be presented in a prescribed format. The rules of procedure require that pleadings be in a particular form and format: typed, signed, dated, with the name of the court, title and number of the case, name, address and of the advocate or person acting for him/her included. A good example of the formal requirements of pleadings can be found in Order 2 Rule 2. (1)

‘Every pleading shall be divided into paragraphs numbered consecutively, each allegation being so far as appropriate contained in a separate paragraph.(2) Dates, sums and other numbers shall be expressed in figures and not words’.

Good pleading is an art: A good pleading is clear, logical, well-organized, comprehensive, and includes all essential facts.

Common law pleading was the system of civil procedure used in England, which early on developed a strong emphasis on the form of action rather than the cause of action. The old common law rules of pleading were complicated and rigorous. The emphasis was on procedure over substance. Meritorious complaints were often thrown out of court for technical flaws in form rather than substance.

Today, a pleading need no longer conform to the common law archaic formats and a simple document setting forth the relevant facts and asking for a remedy may suffice. However, there are still many formal requirements intended to make the system of pleading orderly, efficient and effective. In ***Silpack Industries v Kioko*** the court of appeal sounded a telling warning to a casual approach to procedural issues

“No one has ever told the court that the rules are too difficult to be understood and complied with. We agree… that rules are merely the handmaiden of justice, but it would be equally a sad day for justice if the court enforced no rules at all. Indeed that may well lead to more serious mischief than observance of the rules.”

But in the year 2010 the Civil Procedure Rules were amended to exclude technical objections!

Order 2 Rule 14 provides

‘No **technical objection** may be raised to any pleading on the ground of any want of form’.

**Formal aspects: Heading of the pleading**

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| **REPUBLIC OF KENYA**  **IN THE HIGH COURT OF KENYA AT NAIROBI**  **(SMALL CLAIM/FAST TRACK/MULTI TRACK)**  **CIVIL CASE NO 715 OF 2009**  **PRIDE PROPERTIES LTD PLAINTIFF**  **Vs**  **CONSOLIDATED BANK OF KENYA LTD 1ST DEFENDANT**  **GAMI PROPERTIES LTD 2ND DEFENDANT** |

**Formal Aspects: Description**

The pleading must disclose what it is; a plaint, a defence, a counter-claim etc

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| **REPUBLIC OF KENYA**  **IN THE HIGH COURT OF KENYA AT NAIROBI**  **(SMALL CLAIM /FAST TRACK/MULTI TRACK)**  **CIVIL CASE NO 715 OF 2009**  **PRIDE PROPERTIES LTD PLAINTIFF**  **Vs**  **CONSOLIDATED BANK OF KENYA LTD 1ST DEFENDANT**  **GAMI PROPERTIES LTD 2ND DEFENDANT**  **PLAINT** |

**Formal Aspects: Paragraphs**

Every pleading must be divided into paragraphs and numbered consecutively

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| **REPUBLIC OF KENYA**  **IN THE HIGH COURT OF KENYA AT KISUMU**  **(SMALL CLAIM/FAST TRACK/MULTI TRACK)**  **CIVIL CASE NO 1 OF 2014**  **PRIDE PROPERTIES LTD PLAINTIFF**  **Vs**  **CONSOLIDATED BANK OF KENYA LTD 1ST DEFENDANT**  **PLAINT**   1. The plaintiff is a limited liability company incorporated in Kenya under the Companies Act Cap 486 LoK. Its address of service for purposes of this suit only shall be c/o Charles B G OUMA Advocate, C/O Kenya School of Law Karen Campus, Langata South Road, 1st Floor New Tuition Block P O BOX 30369-00100 NAIROBI 2. The defendant is a limited liability company incorporated in Kenya under the Companies Act Cap 486 LoK. Service of process upon it shall be affected by the plaintiff’s advocates or their agents. 3. At all material times……………………….. 4. It was an express or an implied term of the contract that the defendant would pay to the plaintiff the sum of Ksh 1,000,0000 ……………………. 5. On or about the 7th /10/2014, the plaintiff made a formal demand for payment but the defendant has failed, refused or ignored to make payment 6. The plaintiffs claim against the defendant is for the sum of Ksh 1,000,000/= on the foot of the defendants agreement to pay the said sum to the plaintiff as pleaded in paragraph 4 above 7. There are no pending nor have there been previous proceedings between the parties to this suit over the same subject matter 8. The contract was made at the defendant’s Kisumu Branch in Kisumu Town and the defendant does business for gain in Kisumu and this honourable court has jurisdiction 9. READONS WHEREFORE the plaintiff prays for judgement against the defendant for 10. The sum of Ksh 1,000,000 11. Interest on Ksh 1,000,000/= at court rates with effect from the date of filing of this suit until payment in full   Dated at Nairobi this 12th Day of October 2014  Description: coumasignature  CHARLES B G OUMA  ADVOCATE  DRAWN AND FILED BY  CHARLES B G OUMA  ADVOCATE  C/O KENYA SCHOOL OF LAW KAREN CAMPUS,  1ST FLOOR NEW TUITION BLOCK  LANGATA SOUTH ROAD,  P O BOX 30369-00100 NAIROBI  TO BE SERVED UPON  CONSOLIDATED BANK OF KENYA LTD |

