



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 168 OF 2015

SAGAL TRAVEL AGENCY LIMITED.....APPLICANT

VERSUS

SAHAM ASSURANCE COMPANY KENYA LIMITED.....RESPONDENT

RULING

(1) Before this court is the Notice of Motion application dated **29th July 2019** by which **SAGAL TRAVEL AGENCY LIMITED** (the Plaintiff herein) seeks the following Orders:-

- “1. THAT leave be granted to the Plaintiff to amend its Complaint dated 1st April 2015.**
- 2. THAT this Honourable court do grant leave for the Plaintiff’s Further Witness Statement dated 5th February 2019, Further Supplementary list of and Bundle of Documents dated 5th February 2019 and both filed in this court on 6th February 2019 be deemed to be duly filed and served.**
- 3. THAT leave be granted to the Plaintiff to file a second Further Supplementary list and Bundle of Documents.**
- 4. THAT costs of this application be in the cause.”**

(2) The application which was premised upon **Order 8 Rule 3 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act Cap 21, Laws of Kenya** was supported by the Affidavit of even date sworn by **ABDIQAND ALI** a Director of the Plaintiff Company.

(3) The Defendant **SAHAM ASSURANCE COMPANY KENYA LIMITED** opposed the application by way of the Grounds of Opposition dated **29th July 2019** which raised the following grounds:-

1. The application has been brought after considerable delay, which delay has not been sufficiently explained. The Complaint in this matter was filed on **1st April 2015**. The application to amend the Complaint is being made 4 years later, after parties have complied with pre-trial directions and set the matter down for hearing.
2. The application will prejudice the Defendant’s counter-claim by further delaying the hearing of this matter.
3. The facts sought to be introduced by the amendments are not as a result of new information available to the Plaintiff.
4. The late amendment prejudices the efficient administration of justice as the suit has already been confirmed ready for hearing.
5. The application is an abuse of Court process and ought to be dismissed with costs.

(4) The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions on **4th December 2019**, and the Defendant/Respondent filed its applications on **2nd March 2020**.

BACKGROUND

(5) The Plaintiff/Applicant filed this suit by way of a Complaint dated **1st April 2015** seeking inter alia damages for loss of business value in the

sum of **Kshs.964,583,776.80**. The suit was certified ready for hearing which hearing was due to commence on **6th February 2019**. On that date **Ms Ahomo** for the Plaintiff raised the issue of an error in computation regarding the amount being claimed. The court directed that the Plaintiff file the necessary application, hence the present application.

(6) On the other hand, the Defendant/Respondent submits that the application to amend pleadings has been made too late in the day and that to allow the same would be prejudicial to the Defendant.

ANALYSIS AND DETERMINATION

(7) I have carefully considered the submissions filed by both parties in this matter. **Order 8 Rule 3 of the Civil Procedure Rules 2010** provide as follows:-

“Subject to order 1 Rules 9 and 10, Order 24 rules 3,4,5 and 6 and the following provisions of this rule, the court may 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, allow any party to amend his pleadings.”

(8) In the case of **KASSAM –VS- BANK OF BARODA (KENYA) LIMITED [2002] I KLR**, the factors which a court ought to consider when deciding whether or not to allow an application to amend pleadings were set out as follows:-

“(a) Whether the Amendment sought embodies a legal valid claim or defence.

(b) The reasons why the subject matter of the amendment was not included in the original pleading or offered sooner.

(c) Delay or disruption of judicial administration.

(d) The extent to which the amendment departs from the original claim or tends to complicate issues; and

(e) Whether the amendment is offered by the Plaintiff or the Defendant.”

(9) The Defendant/Respondent submits that there has been inordinate delay by the Plaintiff in bringing this application to amend pleadings. It is true that the original Plaintiff having been filed in **April 2005**, it was not until **July 2009** that the Plaintiff brought this application to amend its Plaintiff. However, the Plaintiff has explained the factors which have necessitated this application being a computational error which was only discovered whilst preparing for the trial. To err it is said is human. I further note that although this application was brought after the matter had been certified ready for hearing the actual trial had not yet commenced. In the circumstances I fail to see what prejudice the Defendant stands to suffer if the present application is allowed.

(10) In **EASTERN BAKERY –VS- CASTELINO [1958] E.A** the Court of Appeal held thus:-

“It will be sufficient to say for the purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed. If they can be made without injustice to the other side and that there is no injustice if the other side can be compensated in costs.”

(11) Further in the case of **CENTRAL KENYA LTD –VS- TRUST BANK LTD & 5 OTHERS**, the Court of Appeal held as follows:-

“The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

(12) Further the Court of Appeal quoted **AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, Vol 26th Ed. At P.2245** as follows:-

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. At P.2245 of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

“That a party is allowed to make such amendments as maybe 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.”

(13) I am satisfied that the amendment sought by the Plaintiff are necessary to enable the court reach a just decision in this matter. The Defendant will suffer no prejudice as they equally have a right to amend their pleadings if need be.

(14) Accordingly, I do grant prayers 1,2, and 3 of this application. I further order the Plaintiff to pay to the Defendant/Respondent Getting up costs of **Kshs.30,000/=** since this application was made on the date when the hearing was due to commence. The Plaintiff/Applicant will

also pay the costs of this application.

It is so ordered.

Dated in Nairobi this...18th ..day of September 2020.

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Justice Maureen A. Odera