REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 339 OF 2009

MOHAMMED HASSIM PONDOR (*Suing on behalf*

***of* THE INTERNATIONAL AIR TRANSPORT**

ASSOCIATION – IATA.....1ST PLAINTIFF

MERCANTILE INSURANCE COMPANY LIMITED.....2ND PLAINTIFF

VERSUS

NORDIC TOURS & SAFARIS LTD.....1ST DEFENDANT

AMIN GWADERI..... 2ND DEFENDANT

GULSHAN HUSSEIN DHANJI.....3RD DEFENDANT

RULING

1. Applications for leave to amend pleadings are often not seriously contested. But not the one dated 25th May 2016.

2. In it the Plaintiffs namely Mohammed Hassim Pondor (Suing on behalf of The International Air Transport Association – IATA) (Pondor) and Mercantile Insurance Company Limited **(Mercantile)** seek changes to correct names of the Plaintiffs. In respect to Pondor, it is proposed that his name be struck out so that the 1st Plaintiff is The International Air Transport Association – IATA. For Mercantile, its amendment is to substitute it with Saham Assurance Company Kenya Ltd **(Saham)** following a change of name of Mercantile.

3. The provisions of Order 8 Rule 3(3) and (5) of the Civil Procedure Rules are cited as providing the anchor for the application. They read:-

> **[Order 8 Rule 3(3)] An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the 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.**
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> **(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will he to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.**

4. Let me start with the leave sought in respect to Mercantile. Shown to Court is a Certificate of Change of Name dated 12th March 2014 in which Mercantile changed its name to Saham Assurance Company Kenya Limited. Ordinarily, there would be no reason resisting such an application but the Defendant raise the issue of delay in bringing the application. The change of name happened on 12th March 2014, yet it took the 2nd Plaintiff about 2 years later to seek the current changes. I agree that this application ought to have been brought more swiftly. However, I note that the hearing of the suit is yet to commence and no prejudice that granting leave may cause has been shown or demonstrated. I will allow that amendment.

5. More controversial and animated is the plea to remove the name of Pondor as the Plaintiff with the effect that the name of the 1st Plaintiff will be The International Air Transport Association – IATA. Some background to these proceedings reveals the reasons for the heat.

6. By virtue of a power of Attorney executed on 3rd July 2006, IATA appointed Pondor to be the true and lawful Attorney in respect to its Eastern African operations which includes its activities in Kenya. Paragraph 1 of the Plaint reads:-

> **1. The 1st Plaintiff is a male adult of sound mind residing and working in Nairobi and is suing on behalf of the International Air Transport Association (hereinafter called "IATA") by virtue of a power of attorney which appointed him as Country Manager Eastern Africa. The cause of action arose in Nairobi. The local IATA office is registered in Nairobi, Kenya. Its address of service for purposes of this suit is Care of Messrs. Walker Kontos, Advocates, Hakika House, Bishop Road, and P. O. Box 60680, Nairobi.**

7. The Defendants have continuously raised the issue of lack of capacity on the part of Pondor. A few examples suffice. The 1st Defendant is its written submissions of 31st May 2010 and citing the decision of **Kajubi – VS – Kayanja [1967] E.A. 301** makes the argument that a power of Attorney did not authorize the holder to institute proceedings on behalf of the donor in his personal name and capacity. As well pointed is the Notice of Preliminary Objection filed by the 2nd and 3rd Defendants on 1st December 2011 in which one ground is that;

> **"1st Plaintiff (sic) has no right in law to sue under power of Attorney, as an attorney of a known principal".**

8. It is the case of the Defendants that notwithstanding this protestation, the 1st Plaintiff has always insisted on his capacity to sue in his own name. Examples are in the 1st Plaintiff's Notice of Motion of 9th July 2010, his witness statement of 16th March 2012 and written submissions made on his behalf dated 13th March 2011.

9. The Defendants argue that the 1st Plaintiff was always aware of this mistake and it is not a genuine mistake.

10. It is now opportune to discuss what amounts to a genuine mistake in a pleading within the contemplation of Order 8 Rule 3. There is no legal definition of a word genuine and I turn to the Concise Oxford English Dictionary 12th Edition for its meaning;

> **1. Truly, what it is said to be authentic.**
>
> **2. Sincere, honest**

11. For a mistake to be genuine it has to be a sincere or honest mistake. The question here is whether the previous insistence by the 1st Plaintiff in his capacity to sue was in fact a sincere or honest mistake.

