



REPUBLIC OF KENYA



KENYA LAW
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**Sunfunder Inc v Mayfair Insurance Company Limited & another (Civil Case E158 of 2019)
[2022] KEHC 16132 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E158 OF 2019
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

SUNFUNDER INC PLAINTIFF

AND

MAYFAIR INSURANCE COMPANY LIMITED 1ST DEFENDANT

UNDERWRITING AFRICA LIMITED 2ND DEFENDANT

RULING

1. This ruling settles two applications and a preliminary objection (PO) namely:
 - a. The preliminary objection dated February 10, 2022.
 - b. The 1st defendant application dated October 12, 2021.
 - c. The plaintiff's application dated May 6, 2021.

Preliminary Objection

2. The 1st defendant objected to institution of the suit on the basis that it is *res judicata*. The 1st defendant argued that a similar suit being HCCC No 205 of 2021 *Sunfunder Inc & Beyond the Grid Solarfund LLC vs Astonfield Solesa Pilar Kenya Ltd* had been conclusively determined.
3. The plaintiff, on its part, argued that the doctrine of *res judicata* is not applicable in this case.
4. Section 7 of the *Civil Procedure Act* stipulates as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between



parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

5. The conditions that must be satisfied in order to successfully argue the doctrine of *res judicata* were set out in [Kenya Commercial Bank vs Benjob Amalgamated Ltd](#) [2017] e KLR as follows: -

“The elements of *res judicata* have been held to be conjunctive rather than disjunctive. As such, elements reproduced below must all be present before a suit or an issue is deemed *res judicata* on account of a former suit.

- a. The suit or issue was directly and substantially in issue in the former suit.
 - b. The former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
6. In the instant case, I have compared the particulars of the parties herein and the parties in the alleged similar case. I note that a cursory look at the names of the parties reveals that while Sunfunder is the plaintiff in the related case, the rest of the parties are different.
7. Furthermore, it is not clear if the alleged related case has been finally determined or if the issues in the said case are the same as the issues in this case.
8. I find that the doctrine of *res judicata* is not applicable in this case and that of the issues I have highlighted herein above are not pure points of law as they will require that the court takes evidence to establish them.
9. I find that the preliminary objection is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

Application Dated May 6, 2021

10. Through the application dated May 6, 2021, the plaintiff seeks orders to be allowed to amend the plaint shown in the draft amended plaint.
11. The application is supported by the affidavit of the plaintiff’s Director Ms Andrey Desiderato.
12. The respondents opposed the application through their respective grounds of opposition wherein they state that:-
 - i. The amendment motion is an afterthought aimed to cure fatal defects in the plaint and joinder of parties at an advanced stage of the suit.
 - ii. The plaintiff is guilty of laches;
 - iii. The amendment motion is bases in the 2nd defendant’s preliminary objection.
 - iv. The pleadings do not show any nexus between the plaintiff and the proposed 2nd plaintiff.



- v. The draft amended plaintiff introduces a new cause of action which is of a substantially different character inconsistent with and which departs from the original claim.
 - vi. The new cause of action so introduced by the proposed amendment is statute barred.
 - vii. The proposed amendments are prejudicial to the 1st defendant.
 - viii. The amendment motion is made in bad faith and is an abuse of the court process.
 - ix. The amendment motion is a misapprehension and/or disregard of the law on joinder.
 - x. The amendment motion does not justify why the proposed amendments were not initially incorporated in the plaintiff.
 - xi. The proposed amendments are immaterial unnecessary in the determination of the real issues in the suit.
13. Section 100 of *Civil Procedure Act* stipulates as follows on amendment of pleadings.
- “The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding 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.”
14. Order 8 rules of the *Civil Procedures Rules* stipulates that:-
- “(1) 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.”
15. The above provisions show that the court has the discretion to allow amendment of pleadings at any stage of the proceedings.
16. I have perused the draft amended plaintiff and noted that the proposed amendment seeks to introduce a second plaintiff, Beyond the Grid Solar Fund LLC.
17. I note that the proposed 2nd plaintiff is described as the insured party under the insurance policy that is the subject of the suit.
18. Courts have adopted the position that they will generally and liberally allow amendments of pleadings in order to effectively and finally determine the issues in a suit (see the *British India General Insurance Company Limited vs GM Parmar & Company* [1966] EA 172 and *Eastern Bakery vs Castelino* [1958] EA 461(CAK)).
19. In *Central Kenya Limited vs Trust Bank Limited* [2000] CA 365 the Court of Appeal held that:-
- “The guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings provided that the amendments or joinder as the case may be will not result in prejudice or injustice to the other party which cannot be properly compensated for in costs.”



20. In the instant case, I note that the plaintiff has explained that the amendment is intended to include a 2nd plaintiff as the insured party under the contract that is the subject of the suit.
21. I find that the said intended 2nd plaintiff is a necessary party to the suit whose addition/inclusion in the matter will assist the court to fully and finally determine the dispute between the parties herein. I further note that the defendant did not state that the amendment will prejudice its case in any manner. I therefore find that the application dated May 6, 2021 is merited and I allow it with orders that costs shall abide the outcome of the main suit.

Application Dated October 12, 2021

22. Through the application dated October 12, 2021, the 1st defendant seeks orders to strike out the plaintiff's case against it on the basis that it is contra statute, discloses no cause of action against the 1st defendant, is an abuse of the court process, is frivolous and vexatious.
23. The 1st defendant's case is that it did not issue the plaintiff with an insurance cover for the alleged sum of USD 2,500,000 and that the plaintiff did not pay any premiums to the 1st defendant.
24. The plaintiff opposed the application through the replying affidavit of its Director Ms Andrey Desiderato who avers that the plaintiff's principle claim is for USD 2,250,000 being the sum insured under a credit insurance policy issued by the 1st defendant in favour of the proposed 2nd plaintiff with the brokerage of the 2nd defendant.
25. It is the plaintiff's case that there is a nexus between the debit note issued by the 2nd defendant and the four provisional covers issued by the 1st defendant thus justifying the 1st defendant's inclusion in the case.
26. Order 2 rule 15 (2) of the [Civil Procedure Rules](#) stipulate as follows:-

"No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made."
27. The principle that emerges from the above cited cases is that courts will always be cautious in exercising their discretion to strike out the pleadings so as not to deny a litigant his right to access justice.
28. In the present case, the 1st defendant seeks to strike out the plaintiff's on the basis that it did not issue the insurance policy in question.
29. My finding is that the grounds/reasons advanced by the 1st defendant for seeking the orders to strike out the case are ideally grounds that should form the defence to the main suit. The said grounds can only be determined after hearing the merits of each parties' case.
30. I am not satisfied that the 1st defendant's application meets the threshold for striking out of pleadings.
31. Consequently, I dismiss the application dated October 12, 2021 with orders that costs shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -



Mr. Atika for Wachira for plaintiff.

Mr Owuor for 1st defendant.

Ms Rutere for Mr. Rutere for 2nd defendant

Court Assistant- Sylvia

