REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 337 OF 2011

FUELS TRADING COMPANY LIMITED ……..…….. 1ST PLAINTIFF

DAVID MWANGI NGITE …….…….. 2ND PLAINTIFF

VERSUS

APA INSURANCE COMPANY LIMITED …….……..…..……. DEFENDANT

AS CONSOLIDATED WITH

HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 418 OF 2012

DAVID MWANGI NGITE …….……. 1ST PLAINTIFF

GEOFFREY KAMAU NGUMO …… 2ND PLAINTIFF

VERSUS

APA INSURANCE COMPANY LIMITED …… 1ST DEFENDANT

JOHN M. MUKIGI TRADING AS

RAPID INVESTIGATIONS SERVICES ……... 2ND DEFENDANT

RULING

Amendment of defence

[1] The Defendants filed a Motion dated 28th May 2014 seeking leave of the court to amend their defence in order to plead the pre-accident and salvage values of the Plaintiff's motor vehicle as given in the Report by Diplomatic Accident Assessors who had been instructed by the Defendant in **HCCC No 337 of 2011.** The Application is supported by the grounds set forth on the face thereof and a Supporting Affidavit sworn by Fredrick Otieno Mege Advocate.

Grounds of application

[2] It is contended that on 27th May 2014 which was on the eve of a hearing scheduled for 28th May, 2014, the 1st Defendant's Legal Officer Mr. Paul Kariba visited the Defendants Advocates offices for pre-briefing. He carried with him their file on the subject incident which he gave to Mr. Fredrick Otieno Mege Advocate for the Defendants. The advocate perused and noticed therein an Assessment report prepared by Diplomatic Accident Assessors on 9th February 2010 giving the subject motor vehicle a pre-accident value of **Kshs.4,577,360/=** salvage value of **Kshs.650,000/=.** The Defendants' Advocates was not aware of the existence of the Assessment report until Mr. Mege saw it in the client's file on 27th May 2014. The 1st Defendant's Legal Officer also averred in paragraph 8 of Supporting Affidavit that they had inadvertently overlooked and did not forward the same to the advocates.

[3] The Applicants stated that there is no delay in filing the application as alleged by the Respondents in view of Section 100 of the Civil Procedure Act and Order 8 Rule 3(1) of the Civil Procedure Rules which provides that amendment of pleadings may be allowed *at any stage of the proceedings on such terms as to cost or otherwise as may be just.* They relied on the decision by R. N. Sitati J in **KISII HCCC No. 37 'A' of 2008 Gudka Westend Motors Ltd –Vs- Industrial & Commercial Development Corporation** that amendments should be allowed where:

i. ***They are necessary for determining the real question in controversy.***
ii. ***To avoid multiplicity of suits provided there has been no undue delay.***
iii. ***Only where no new or inconsistence cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as the cause of action.***
iv. ***That no valid interest or accrued legal rights is affected.***
v. ***So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.***

They submitted that the amendment application is deserved and the omission has been explained. The value of the subject motor vehicle registration number KAY 169F is one of the issues in controversy and the proposed amendment will enable the court to determine the issue. The Plaintiff quoted a value of **Kshs. 5,000,000/=** in paragraph 15 of the Plaint. They argued that, the intended amendment does **not** introduce any new cause of action, but will merely build on the Defendant's denial of the pleaded value by offering the Defendant's differing valuation. Parties will also have an opportunity to call for evidence in support or denial of their respective contention on the vehicle's value. The amendment will not take away any accrued legal rights or occasion any prejudice or injustice to the Plaintiff which cannot be compensated by costs. The Applicants regretted the inconvenience caused to the Plaintiffs on the adjournment of the hearing which had been schedule for 28th May 2014. However, that inconvenience has been appropriately compensated by costs which the Defendants were ordered to pay. And as the suit has no hearing date, it is not right to say that the application is frustrating trial herein. The matter should be fast tracked.

Respondents' resisted amendments

[4] The Respondents urged that the Motion was filed on the day of hearing of the suit. Since the suit was filed on 3rd August 2011 the Applicants have been in possession of the motor vehicle assessors report. The said motor vehicle assessors report was an integral feature of their defense yet the Applicants did not find it fit to include it in evidence or Defence filed on 5th October 2011. The amendment is a mere afterthought and the explanation by the Legal Officer one Mr. Paul Karina is fallacious at best. Over three years have passed by since they filed defence and so they are guilty of lashes. The application was, therefore, filed to frustrate the hearing scheduled for 28th May 2014.