**Formal Aspects: Figures in pleadings**

Dates, sums and other numbers should be in figures ( see para 4 and 5 in our sample plaint

**Formal Aspects: Signature**

Every pleading must be signed by the pleader (see our sample plaint)

**Formal Aspects: Other formal requirements**

Pleadings must be typed, typically on A4 Paper. Margins should be 1 ½ inch wide on the left, 1 inch on the right, top and bottom. Type on one sided. Type in black

**SUBSTANTIVE REQUIREMENTS**

To ensure that pleadings perform the four functions outlined above, the rules of procedure require that certain information must be contained in the pleadings. This type of information constitutes the substantive requirements of pleadings. Courts are, understandably, reluctant to accommodate departures from substantive requirements than they are with formal departures. A good example of a substantive requirement is found in Order 2 Rule1. (1)

‘Every pleading in civil proceedings including proceedings against the Government shall contain information as to the circumstances in which it is alleged that the liability has arisen and, in the case of the Government, the departments and officers concerned’

**Substantive requirements: Rules of pleadings**

There are five principle rules of pleadings

1. Every pleading must state material facts only
2. Every pleading must state all the material facts relied on
3. Every pleading must state the material facts but not the evidence by which they are to be proved
4. Every leading must state material facts but not law
5. Every pleading must state material facts in a summary form

**Substantive requirements : Every pleading must state material facts only**

The function of the courts is to adjudicate the issues in controversy between the parties. In a vast majority of cases it is the facts, not the law that is in controversy. Accordingly, the rules of pleadings emphasize that it is the facts, not the law that is to be pleaded. Even where the law is relied on the material fact bringing the matters in dispute within the application of the law must be pleaded. In addition thereto even when pleading law, one is not to plead arguments reasons theories or conclusions.

Only material facts are to be pleaded. Material facts are those the pleader must establish by evidence in order to succeed in a claim or defence.

**Substantive requirements: Every pleading must state all the material facts relied on**

The intention is twofold. First to ensure the pleadings are complete, but even more importantly to avoid trial by ambush. The defendant must not be prejudiced or embarrassed in his defence by the incompleteness of the pleadings

**Substantive requirements : Every pleading must state the material facts but not the evidence by which they are to be proved**

It is enough to allege the material fact without setting out the subordinate facts which are the means of proving it or the evidence sustaining it. Only then can precision and clarity be achieved. Plead only ***allegata probanda*** not ***allegata probantia***

**Substantive requirements : Every leading must state material facts but not law**

Plead the facts, not the legal consequences which flow from those facts. Plead only the facts that bring you within the operation of a legal rule and let the court draw the legal conclusions Foreign law must be pleaded since it is always a question of fact

**Substantive requirements : Every pleading must state material facts in a summary form**

Pleadings must be as brief as the circumstances of the case will permit. Pleadings must, so far as is possible be concise, precise clear and definite. Avoid unnecessary details and explanations. Courts have the power to deal with prolix pleadings but pleadings are not prolix if they state numerous material facts in a summary form

There is no general rule to guide the pleader as every pleading turns on its peculiar circumstances. Common sense, the needs of the occasion and precedent will guide the pleader. The pleader is not engaged in an exercise of fine writing but of hard, downright, business-like assertions.