12. In support of the application for leave to amend, Salome Angela Osure who is a Manager – Eastern African for IATA deposes;

> **"The error in description of the 1st Plaintiff was a genuine mistake and was not deliberately misleading or intended to cause any reasonable doubt as to the identity of the 1st Plaintiff".**

Juxtaposing this disposition with the stance taken by 1st Plaintiff on several occasions in which he argued as to the correctness in bringing the suit in his name, can there be said to be a genuine mistake?

13. In answering this question, I draw a lesson from the decision of **Lombard Banking Kenya Ltd –vs- Shah Bhaichand Bhagwanji [1960] EA 969,** which was cited to this Court by counsel for 1st Defendant for another limb of his opposition to the application. Under discussion in that decision was r.10(1) of Order 1 of the Civil Procedure (Revised) Rules 1948 which reads;

> **"Where a suit has been instituted in the name of the wrong persons as Plaintiff, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the Court thinks fit".**

14. The Court held;

> **"In that case it was not decided under O.XVI – There were special circumstances which do not exist here. It is true that there was negligence in the presence case, but almost any mistake is procedure, if made by a barrister or solicitor may be said to amount to negligence. I do not think that a mistake is necessary excluded from r.10 of O.I merely because it is a negligent mistake, provided it is one that has been honestly made".**

15. Although the Judge was discussing a "bona fide" mistake, the same can be extended to a "genuine" mistake because bona fide itself means genuine or real **(Oxford Dictionary *Supra*)**.

16. I would think that it cannot be taken that simply because the 1st Plaintiff had believed in the correctness of its position then that belief is not a genuine mistake. Very often lawyers insist on a wrong proposition of a law yet they do so honestly. The test is not whether the 1st Plaintiff's insistence on his capacity to sue in his own name was doggedly urged but whether the insistence was honest or bona fides.

17. The 1st Plaintiff in this matter disclosed that he was bringing this suit on behalf of "IATA". IATA therefore was disclosed to be the real

owner of the action. The role of the 1st Plaintiff was not hidden. The 1st Plaintiff did not seek to mislead or cause a doubt as to the identity of the person suing. For this reason, I hold that the 1st Plaintiff's mistaken interpretation of the extent of his power of Attorney is a genuine mistake.

18. It seems to me that any notion that the 1st Plaintiff may have had about the strength of his standing was disabused by the decision of Ogola J in **Mohammed Hassim Pondor & Another V Resident Travel Limited & 3 Others[2013] eKLR** which involved Pondor and which his capacity to sue in his own name, like here, was under scrutiny. The Court held;

> **[9] I have carefully considered the Preliminary Objection by the Defendants. I have considered the said Power of Attorney, the submissions of the parties and the case law. It is clear to me that by filing the suit in his own name the Plaintiff exceeded the power and authority ceded to him in that Power of attorney. The Power of Attorney is replete with clauses restricting the powers of the donee. Clauses 1 (e), (g), (i) and Section B (1) required the donee to act "in the name of, and on behalf of the donor."**
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> **[10] Mr. Billing for the Respondent has submitted that the court should be guided by the values and principles of the new Constitution especially Article 159 (2) (d) and (e) which require this court to administer justice without reliance on procedural technicalities. In my view, however, the point raised by the Defendants is not a procedural technicality but a point of substantive law. The right party should sue as the Plaintiff. The objection is substantive and goes to the root of the case.**

19. This brings me to two related grounds of opposition raised by the Defendants. The first is the undue delay in bringing this application and second, that the sole purpose of the application is to defeat the Preliminary Objection taken up on the propriety of the suit.

20. This Court has no doubt that having known the decision of Judge Ogola on 30th May 2013, Pondor made no effort to seek a quick correction of the position here. In the affidavit in support of the Application no reasons are given for the 3 years delay in bringing this application. That delay is certainly inordinate. While leave to amend pleadings may be given at any stage of proceedings, inordinate delay can disentitle the applicant from grant of such order and more so when it prejudices the other side.

21. So has the delay prejudiced the Defendant? First, as the matter is yet to be heard, and in the absence of reasons that the delay handicaps the Defendants from presenting their Defence, this Court does not find prejudice on that score.