[5] On the merit of the amendment, the Respondent stated that at paragraph 14 of Defendants Statement of Defence, the Defendant averred that the value of the Motor Vehicle would best be established and determined through assessment of the same by a professionally qualified Motor Vehicle Assessor. This means that the Defendant knew the importance of the Motor Vehicle Assessors report at the time of filing the Statement of Defence but nonetheless no point of filing the assessors report in their possession. Mr. Paul Karina as a legal practitioner within the insurance industry should have known better about the importance of the report in this case. A reasonable man would not believe that the Legal Officer overlooked the assessors report, but rather, that the assessors report is an afterthought or came out of the blue to defeat the ends of justice and cause an adjournment. The Applicants have sought on numerous occasions sought to substitute witnesses and to file supplementary witness statements but they defaulted to act or file papers as directed until at one time Honorable Mr. Justice Havelock declined the Defendants/Applicants request to file supplementary witness statements and the matter was set down for hearing. All these are on Court's record. Leave to amend is yet another clever maneuver to cause delay. This behaviour by the Applicants has been highly prejudicial to the Respondents. Article 159(2)(b) of the Constitution of Kenya, 2010 provides that "Justice shall not be delayed". Justice delayed is Justice denied. "Equity protects the vigilant and not the indolent" and that "He who comes to equity must come with clean hands". They have been indolent and should not be given any further indulgences.

[6] The Respondent gave the request to amend the Statement of Defence to include the assessor's report in their list of documents as another way of going round the earlier court order mace by Havelock J on 27th September 2013 barring them from filing a supplementary witness statement as almost invariably the amendment will necessitate the filing of a supplementary witness statement. The order was not reviewed or set aside. For the above reasons the Respondents urged the court to dismiss the Motion with costs for being frivolous, vexatious and an abuse of the court process and a waste of valuable court resources.

DETERMINATION

[7] He who comes to equity must come with clean hands; must do and be prepared to do equity; and must not be guilty of lashes. These maxims are realities of law and constitute the norms and principles which guide justice in resolution of disputes. See Article 159 of the Constitution. On 27th September 2013 Havelock J issued an order barring the Applicants from filing a supplementary witness statement. The Learned judge did not reach that painful decision out of the blue. He made the decision on sound reason and consideration of the conduct of the Applicant in this case. The good judge allowed the Applicants on several occasions leave to file supplementary witness statement but the orders were not obeyed by the Applicants. It is worth noting that the orders were at the request of the Applicants. The Applicants are such indolent suitors who are bent at employing every trick in the books to temporize this case for as long as possible at the detriment of fair trial and rights of the Respondents.

[7] I need not remind the Applicants of their statutory as well as constitutional obligations under the overriding objective to assist the court to attain a just, affordable, expeditious and proportionate resolution of disputes. Their conduct is a complete negation of this obligation and tenets of a reasonable litigant who has come to court for justice. It seems they are not here to aid justice but to impede it. Such overt and or stealth force is a fraud on the administration of justice and an insurance company in service of the general insuring public should be wary of actions which do not meet the approval of equity. I agree that the record is adverse to the Applicants and the amendment may as well work out for the Applicants in reviewing the orders of Havelock J through the back door. In saying all these things, the court is aware that it must use measured language in its judicial communications. But where force whether overt or stealth or veiled manifests itself before court as an attack on the administration of justice, the court must live to its oath of office to administer justice without fear or favour by suppressing and denouncing fraud or abuse of its process in no uncertain terms. Where there is fraud, the court should say there was fraud; where there is force or abuse of the process, the court should equally say so without

mincing words. A court of law worth the name should never find less intrusive words to describe a patently intrusive situation. It will not work; the court which goes that way will cease from being a court of law. As the court writes this ruling, it is with a lot of trepidation, but still maintaining its dignified mood and cool. I will, therefore, act firmly but fairly and allow the amendment except the amendment shall be limited only to indicating in the defence the value of vehicle as shown in the assessment report. Also only the assessment report should be filed as one of the documents of the Applicants. If the maker of the report or appropriate person has not filed a statement in relation to the assessment report as an expert witness, one should be filed limited to introducing the report in the court record. The Applicants will not be allowed to file any other document or statement other that those allowed and in the tenor prescribed in this ruling. All these acts and steps shall be done and taken within 7 days of today. In the event any or more of the acts ordered shall not be done within seven days of today, the application dated 28th May 2014 will be deemed to have been dismissed with costs to the Respondents. Meanwhile, the Applicants will pay costs of the application to the Respondents. I hope my orders are clear and will be observed; the court will not entertain any further delay by the Applicants. This case shall be mentioned exactly on the eighth day of today to confirm compliance with or otherwise of the orders herein, and for further directions. It is so ordered.

Dated, signed and delivered in court at Nairobi this 28th day of April 2015

F. GIKONYO

JUDGE