



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CIVIL SUIT NO. 9 OF 2007**

**BEATRICE GIKUNDA.....PLAIANTIFF/APPLICANT**

**VERSUS**

**CFC LIFE ASSURANCE LIMITED.....DEFENDANT/RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This ruling pertains to the application dated 11/11/2019 in which the applicant seeks for orders to amend his plaint to specifically indicate the insurance policy number as 9000447 in place of No. 9000541 which she had inadvertently indicated.
2. It is the applicant's case that at the time of filing the suit she had a copy of the insurance policy indicating the policy number as 9000541 however the defendant indicated the correct policy number as 9000447. The issue has also been raised in its witness statement made on the 17/05/2019.
3. The applicant states that allowing the application will enable the court to determine the real issues between the parties on merit and that no prejudice will be suffered by the defendant if the application is allowed.
4. In rejoinder, the respondent filed grounds of opposition dated 15/11/2019 in which it asserts its opposition on the grounds that the proposed amendment would be prejudicial to the defendant's case as the parties have closed their respective cases and are awaiting judgement and further that the proposed amendment though pointed out 12 years ago has been brought too late in the day, it is unexplained and that the affidavit in support of the application offends the clear provisions of the Advocates Act and should be struck out for being defective.
5. The parties disposed of the application by way of written submissions.

**B. Applicants' Submissions**

6. It is submitted that the respondent at all times acknowledged and appreciated the applicant as an insured person under the policy number 9000447 as is evidenced from the respondent's bundle of documents filed on 20/09/2007. It is further submitted that the cover that was valid during the time of the accident and that referred to in the correspondences between the parties herein is policy number 9000541.
7. It is submitted that the applicant's referral to the insurance policy as number 9000447 in place of number 9000541 was inadvertent and that it would be in the interest of justice and not prejudicial to the respondent to allow the amendment.
8. The applicant further submits that the court will only be able to determine the issue between the parties herein upon allowing the amendment to take place. Reliance is placed on the case of **Kampala Coach Limited v First Community Bank Limited & Another [2016] eKLR.**

**C. Respondent's Submissions**

9. It is submitted that while leave to amend pleadings may be granted at any stage of the proceedings, it is fettered by judicial discretion as was captured in the case of **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR.**
10. It is further submitted that the amendment sought should not be allowed as it has been brought too late into the case and further that the same is not made in good faith and if allowed inevitably prejudices the respondent, which prejudice cannot be cured by an award of costs.

11. It is also submitted that the application is prejudicial to the respondent as it has been brought 13 years after the case was instituted and further as it is not clear as to when the applicant or his advocates became aware of the mistake that they seek to remedy via their amendment. Reliance is placed on the case of **Rubina Ahmed & 3 Others v Guardian Bank Ltd [2019] eKLR** where the court denied amendment of pleadings on account of indolence which was attributable to the applicant's "deep slumber."

12. It is also submitted that the loss the respondent stands to incur should the application be allowed cannot be contained by an award of costs and as such the application must be denied.

13. It is further submitted that amendments must be brought at the earliest opportunity as to allow a late amendment would amount to an abuse of the court process as was quoted in the cases of **Supreme Service Station Limited v Agip Kenya Limited [2008] eKLR** and that of **Kyalo v Bayusuf Brothers Ltd. Civil Appeal No. 38 of 1983.**

#### **D. Analysis & Determination**

14. I have considered all the forgoing. The issue for determination is whether the application by the applicants dated 11/11/2019 has merit.

15. With regard to the prayer to amend the pleadings, it is trite law that amendments to pleadings can be freely allowed at any time before delivery of a judgment. According to Mulla, The Code of Civil Procedure, 17<sup>th</sup> Edition Volume 2, at pages 333, 334 and 335; as a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order.

16. Leave to amend must always be granted unless the party applying was acting mala fide and where it is not necessary for determining the real question in controversy between the parties. I am also of the opinion that an application to amend must be made bona fide and made in good faith.