22. Second, it is argued that the application was merely a reaction to objection of 1st December 2011. That may be so but a party facing a difficulty is entitled to seek the Court's intervention to correct an error if the law permits. The amendment sought by the Applicant is a type that is permitted by law and the applicant was within his right to seek to correct the genuine mistake so as to avoid the dire consequences of the objection. The prejudice caused by the action of the Applicant can be mitigated by an award on costs of the objection which would otherwise have been successful.

23. I turn to another objection raised by the Defendants. They argue that to allow the application has the effect of defeating a defence of Limitation of Action available to them. It is argued that the suit is a 2009 matter while the application was filed in 2016. The defence of limitation is said to have accrued. I was urged to give regard to the decision in **Kenneth Kariuki Githii v Royal Media Services Ltd [2009] eKLR** in which it was held that;-

> **"The position in this case appears to be in all four with the above case. So it is not only the question of being compensated with costs. Amendments that seek to defeat an accrued defence are only allowed in exceptional and peculiar circumstances. There are no exceptional and peculiar circumstances in this case to warrant the granting of leave to amend. The plaintiff does not claim to have known later of the republication of the libel. What was aired and the number of times that was done was within the plaintiff's knowledge. There is therefore no reason why the whole text was not pleaded. As stated by the Court of Appeal in the above case, to allow the amendment would be to aid a negligent pleader".**

24. On this matter the Court sides with the 1st Plaintiff because right from the outset, it was clear from the Plaint that the cause of action belonged to IATA. The suit had been brought by the Plaintiff on behalf of IATA. For the reason that there was disclosure that the cause of action was that of IATA and brought for its benefit, an amendment to have IATA and not Pondor as the real Plaintiff does not serve to defeat the defence of limitation. This is a peculiar circumstance in which the leave sought is to bring the principal into the suit in place of an agent on an action which remains the same and does not change in character.

25. I turn to the final ground for resistance. This Court is told that the application violates the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 which reads:-

> **"[Order 1 Rule 10]**
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> **(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.**

26. The Defendants point to two authorities in support of this position. **Lombard (*supra*) and Karl Heinz Straus & 2 Others –vs- Russel Wilmot & Another [2008] eKLR**. In Lombard the Court held;

> **"While a defendant may be joined as a party without his consent, no person ought to be compelled to bring an action without his consent, and it seems to me clear, therefore, that in the absence of the consent of the proposed Plaintiff, which has not been obtained as required by Sub-rule (3), the proposed substitution cannot be made".**

27. It is pressed by the Defendants that as there is no evidence that the power of Attorney of the 1st Plaintiff has been revoked then his consent to exit the suit was necessary.

28. The full and complete answer to this argument is found in the provisions of Rule 3 of order itself. It reads:-

> **"O.1. r.10 [3]: No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto".**

29. The party whose consent is required is the intended Plaintiff. In this case it is IATA. In this matter, the supporting affidavit to the application is made by IATA through Salome Angela Osure who deposes to be manager – Eastern Africa for IATA and duly authorized to swear the affidavit on behalf of IATA. Supporting the motion to bring itself into the suit as the 1st Plaintiff is an implied consent to join the suit as the 1st Plaintiff. It would be too technical and pedantic to require IATA to again file a formal consent. As to Pondor, the exiting party, the application is brought by his very own advocates, consent is implied.

30. The Notice of Motion is for allowing in respect to the two prayers. Yet as noted earlier, the effect of allowing the application is to frustrate the Defendants from successfully arguing their objection on Pondor's capacity to sue in his own name. That frustration ought to be mitigated by an order on costs. The Defendants shall have costs as though they had prosecuted the Preliminary Objection but for clarity not costs for a dismissed suit. The Defendants shall also have costs for the current application. Both sets of costs shall be in any event and shall be payable before this suit is set down for hearing.

31. To the extent stated in the preceding paragraph, the Notice of Motion dated 26th January 2016 is allowed, the amended plaint to be filed and served within 14 days and the Defendants shall be at liberty to file and serve a reply or to amend their Defence within 14 days of service.

Dated, Signed and Delivered in Court at Nairobi this 31st Day of January 2020

F. TUIYOTT

JUDGE

PRESENT:

Rayani for 2nd and 3rd Defendants

Kimani for Plaintiff

Athmin holding brief Khan for 1st Defendant