**OUR RULES OF PLEADINGS**

Our rules of pleadings contain the principles of pleadings and rules of pleadings outlined above. They also contain the formal and substantive requirements for pleadings. The rules are found in Order 2 of the civil procedure rules. They are as follows

* Order 2 Rule 1 Substantive requirements
* Order 2 Rule 2 Formal Requirements
* Order 2 Rule 3 Facts not to be pleaded: Plead Material and material facts only
* Order 2 Rule 4: Facts that must be pleaded
* Order 2 Rule 5: Matters may be pleaded whenever arising
* Order 2 Rule 6: Subject to the right to amend and the right to plead in the alternative, a party may not depart from his pleadings
* Order 2 Rule 7: In defamation claims certain particulars must be given
* Order 2 Rule 8: In libel claims particulars of evidence in mitigation must be given
* Order 2 Rule 9: A party may by his pleading raise any point of law.
* Order 2 Rule 10: Particulars of alleged states of the mind, fraud or misrepresentation must be given
* Order 2 Rule 11: Allegations made in the plaint are deemed to be admitted unless specifically denied or deemed to be denied by a joinder of issue. General denials will not do. Every allegation must be addressed specifically.
* Order 2 Rules 12. If there is no reply to a defence, there is a joinder of issue on that defence

**FILING**

Once the pleadings are prepared they are to be filed in court. The filing is done at the civil registry. The procedure of filing is as follows

* The court fees is assessed
* The documents are presented to the filing clerk who receives them by stamping and dating them
* The court retains only one comply. The other copies are given back to the person filing for service unless arrangements are made for service through the court

Always ensure you have produced sufficient copies for all parties and one for your own records

**Filing out of time**

It is not the responsibility of the registry to determine whether or not a document is filed on time. That will be dealt with when the matter comes up for hearing

**SERVICE OF PLEADINGS**

In an adversarial system, it is the duty of the parties to prepare, produce, file and serve their pleadings on the opposite party. The rules of service are as follows

* Personal service is preferred. There must be evidence of due diligence in effective personal service
* Substituted service is possible with leave of court
* Only authorised personnel may serve
* An affidavit of service must be filed

**SEQUENCE OF SERVICE OF PLEADINGS**

You recall that a fundamental object of the system of pleadings is to give parties to a suit adequate notice of the case they have to meet and to enable them prepare and present their response. This objective is partly met by the sequence of service of pleadings. The timetable for the service of pleadings is designed to facillitate an orderly and time-bound exchange of pleadings. The strict timetable is intended ensure expeditious disposal of cases while at the same time guaranteeing sufficient time to respond to the case.

The sequence is a s follows

The plaintiff serves the plaint and summons to enter appearance. The defendant must be given adequate time to respond. In any event the defendant must be given at least 10 days to respond( Order 5 Rule 4)

Upon receipt of summons, the defendant enters appearance. If the defendant wishes to file a defence, he must do so within 14 days of entering appearance. He may file a defence and a counterclaim. The defendant must then serve the defence on the plaintiff within 14 days of filing it. If the defence contains a counterclaim against the plaintiff or other persons not already party to the suit, the defence must be accompanied by a verifying affidavit, a list of witnesses and copies of witness statements and documents sought to be relied on.( Order 7 Rule 5) Upon service on the plaintiff, the plaintiff has fourteen days to file a reply but if no reply is file, a joinder of issues is implied. If there is a counterclaim against a person not already party to the suit, the defence and counterclaim together with the documents required by order 7 Rule 5 are served in accordance with the rules regulating the service of summons. Note that no summons to enter appearance to the counterclaim is prepared. (See order 7 Rule 10). But the person against whom the defendant counterclaims must enter appearance and file defence. Such a party must them file his defence within 15 days of the date of entering appearance The plaintiff against whom a counterclaim is filed need only file a defence

The defendant may elect to reply to the defence to counterclaim. But if he does not do so, a joinder of issues is implied.

