



**REPUBLIC OF KENYA**  
**IN THE HIGH COUR OF KENYA AT KISII**

**CIVIL SUIT NO. 183 OF 2012.**

**H. YOUNG & CO.(E.A) LTD.....1ST PLAINTIFF/APPLICANT**

**FIRST ASSURANCE CO. LTD.....2ND PLAINTIFF/APPLICANT**

**VERSUS**

**JAMES MWANGI.....1ST DEFENDANT/RESPONDENT**

**STANLEY DENNIS MUGENDI.....2ND DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiffs herein sued the defendants through a plaint dated 24<sup>th</sup> May 2012 in which they sought, *inter alia*, special damages of Kshs. 7,715.399.60. The defendants, on their part, filed their defence and counterclaim on 17<sup>th</sup> September 2012. Before the matter proceeded to hearing, the plaintiffs filed the instant Notice of Motion application dated 31<sup>st</sup> October 2016 under order 8 Rule 3(1) and Order 51 Rule 1 of the Civil Procedure Rules seeking to be granted leave to amend the plaint.

2. The application was supported by the affidavit of Jane Rose Gitonga, the Legal Manager of the 2<sup>nd</sup> plaintiff herein, First Assurance Limited, in which she deposes that the plaintiffs desire to amend the plaint as shown in a copy of the draft amended plaint marked as " **Ex 1.**" She avers that the matters sought to be amended were erroneously left out at the time of filing the plaint and that the amendments sought are therefore necessary in the interest of justice as they will enable the court to determine the real issues between the parties.

3. She further avers that the defendants will not be prejudiced in any way if the amendments sought are allowed.

4. The application was opposed by the defendants through their grounds of opposition dated 21<sup>st</sup> November 2016 wherein they have set out the following grounds:

**1. THAT the application by the plaintiff has been made too late after the matter was certified ready for hearing and several hearing dates fixed hence the proposed amendment is an afterthought.**

**2. THAT the applicant has failed to show that the intended amendment includes facts of a decisive character which were at all times outside the knowledge of the applicant when the matter was filed four years ago.**

**3. THAT the application herein has been brought over 6 years after the cause of action arose**

**hence allowing the application would prejudice the defendants by denying them the defence of limitation.**

5. When the application came before me for hearing on 5<sup>th</sup> December 2016, parties agreed to canvass it by way of written submissions.

**Submissions by the plaintiffs.**

6. It was the plaintiffs' submission that under Order 8 Rule 3 of the Civil Procedure Rules, this court has a wide discretion to grant leave to amend pleadings at any stage of the proceedings. The plaintiffs quoted **Bullen Leak and Jacobs Precedents of Pleadings, 12<sup>th</sup> Edition** page 127 titled "amendment with leave time to amend" it states;

**".....the power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise."**

**Submissions by the defendants**

7. The defendants submitted that the new claims that the defendant seeks to introduce in form of an amendment are time barred contrary to the provisions of **section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya**. They contended that **section 4(2) of the Limitations of Actions Act** is very clear that an action founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued. Thus any extension of the limitations period under **section 27 and 28 of the Act** has to be with leave of court. The defendants further submitted that allowing the plaintiffs' present application would in effect by-pass the requirements set under **sections 27 & 28 of the Limitations of Actions Act** thereby prejudicing of the defendants' case.

**Determination**

8. Upon considering the applicants application, the respondents grounds of opposition and the parties respective written submissions, the following issues present themselves for determination:-

**a) Whether the plaintiffs' application if allowed would deny the respondents the defence of limitation of action.**

**Order 8 Rule 3 (2) of the Civil Procedure Rules** provides –

***“Where an application to the Court for leave to make an amendment in sub-rules (3), (4) or (5) is made after any relevant period of limitation current at the date of filing the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it feels just so to do.”***

9. In the case of **Chemelil Sugar Company Ltd v Phoenix of East Africa Assurance Co. Ltd (2014)** it was held:

***"By this application dated 15/06/2012 the applicant prays to be allowed to amend the plaint to include special damages.....The defendant has opposed the said application vide the grounds of opposition filed on 19-12-2012. The basic argument is that the said suit first of all is time barred and by allowing this amendment this court would be going against the principles of limitation of time which the plaintiff was already in breach....."***

