



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 136 OF 2003

COPANA LIMITED PLAINTIFF/APPLICANT

VERSUS

PAN AFRICA INSURANCE CO. LIMITED DEFENDANT/RESPONDENT

RULING

The Plaintiff's application in the Notice of Motion dated 1st February 2017 is for substitution of the Defendant with APA Insurance Company Limited and upon such substitution the plaint be amended accordingly and the Amended Plaint be deemed duly filed subject only to the payment of fees.

The application is expressed to be brought under Order 8 Rule 3, 5 and 8 and Order 1 Rule 10 of the Civil Procedure Rules, Section 1A, 1B, 3A and 100 of the Civil Procedure Act as well as Article 159 of the Constitution. It is supported by an affidavit sworn by Johannes Akelo Omboto, the Plaintiff's Managing Director, and a further affidavit sworn on 22nd March 2017 by David Otieno, the Advocate for the Plaintiff in which they depose that the dispute between the Plaintiff and the Defendant arose out of an Insurance Contract dating back to 1998 and that the fire policy which is the subject of the dispute between the parties was part of the Defendant's short term insurance business and was one of the liabilities that were transferred to Pan Africa General Insurance Company Limited which merged with Apollo Insurance Company and transferred their business to Newco Limited which later changed its name to APA Insurance Company Limited; That in the circumstances the liability to compensate the Plaintiff under the policy and to settle this claim falls to APA Insurance Company Limited which ought to be substituted as the Defendant and the plaint amended accordingly.

The application was opposed on grounds that:-

- “1. The application completely lacks merit as the reasons advanced do not justify grant of the orders sought.**
- 2. The application does not establish any nexus between the Defendant and the new entity sought to be brought in.**
- 3. The application has been filed 13 years after plaint was presented. The Plaintiff is guilty of un-excusable delay.**
- 4. The effect of the application (if allowed) will be to withdraw suit against the Defendant Pan Africa Insurance Co. Limited. In that event, the said Defendant should cost of the suit.**

The Defendant at ground 5 contends that should the application be allowed the Plaintiff should be required to extract summons to enter appearance and serve the same upon the intended new defendant to

enable it defend itself against the Plaintiff's allegations.

The application was canvassed orally with both parties represented by Counsel.

Mr. Otieno, Learned Counsel for the Plaintiff/Applicant reiterated the depositions in the supporting affidavit and emphasized that the Defendant herein has ceased to do Insurance business in Kenya a fact which is not in dispute. He submitted that under both Order 1 Rule 10 and Order 8 of the Civil Procedure Rules this Court has unfettered discretion to allow amendments. He also submitted that all rules must be brought under the Oxygen Principle which is intended to attain fairness and justice in proceedings before the court. He urged this court to find that this is an appropriate case to allow the application so that the Plaintiff does not pursue a non-existent party and so that the resultant judgment will mean something to the parties. He relied on the ruling of Nyamu JA, as he then was, in **Kenya Commercial Bank Limited V. Kenya Co-operative Union [2013] IEA 136.**

The application was vehemently opposed. Mr. Oduor, Learned Counsel for the Defendant/ Respondent while admitting that there was transfer of business from the Defendant to the intended Defendant, submitted that the applicant has offered no explanation for bringing this application late (thirteen years after filing of the suit and the transfer of business). He submitted that Section 8 of the Transfer of Business Act places a duty on any person affected to make the necessary steps to substitute and that such applications must be made within six (6) months of the publication of the notice. Mr. Oduor further submitted that the Plaintiff/Applicant also had an opportunity under Section 114 of the then Insurance Act to object to the transfer of insurance business but did not do so. Mr. Oduor contended that this application is made in bad faith and will prejudice the intended defendant. Counsel contended that it is unfair to hold the new entity liable thirteen years later. He also contended that the effect of allowing this application would be withdrawing this suit entirely and it would have to be filed afresh and the fresh suit would be affected by the Limitation of Actions Act which limits actions on torts to three years. He contended that the transfer of business in this case was effected by September 2002. He urged this court to find the Plaintiff/Applicant guilty of indolence and to dismiss this application. In support of his submissions he cited two cases -