**Pleadings subsequent to the reply**

No pleadings ( save by way of amendment without leave) may be filed subsequent to the reply without leave of court

**EXTENSION OF TIME**

The court has the jurisdiction to extend the time for the filing and service of pleadings. It is also possible for the parties to extend the time by consent. Parties are encouraged to concede to bona fide requests for extension of time as it can save a lot of judicial time and minimise the cost of litigation

**CLOSE OF PLEADINGS**

Order 2 Rules 13. The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with

**Implication**

The right to amend once without leave is extinguished when pleadings close. Order 8 Rule (1) A party may, without the leave of the court, amend any of his pleadings once at any time before the **pleadings are closed**.

**AMENDMENT OF PLEADINGS**

The court is given the general power to permit am amendment of pleadings. Section 100 of the Civil Procedure Act provides.

The court may at any time, and on such terms as to costs or otherwise as it thinks fit, amend any defect or error in any proceedings in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

The general power to amend is buttressed by the specific power to amend given in Order 8 of the CPR

**Amendment of Pleadings: Object of Amendment**

The object of amendment is to ensure that litigation between parties is conducted not on a false hypothesis of facts but on the basis of the true state of things; This principle originated in the case of Baker V. Medway Ltd.

The general rule is that ammendments will be freely allowed as long as they are sought in good faith, without undue delay and to enable the court determine the real issues in controversy.

Order 8 Rule 5 provides ‘For the purpose of **determining the real question in controversy** between the parties, or **of correcting any defect or error in any proceedings**, the court may either of its **own motion or on the application of any party** order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just’.

Amendments allow the court to deal with the real issues in controversy between the parties. In ***Cropper V. Smith*** the court said ‘I think that it is a well-established principal that the object of the courts is to decide the rights of the parties and not to punish them for mistakes which they make in the conduct of their case. The courts do not exist for the sake of discipline but for the sake of deciding matters in controversy. I do not regard such amendment as a favour or of grace. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done’.

Ammendments have thus been allowed

* Where the amendment consists of addition, omission or substitution. . An amendment to substitute amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
* Where the amendment consists of alteration of the capacity in which a party sues or is sued
* Where the amendment constitutes addition or substitution of a new course of action

The general rule of practice is that the court allows late amendments very sparingly. Always seek to amend your pleadings as soon as is practicable. Whenever you apply for leave to amend the court will take into account the time within which you have brought the amendment, the court will want to know why you have for instance applied for an amendment very late in the course of the trial. The court will also look to see that the amendment is brought in good faith.

**Amendment of Pleadings: Procedure for applying for amendment**

The application is by way of chamber summons supported by an affidavit. Always make sure you have attached a copy of the draft amended plaint .This enables the court and the counterparty appreciate the nature and impact of the amendment sought. It is also possible to make an oral application for leave to amend

**Amendment of Pleadings: Mode of amendment**

The mode of amendment is provided for in Order 8 Rule 7. The amendment is effected by striking off in red the materials to be deleted and underlining in red the material to be introduced by amendment. Different colours are used for any subsequent ammendments

The amendment is completed by dating the document

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| **IN THE HIGH COURT OF KENYA AT KISUMU**  **(SMALL CLAIM/FAST TRACK/MULTI TRACK)**  **CIVIL CASE NO 1 OF 2014**  **PRIDE PROPERTIES LTD PLAINTIFF**  **Vs**  **~~CONSOLIDATED BANK OF KENYA LTD 1~~~~ST~~ ~~DEFENDANT~~**  **GAMI PROPERTIES LTD IST DEFENDANT**  **AMMENDED PLAINT**   1. The plaintiff is a limited liability company incorporated in Kenya under the Companies Act Cap 486 LoK. Its address of service for purposes of this suit only shall be c/o Charles B G OUMA Advocate, C/O Kenya School of Law Karen Campus, Langata South Road, 1st Floor New Tuition Block P O BOX 30369-00100 NAIROBI 2. The defendant is a limited liability company incorporated in Kenya under the Companies Act Cap 486 LoK. Service of process upon it shall be affected by the plaintiff’s advocates or their agents. 3. At all material times……………………….. 4. It was an express or an implied term of the contract that the defendant would pay to the plaintiff the sum of Ksh 1,000,0000 ……………………. 5. On or about the 7th /10/2014, the plaintiff made a formal demand for payement but the defendant has failed, refused or ignored to make payement 6. The plaintiffs claim against the defendant is for the sum of Ksh 1,000,000/= on the foot of the defendants agreement to pay the said sum to the plaintiff as pleaded in paragraph 4 above 7. There are no pending nor have there been previous proceedings between the parties to this suit over the same subject matter 8. The contract was made at the defendant’s Kisumu Branch in Kisumu Town and the defendant does business for gain in Kisumu and this honourable court has jurisdiction 9. READONS WHEREFORE the plaintiff prays for judgement against the defendant for 10. The sum of Ksh 1,000,000 11. Interest on Ksh 1,000,000/= at court rates with effect from the date of filing of this suit until payment in full   ~~Dated at Nairobi this 12~~~~th~~ ~~Day of October 2014~~  Amended at Nairobi this 14th Day of October 2014  Description: coumasignature  CHARLES B G OUMA  ADVOCATE  DRAWN AND FILED BY  CHARLES B G OUMA  ADVOCATE  C/O KENYA SCHOOL OF LAW KAREN CAMPUS,  1ST FLOOR NEW TUITION BLOCK  LANGATA SOUTH ROAD,  P O BOX 30369-00100 NAIROBI  TO BE SERVED UPON |