*The question whether the suit is already in breach of statute of limitation as argued by the respondent is really a matter of evidence. It is not at this juncture possible to determine the reality or otherwise of the defendants allegation. This is an issue of evidence especially taking into consideration that there was an insurance contract between the parties herein.*

*There is no prejudice in my opinion which the respondents stand to suffer. In any event this suit is yet to start and for all issues in controversy to be spelled out it is necessary to allow the amendment. As stated above I do not see any prejudice the respondent stands to suffer. Any argument raised by the plaintiff shall be countered if need be by the respondent. Beside this, Article 159 of the constitution essentially provides that justice should not be denied to any party provided that no prejudice shall be suffered and as long as adequate space is provided for each of the interested parties to respond. In the premises the application is allowed."*

10. In the instant case, I note that the only part of the plaint that the plaintiffs seek to amend in the pleading on special damages. It is trite law that special damages must not only be pleaded but must also be proved. In my humble view, the amendment sought by the plaintiffs is within the same set of facts already pleaded in the plaint in which case, the defence of limitation of actions does not arise and even if it did, limitation of actions is a matter of evidence which the defendants will still have an opportunity to raise at the hearing as has been stated the **Chemelil Sugar Company case (supra)**.

**b) Whether the amendment will prejudice the defendants' case.**

In the case **Hiram Bere Kinuthia & 2 Others v Edick Omondi & 3 others [2014]eKLR** the Court observed:

*" Save for stating that the application for amendment is highly prejudicial, the 3rd and 4th defendants have not indicated what prejudice they are likely to suffer if the amendment is allowed. The 1st and 2nd defendants have indicated that the application will delay the hearing of the suit. It has not been stated that such delay will cause an injury that cannot be compensated for in costs.*

*The court in **Central Kenya Limited v Trust Bank Limited** 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 my view, no prejudice which cannot be compensated by an award of costs, will be visited upon the defendants if the application for amendment is allowed. The defendants at any rate shall have the opportunity to respond to the amendment if they so wish.*

*In the case of **Eastern Bakery vs. Casterlino (1958)E.A 461**, the former Court of Appeal of East Africa held that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side. My view is that amendments made before the hearing of a suit should be readily allowed if no prejudice is caused to the other party and if they are designed to help place before the court all the relevant matters for determination of the real issue in dispute between the parties."*

11. Taking a cue from the above cited authority, I am of the humble view that the defendants herein will not be prejudiced if the instant application is allowed as such prejudice can, in the worst case scenario, be compensated in damages.

12. On the last issue of whether the plaintiff's application should be allowed, I am guided by the holding in the case of **Avanti Company Limited vs Barclays Bank of Kenya Limited [2012]eKLR** wherein it was stated:

*" I take the view that the only issue for determination is whether the application for leave to amend the plaint ought to be allowed.....Even if the original pleadings were faulty owing to the negligence or carelessness in drafting it is excusable provided that the amendment can be*

*made without injustice on the other side and there is no injustice where the other side can be compensated by costs.....Although the respondent contends that the amendment will be prejudicial to it, it has failed to show the prejudice alluded to or how the amendment would cause injustice. In the circumstances, I find that the amendment sought in this application arose out of substantially the same facts with the claim originally pleaded.....''*

13. I find that the circumstances in the **Avanti Company case** (supra) are identical to the facts in the instant case. Consequently, I allow the plaintiffs' application dated 31st October 2016 and order that the plaintiffs shall file their amended plaint within seven (7) days from the date of the delivery of this ruling. The amendments must be as set out as shown in the draft amended plaint annexed to the application. The defendants shall, within fourteen (14) days of service with the amended plaint, file an amended defence should they deem it necessary. Upon the filing of amended pleadings this matter shall be mentioned on 20<sup>th</sup> of September 2017 for directions. The costs of this application shall be in the cause.

**Dated, signed and delivered in open court this 27<sup>th</sup> day of June, 2017**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

- N/A for the Applicant
- Mr. Bosire for Respondent
- Omwoyo: court clerk