(a) Mediplus Services Limited

Versus

Pan Africa Insurance Company Limited – 1st Defendant

Hannover Life Reassurance Africa Limited – 2nd Defendant

Milimani HCCC NO. 121 of 2003

(b) Wanga & Company Advocates

And

APA Insurance Company Limited

Kisumu Court of Appeal No. 78 of 2009

In reply Mr. Otieno submitted that this court ought not to consider facts which were not proved. He contended that the Defendant had not explained why it would be prejudiced by the delay in bringing this application thirteen years later. He submitted that that is why the rules provide that an application may be made at any time before

judgment. He wondered where the prejudice is yet the suit has not been heard. He further submitted that an amendment may be allowed even where it may result in substituting a party and once allowed the amendments goes back. He distinguished **Wanga V. APA Insurance** (Suppra) by stating that there the

Court of Appeal was concerned that the Notice had not been exhibited in the High Court. As for **Mediplus Services Limited VS Pan Africa Insurance Co. Ltd. & Another (Milimani HCCC No. 121 of 2003)** Mr. Otieno submitted that the Plaintiff had not shown that the Defendant had become defunct. On the issue of limitation he submitted that the same will be dealt with at the appropriate stage. He urged this court to look no further than in the Grounds of Opposition in determining this application. He prayed that the application be allowed.

The application before me is for substitution of the Defendant and amendment of the plaint accordingly. Such an application is made under Order 1 Rule 10 of the Civil Procedure Rules which provides -

“10.(1) Where the 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.

1. 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.

2.4

(3)

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the courts thinks fit, on the original defendants.”

It is not an application for amendment generally and it is clear that the drafter of the Notice of Motion was very alive to this. Mr. Otieno's argument that the application can be allowed any time before judgment, is with due respect, misplaced. That argument would be correct if the application was not for substitution but for amendment of pleadings generally. The issue for determination here is whether at this stage the Defendant can be substituted with APA Insurance Company to who its insurance business was transferred during the pendency of this suit and only once the court determines this in the affirmative will it order the amendment of the plaint.

Wanga & Company Advocates VS. APA Insurance Company Limited (Suppra) was an appeal against the finding that APA Insurance Company Limited (the Respondent) was liable to pay Advocate costs in respect of a matter that had been dealt with before it came into existence. The Court of Appeal dismissed the appeal for reasons that the Gazette Notice the applicant was relying upon had not been exhibited in the High Court. The appellant was as it were raising a new point which amounted to putting her case differently. The court also found that the merger had not been proved. The issues raised in this application are different. Here the merger is admitted and the claim is not one for an Advocate's costs but for reimbursement under an Insurance Policy. The issues raised in the **Mediplus Services Limited VS Pan Africa Insurance Co. Ltd. & Another (Milimani HCCC No. 121 of 2003)** case are on all fours with those in this application. It must however be noted that the reasoning in **Mediplus Services Limited VS Pan Africa Insurance Co. Ltd. & Another (Milimani HCCC No. 121 of 2003)** decision are merely persuasive but not binding.

The Applicant has demonstrated through gazette Notices that indeed the Defendant and the proposed Defendant merged. There is also notice to the effect that by the merger the proposed defendant took over

the general insurance business and liabilities of the Defendant. It can therefore be argued that the proposed defendant having done so also assumed liabilities that awaited determination at the time of the merger. Indeed this is the case under Section 3(1) of the Transfer of Business Act where the transferee becomes liable for all the liabilities incurred in the business of the transferor subject to notice being issued. However and this is crucial Section 8 of the Act limits actions against the transferee to a period of six months from the date of the transfer. That section reads -

“8. Limitation of actions

Notwithstanding the provisions of this act or of any other written law, no proceedings shall be brought against a transferee in respect of any liability imposed by this Act after the expiration of six months after the date of the transfer concerned.”

The applicant in this case waited for thirteen years to bring this application, yet it had notice of the transfer all along. Learned Counsel Mr. Otieno D did not address himself to this express provision of the law. Like my brother Kimondo J in **Mediplus Services Limited V. Pan Africa Insurance Company** (Supra) I find the delay in this case inordinate and unworthy of the exercise of the discretion of this Court in its favour. The application for substitution is dismissed. There shall be no order for costs.

Signed, dated and delivered at Kisumu this 3rd day of August 2017

E. N. MAINA

JUDGE

In the presence of:-

N/A for the Plaintiff/Applicant

Mr. Omondi MM for the Defendant/Respondent

Evon – Court Assistant