**PARTICLUARS**

**Particulars: What are particulars?**

The rules require that every pleading must state the necessary particulars of the claim or defence sought to be relied on

It is difficult to state what level of particularity a party must meet when pleading. Each case must turn on its own merits. But the general rule is that each party must give his opponent a fair outline of the case against him and when a party is unable to answer a claim because of insufficient detail the party is entitled to request for more information. Such information is what ordinarily constitutes the particulars of the claim or defence. Particulars can therefore be described as the additional details of the case set up by either side. Particulars should therefore indicate to the opposite party the nature of the evidence required of him.

In certain cases the rules require that given the gravity of an allegation made against a party, the allegations must be particularized. Accordingly the rules require particulars of fraud, misrepresentation, malice, negligence

In defamation cases particulars of the precise words complained of must be given[[4]](#footnote-5), so must any particulars of facts that can constitute defamation by innuendo[[5]](#footnote-6), particulars of malice in an occasion of qualified privilege, justification,[[6]](#footnote-7) fair comment[[7]](#footnote-8) ,and particulars to support a plea of mitigation[[8]](#footnote-9).

In a fatal accidents claim the plaintiff must set out the particulars of the dependants on whose behalf the claim is brought

**Particulars: Function of Particulars**

The function of particulars is to operationalise the general principle that litigation must be conducted fairly, openly, without surprise and to save on costs

According to Bullen Leake and Jacobs, the functions of particulars are

* To inform the other side of the case they have to meet
* To prevent the other side from being taken by surprise
* To enable the other side know what evidence they ought to be prepared with in evidence
* To limit the generality of pleadings
* To limit and define the issues to be tried and as to which discovery should be made
* To tie the hands of the other party so that he cannot, without leave, go into any matter not included in the particulars

**Particulars: Misuse of particulars**

* Particulars are not intended to fill the gaps in poorly drafted pleadings
* Particulars are not intended to shop for evidence. That is the work of interrogatories

**Particulars: Requests for particulars**

If a party omits to give necessary particulars or gives insufficient particulars, the counter party may request for them. The request is in form No .The application should be made within reasonable time and preferably before the pretrial conference. If the particulars given are not sufficient, one may apply for further or better particulars. If the request for particulars of further or better particulars is not adequately responded to or there is no response, the party requesting may apply to the court for orders to comply with the request. The consequences of not complying with an order for particulars or for further and better particulars are drastic. The entire pleading or a portion of the pleadings may be struck out. Alternatively the party in default may be barred from relying on or proving certain allegations in his pleadings