17. In **Ogders on Pleadings and Practice 20th Edition** at page 170 the learned authors also state that where the amendment is necessary to enable justice to be done between the parties, it will be allowed on terms even at a late stage. However, if the application be made mala fide, or if the proposed amendment will cause undue delay, or will in any way unfairly prejudice the other party, or is irrelevant or useless, or would raise merely a technical point, leave to amend will be refused.

18. In the case of **Eastern Bakery v Castelino [1958] EA 462 (CAU)** where it was held at page 462 that: -

**"The court will not refuse to allow an amendment simply because it introduces a new case..... The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character ..... or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ ....."** Further to the above, the Court of Appeal also stated in the case of **Central Kenya Limited v Trust Bank Limited (2000)2 EA 365** that ;

**"..... a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side."**

19. From the foregoing case law and legal texts cited, it goes without saying that the Court has wide discretion to allow any party to amend its pleadings at any stage of the proceedings on such terms as to costs or otherwise as may be just and in such manner as it may direct under Order 8 Rule 3 of the Civil Procedure Rules.

20. Thus, the overriding consideration in an application for leave for amendment is whether the amendments sought are necessary for determining the real question in controversy and whether any delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.

21. Amendment of pleadings is another discretionary power, liberally exercised, which is donated under **Order 8 rule 5 (1) of Civil Procedure Rules**. It provides: -

**"For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either on 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."**

22. In the case of **Elijah Kipngeno Arap Bii (supra)**, which was relied on by the appellants, this Court differently constituted observed: -

**"The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12<sup>th</sup> Edition, in the case of Joseph Ochieng & 2 Others vs First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows: -**

**"The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to**

determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

23. The applicant seeks to amend her plaint to specifically indicate the insurance policy number as 9000447 in place of No. 9000541 which she had inadvertently indicated as at the time of filing the suit for she had a copy of the insurance policy indicating the wrong number.

24. The respondent has contended that the application before court is incompetent since there has been undue delay in making the application which has been brought 13 years after the case was commenced and that shows that the same is a mere afterthought.

25. I have considered the respondent’s submissions. There is no doubt that there has been quite some delay in filing the instant application since the case was filed about 13 years ago. I have already said that the law does not give limitation of time for amending pleadings. However, the defendant has not demonstrated what particular prejudice if any, it is likely to suffer if the application is allowed. The only issue put forward is that late amendment cannot be compensated by an award of costs. Further, the amendment sought by the applicant is not on an issue that is contested as the respondent himself in its bundle of documents attached a schedule which indicated the proper policy number as 9000447. This is the same number being sought to be inserted by the applicant in place of the wrong one.

26. In the case of **Central Kenya Limited v Trust Bank Limited (supra)** it was stated that mere delay is not a ground for declining leave to amend, but that such delay must be one likely to prejudice the other party beyond monetary compensation. In this particular case, I am of the view that there is no prejudice that will be caused to the respondent or one that cannot be compensated by an award of costs to the defendant.

27. Likewise, I am of the opinion that if the application for amendment is allowed, the defendants will have the opportunity to respond to the amendment and may apply to recall the plaintiff if need be even at this stage. The pleadings may be opened at any stage should the circumstance of a case so demand.

28. It was held by the Supreme Court of Uganda in **Gasu Transport (Bus) Services Ltd. v Obene (1990-1994) E.A 88** that courts should generally give leave to amend pleadings rather than give judgments in ignorance of the facts which ought to be known before rights are definitely decided.

29. I find that the applicant has demonstrated a case for an amendment of pleadings and that no prejudice will be suffered by the respondent if this application is allowed.

30. Accordingly, the application dated 11/11/2019 is hereby allowed on the following terms: -

- a. That the amended plaint be filed and served within fourteen (14) days from the date of this ruling.**
- b. That the respondent is hereby granted leave to file an amended defence within fourteen (14) days if need be.**
- c. The applicant shall meet the costs of this application.**

31. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF MAY, 2020.**

**F. MUCHEMI**

**JUDGE**

**Judgment sent to the parties through their respective emails**