



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. 29 OF 2010**

**CANNON ASSURANCE KENYA LTD.....PLAINTIFF**

**VERSUS**

**GERHARD MATTHIESSEN.....1<sup>ST</sup> DEFENDANT**

**HARALD KAMPA.....2<sup>ND</sup> DEFENDANT**

**COTSWOLD ESTATES LTD.....3<sup>RD</sup> DEFENDANT**

**RULING**

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1. The plaintiff, CANNON ASSURANCE KENYA LTD filed a suit claiming from the Defendants, GERHARD MATTHIESSEN LIMITED, a liquidated sum of Khs.25,680,185.00 allegedly from services rendered on account of their guarantee and or promise to pay by various Directors of either entities in which the 1st defendant was participating as Director. In essence, the remedies sought are said to arise from a guarantee executed between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

2. The plaintiff by a notice of motion application dated 19<sup>th</sup> November, 2013 applied to amend the plaint in terms of the draft amended copy annexed to the supporting affidavit sworn on 19<sup>th</sup> November, 2013 and marked as exhibit “ MM1”Baciscall, it is seeking to amend the original plaint in order, in its view, to add facts that will align with the prayers sought in the pleadings.

3. The same is opposed by the Defendant, who filed their joint grounds of opposition dated 31<sup>st</sup> day of August, 2015.

4. The parties counsel appeared before this court to urge this application. Having listened to their rival arguments with regard to the said application for amendment, I have also considered the circumstances of the case, and find it is important to consider the law on amendment of pleadings.

5. The power to amend pleadings is donated by section 100 of the Civil Procedure Act which states as follows;

***“ That 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 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 proceedings”***

This power is wide and courts have reiterated this principle every now and again to align pleadings to the issues raised by the parties so that they are clear, definite and ascertainable for the purpose of achieving a conclusive trial in resolution of disputes.

6. The Rules committee introduced Order 8 Rule 3 of the Civil Procedure Rules which provides for a framework on matters an amendment can cover and which the court can grant.

Order 8 Rule 5 (1) of the Civil Procedure Rules is similar to section 100 of the Civil Procedure Act and is what actually is the reason the court has general power to freely grant and or allow amendments to pleadings. Order 8 rule 5 (1) provides as follows;

***“ 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 enter of its own motion or on the application of any party, order any document to be amended in such a manner as it directs and on such terms as to costs or otherwise as are just”***

This Rule supplies section 100 of the Civil Procedure Act, Cap. 21 Laws of Kenya and Order 8 Rule 3 of the Civil Procedure Rules 2010, with the requirement for fairness.

7. It is these principles that the courts have applied from time to time and refined them to suit the working framework so as to resolve disputes litigants find themselves in and bring before court as in the instant case.

8. The court was referred by the plaintiff/Applicant counsel to the authorities of the court of Appeal, PRINTING INDUSTRIES LTD & ANOTHER VRS. BANK OF BARODA (2017) e KLR, whose finding allowed a defence to be amended. The court in that case discussed the statute and warned that the discretion given to courts should be exercised cautiously. I am alive to the principals laid down in the following decisions:

(a) EASTERN BAKERY V CASTELINO (1958) E.A 461, which propounded that each case must be viewed on its own facts.

(b) MOHAN MEAKIN (K) LTD VRS A.G (2014) e KLR where the court of appeal endorsed that amendments relate back to the date of filing suit and against aligned the principles stated in EPAINITO VRS UGANDA COMMERCIAL BANK (1971) E. A 185 that;

***“ Amendments should not be allowed if they will cause an injustice on the other side which cannot be amended by an award of costs”***

9. The fact of the instant case is that the amendments are introducing three new paragraphs being 2 A, 2A and 2C and patched paragraph 3. These elicited an opposition from the defendant.

10. The first ground of opposition is that the amendment seeks to maintain a cause of action against a deceased person where a death certificate was attached to the grounds. It is worth noting that the 1<sup>st</sup> Defendant demised on 29<sup>th</sup> February, 2012. The application for amendment of plaint was filed on 22<sup>nd</sup> November, 2013 which is two (2) years after the demise of the first defendant. I have perused the record and not seen an affidavit of service or any evidence of when the death certificate was served upon the plaintiff/Applicant.

However, to date there is no demand to substitute the 1<sup>st</sup> defendant. The companies named in that paragraph are not parties to the pleadings neither is there even pretence to join them as parties. The challenge the companies find themselves is that they will be mentioned variously in an adverse matter without affording them an opportunity to defend themselves.

11. The other observation is with regard to grounds 5 and 6 as one examines paragraphs 2A, 2B and 2C generally, and in the context of the claim.

The legal personality of a limited liability company shields its directors and shareholders from direct liability. The fact of cross-share holding and Directorship does not combine action of one company with another. There is nothing said of the 3<sup>rd</sup> Defendant as relates to the claim under 2C which is well documented.

12. The proposed amendment introduced at paragraphs 2A, 2B and 2C mention entities that are not sued as Defendants purportedly as beneficiaries of the services which were rendered by the plaintiff. The only party named, and who is also the 1<sup>st</sup> defendant, is the one whose death certificate has been annexed to the grounds of opposition. The other parties are strangers to the pleadings.

13. The other observation noted is that the pleadings have not complied with the basic requirements of the pleadings under the Civil Procedure Rules, 2010 Parties are required to comply fully with the provisions of Order 3 of the Civil Procedure Rules for the plaintiff and order 7 of the Civil Procedure Rules for the Defendant, in order to make compliance of the provisions of Order 11 of the Civil Procedure Rules possible and so that the objects of sections 1A and 1B of the Civil Procedure Act, Cap 21 of the Laws of Kenya are achieved.

14. In view of my above mentioned observations, I find and hold that there is no sufficient material on record to assist the court make a reasoned ruling in either granting or dismissing the application. I therefore make no orders.

**Ruling delivered, dated and signed this 24<sup>th</sup> day of October, 2018.**

**LADY JUSTICE D.O. CHEPKWONY**

**24.10.2018**