Form of the request

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| **REPUBLIC OF KENYA**  **IN THE HIGH COURT OF KENYA AT NAIROBI**  **(SMALL CLAIM/FAST TRACK/MULTI TRACK)**  **CIVIL CASE NO 715 OF 2009**  **PRIDE PROPERTIES LTD PLAINTIFF**  **Vs**  **CONSOLIDATED BANK OF KENYA LTD 1ST DEFENDANT**  **REQUEST FOR PARTICULARS**  **0.2 r.10**  The plaintiff (or defendant) in this suit requires the following particulars of the defence  (Plaint or other pleading) dated the .............................. day of..................., 20....................  1. Of paragraph ................................................................... - (specify particulars required)  2. Of paragraph ................................................................... - (specify particulars required)  3. Of paragraph ................................................................... - (specify particulars required)  This notice is delivered in duplicate, and you are required to file the original with the particulars supplied.  Dated at Nairobi this 12th Day of October 2014  Description: coumasignature  CHARLES B G OUMA  ADVOCATE  DRAWN AND FILED BY  CHARLES B G OUMA  ADVOCATE  C/O KENYA SCHOOL OF LAW KAREN CAMPUS,  1ST FLOOR NEW TUITION BLOCK  LANGATA SOUTH ROAD,  P O BOX 30369-00100 NAIROBI  TO BE SERVED UPON  CONSOLIDATED BANK OF KENYA LTD |

The request must be precise. So must a court order for particulars

Particulars before defence

Some defendants may use a request for particulars to buy time. Accordingly the time within which a pleading must be filed will continue to run despite the request for particulars unless the court orders otherwise. As a general rule the court will not order particulars before a defence is filed unless the defendant is embarrassed or prejudiced in his defence by the inadequacy of the pleadings.[[9]](#footnote-10) Particulars may also be ordered before defence to enable the defendant decide how to plead as in a case where the defendant wants to know the precise amount claimed.

**Particulars before discovery or interrogatories**

The general rule is that a party has the information on the basis of which he has pleaded and particulars would, as a general rule be ordered before discovery and interrogatories. However where an answer to a particular question is only within the knowledge of the defendant, a request and indeed order for particulars can be deferred until after discovery and interrogatories

**Particulars:Answer to particulars**

The party who is served with a request for particulars or an order for particulars must respond within the given period. The answer is in form No 3 of appendix

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| **REPUBLIC OF KENYA**  **IN THE HIGH COURT OF KENYA AT NAIROBI**  **(SMALL CLAIM/FAST TRACK/MULTI TRACK)**  **CIVIL CASE NO 715 OF 2009**  **PRIDE PROPERTIES LTD PLAINTIFF**  **Vs**  **CONSOLIDATED BANK OF KENYA LTD 1ST DEFENDANT**  **PARTICULARS**  **0.2 r.10**  The defendant (or plaintiff) in answer to the Request for Particulars dated the ................ day of ............................................................., 20................., gives particulars as follows -  1. Of paragraph ........................................................................ - (specify particulars given)  2. Of paragraph ........................................................................ - (specify particulars given)  3. Of paragraph ........................................................................ - (specify particulars given  Dated at Nairobi this 12th Day of October 2014  Description: coumasignature  CHARLES B G OUMA  ADVOCATE  DRAWN AND FILED BY  CHARLES B G OUMA  ADVOCATE  C/O KENYA SCHOOL OF LAW KAREN CAMPUS,  1ST FLOOR NEW TUITION BLOCK  LANGATA SOUTH ROAD,  P O BOX 30369-00100 NAIROBI  TO BE SERVED UPON  CONSOLIDATED BANK OF KENYA LTD |

**Particulars: Form and service**

Particulars are ordinarily part of the pleadings and are introduced immediately after the paragraph containing the allegation particularized.

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| **IN THE HIGH COURT OF KENYA AT NAIROBI(Milimani commercial court)**  **FAST-TRACK**  **CIVIL CASE NO 1 OF 2014**  **ALIYE JERULIWA PLAINTIFF**  **Vs**  **CONSOLIDATED BANK OF KENYA LTD DEFENDANT**  **PLAINT**   1. The plaintiff is a limited liability company incorporated in Kenya under the Companies Act Cap 486 LoK. Its address of service for purposes of this suit only shall be c/o Charles B G OUMA Advocate, C/O Kenya School of Law Karen Campus, Langata South Road, 1st Floor New Tuition Block P O BOX 30369-00100 NAIROBI 2. The defendant is a limited liability company incorporated in Kenya under the Companies Act Cap 486 LoK. Service of process upon it shall be affected by the plaintiff’s advocates or their agents. 3. At all material times the defendant was the registered owner of motor vehicle registration No KBPX 1488Y 4. At all material times motor vehicle registration No KBPX 1488Y was driven, managed and or controlled by one Dereva Pumbavu who was at all material times acting in the course of and within the scope of his employment as a servant, employee or agent of the defendant 5. On or about the 7th /10/2014, the plaintiff was walking on the pedestrian walkway along Langata South Road and the defendant’s driver was driving on the opposite side of the road 6. The defendant’s driver so recklessly, carelessly, or negligently drove, managed or controlled the said motor vehicle that it veered from its side of the road onto the pedestrian walkway thereby colliding the plaintiff   **PARTICULARS OF NEGLIGENCE**   1. Driving under the influence of alcohol 2. Driving at a speed that was not only above the speed limit but which was also too high regard being had to the nature of the road, the conditions of the road 3. Failing to slow down in time or at all 4. Failing to notice the presence of the plaintiff on the pedestrian walkway 5. As a consequence of the said collision 6. The plaintiffs claim against the defendant is for the sum of Ksh 1,000,000/= being the cost of treatment for the injuries arising from the said collision and for the sum of Ksh 4,000,000/= being quantified general damages for pain suffering and loss of amenities 7. There are no pending nor have there been previous proceedings between the parties to this suit over the same subject matter 8. The collision occurred along Langata south road in Nairobi was made at the defendant’s Kisumu Branch in Kisumu Town and the defendant does business for gain in Nairobi and this honourable court has jurisdiction 9. READONS WHEREFORE the plaintiff prays for judgement against the defendant for 10. The sum of Ksh 5,000,000 11. Interest on Ksh 5,000,000/= at court rates with effect from the date of filing of this suit until payment in full   Dated at Nairobi this 12th Day of October 2014  Description: coumasignature  CHARLES B G OUMA  ADVOCATE  DRAWN AND FILED BY  CHARLES B G OUMA  ADVOCATE  C/O KENYA SCHOOL OF LAW KAREN CAMPUS,  1ST FLOOR NEW TUITION BLOCK  LANGATA SOUTH ROAD,  P O BOX 30369-00100 NAIROBI  TO BE SERVED UPON  CONSOLIDATED BANK OF KENYA LTD |

**Particulars: Amendment of particulars**

Particulars cannot be amended without leave of court. But particulars incorporated in the pleadings can be amended once without leave of the court before close of pleadings.

**Particulars: Voluntary Particulars**

If a party subsequent to serving particulars in response to a request or order for particulars discovers new facts and wishes to add further particulars cannot do so without leave. But he may do so with the written and recorded consent.

**Particulars of some specific matters**

The general rule is that all pleadings must be sufficiently particularized[[10]](#footnote-11) to give the counterparty adequate notice of the claim the other party is to meet. The rules have however singled out instances where particulars of certain allegations are required. These are misrepresentation, breach of trust, fraud, wilful default, undue influence, any condition of the mind of any person, whether any disorder or disability of mind or malice, fraudulent intention or other condition of the mind, knowledge and notice [[11]](#footnote-12)

**DEFAULT OF PLEADINGS**

The objects of pleadings cannot be achieved unless there are sanctions for non-compliance. Accordingly there are sanctions for failing to serve pleadings on time, for failing to serve on time and for failing to comply with any court orders on pleadings

The typical sanctions are

1. Judgement in default
2. Striking out

The sanctions are intended to ensure that the timetable for litigation is followed with due diligence. The rules however empower the court to temper the drastic effect of the sanctions by empowering the court to set aside default orders and to extend time for compliance

**Default of taking out and serving summons**

Pursuant to Order 5 Rule 6 ‘Every summons, **except where the court is to effect service**, shall be collected for service within thirty days of issue or notification, whichever is later, **failing which the suit shall abate.**

The defendant is entitled to move the court for an order that the suit has abated. The abatement does not however operate as a bar to a subsequent proceeding on the same facts.

**Default of defence**

If the defendant

1. Fails to enter appearance
2. Having entered appearance fails to file a defence, the options open to the plaintiff depend on the nature of the case

**Liquidated claims (No appearance entered)**

* The plaintiff must file an affidavit of service showing that the defendant has been properly served[[12]](#footnote-13)
* The plaintiff requests for judgement in form No Of appendix[[13]](#footnote-14)
* Judgement is entered **in default of appearance**
* Costs are assessed/taxed
* The plaintiff extracts the decree
* Plaintiff can execute

**Liquidated claims (appearance entered no defence filed)**

* The plaintiff must file an affidavit of service showing that the defendant has been properly served
* The plaintiff requests for judgement **in default of defence** form No Of appendix
* Judgement is entered **in default of defence**
* The plaintiff gives notice of judgement to every defendant who has appeared
* Costs are assessed/taxed
* The plaintiff extracts the decree
* Plaintiff can execute

**Non Liquidated Claim ( no appearance)**

* The plaintiff sets down the suit for hearing
* Judgement is entered based on the evidence
* If positive costs are assessed/taxed. If negative, no further action
* The plaintiff extracts the decree
* Plaintiff can execute

**Non Liquidated Claim (appearance but no defence)**

* The plaintiff sets down the suit for hearing with notice to any defendant who has appeared
* Judgement is entered based on the evidence
* If positive costs are assessed/taxed.
* The plaintiff/defendant who appeared extracts the decree
* Plaintiff/defendant can execute

**Partly liquidated partly unliquidated claim ( no appearance)**

* The plaintiff requests for judgement in form No of appendix [[14]](#footnote-15)
* Judgement is entered on the liquidated claim[[15]](#footnote-16)
* The plaintiff sets down the suit for hearing.
* Final Judgement is entered based on the evidence

**Partly liquidated partly unliquidated claim (appearance but no defence filed)**

* The plaintiff requests for judgement in form No of appendix
* Judgement is entered[[16]](#footnote-17)
* The plaintiff sets down the suit for hearing **with notice to any defendant who has appeared**
* Judgement is entered based on the evidence

**Setting aside**

In all cases of default the court has the discretion set aside the judgement and extends time to take any necessary steps. Such discretion must be exercised judicially and the party in default must satisfy the court that he is worthy of the reliefs he is seeking

Order 10 Rule 10 11. Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

The application to set aside is by way of Notice of Motion[[17]](#footnote-18) supported by an affidavit showing cause why the courts discretion should be exercised in favour of the person in default.

Per Lord Atkin in Evans vs Bartlam ‘the principle obviously is that unless and until the court has pronounced a judgement upon the merits or by consent, it is to have the power to revoke the expression of its coercive power when what has only been obtained by a failure to follow any of its rules of procedure[[18]](#footnote-19)

The affidavit must show what type of defence the applicant has on the merits. The proper practice is to attach a draft defence to the affidavit. The affidavit should state the reason or explanation for the default. This could be mistake, accident, even negligent inadvertence etc. The power of the court to set aside a regular judgement is a discretionary power and the court may impose terms on the defendant such as the payment of thrown away costs or other conditions

**Default of defence to counterclaim**

The same procedure is applied *mutatis mutandis*

**No default Judgement against the government except with leave of the court**

Order 10 Rule 8 ‘No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day’.

1. Bullen and Leake p 7-9 [↑](#footnote-ref-2)
2. Jacob, ‘The present system of Pleadings’ (1960) Current Legal Problems pp 175-176) [↑](#footnote-ref-3)
3. Bullen and Leake and Jacobs, Precedents of Pleadings 12th Edition Sweet and Maxwell , London 1975 [↑](#footnote-ref-4)
4. Order 2 Rule 7(1) [↑](#footnote-ref-5)
5. Oder 2 Rule 7 [↑](#footnote-ref-6)
6. Oder 2 Rule 7(2) [↑](#footnote-ref-7)
7. Oder 2 Rule 7(2) [↑](#footnote-ref-8)
8. Order 2 Rule 8 [↑](#footnote-ref-9)
9. Order 2 Rule 10(4) [↑](#footnote-ref-10)
10. Order 2 Rule 10 [↑](#footnote-ref-11)
11. See order 2 rule 10 [↑](#footnote-ref-12)
12. Order 10 Rule 2 [↑](#footnote-ref-13)
13. Order 10 Rule 4 [↑](#footnote-ref-14)
14. Order 10 Rule 4(2) [↑](#footnote-ref-15)
15. Order 10 Rule 6 [↑](#footnote-ref-16)
16. Order 10 Rule 6 [↑](#footnote-ref-17)
17. Order 51 Rule 1 [↑](#footnote-ref-18)
18. 1937 AC 473 at 480 [↑](#footnote-ref-19)