



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 331 OF 2002

JOHN MULWA KANG'AATU.....PLAINTIFF

Versus

PAN AFRICAN INSURANCE CO. LTD.....DEFENDANT

RULING

Amendment of plaint

[1] The Plaintiff has sought leave of the court through the Notice of Motion Application dated 3rd February 2015 to amend the Amended Plaint dated 18th April 2011. He also sought leave to file to file the Further Amended Plaint within 21 days or as the Honourable Court may direct. And of course, he seeks costs of this application to be in the cause.

[2] The Motion is supported by the Affidavit of John MulwaKang'aatu sworn on the 3rd February 2015.

Plaintiff's request

[3] The Plaint dated 14th March 2002, was amended vide the Amended Plaint dated 18th April 2011. Subsequently a Further Amended Plaint dated 18th July 2012 was filed. The Plaintiff now seeks leave to amend the further amended plaint. The proposed amendment to the Further Amended Plaint is under paragraph 4 and is to the effect that on or about the **23rd day of December 1998**, the Plaintiff entered into a contract of insurance with the Defendant (commercial vehicle policy) whereby the Defendant was to insure and indemnify the Plaintiff's motor vehicle registration number KAK 064X comprehensively, against any loss arising out of the said policy or any other loss related to or incidental to the policy. The grounds for the amendment are as follows:-

- a. **The amendments are to remove typographical errors.**
- b. **The amendments will enable the court to determine the matter effectively.**
- c. **The Defendant will not suffer any prejudice from the proposed amendments.**
- d. **The Court has the discretion to allow amendments sought.**

[4] The Applicant submitted that under the **Civil Procedure Act, section 100**

“...the 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 proceeding 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 proceeding.

In law, the discretion of the court should be guided by the following broad criteria:

- a. That the amendment should be necessary for purposes of determining the real question or issue raised by the parties; and
- b. It is just to do so. See the Civil Procedure Act, Section 3A on the invocation of the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court’s process.”

[5] The Applicant humbly submitted that not even Order 2 Rule 6 Sub-rule 1 of the Civil Procedure Rules can *prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.*” The amendment will not raise any new issues except amending the date indicated in the Amended Plaintiff. The Applicant further submitted that under **Order 8 Rule 3 of the Civil Procedure Rules**, 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. He also cited the case of **Monica Wamuhu Macharia v. A.G and Another CA No. 282 of 1998; Tulip Properties Ltd v. Mohammed Koriow & 6 Others [2013] eKLR; Central Kenya Ltd v. Trust Bank Ltd Appeal No. 222 of 1998; and Timothy Ndalo Otiende v. Joshua A. Osewe Kisumu HCCA No. 73 of 1996.** In these cases, the threshold for amendments is-

- a. **That the amendment is necessary for determining the real question in controversy;**
- b. **To avoid multiplicity of suits provided that there has been no undue delay;**
- c. **Only where no new or inconsistent cause of action is introduced , i.e., if the new cause of action does not arise out of the same facts of substantially the same facts as a cause of action;**
- d. **That no vested interest or accrued legal rights is affected; and**
- e. **So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for.**

[6] The Applicant was of the view that the ‘Grounds of Opposition’ dated 27th February, 2015 should not be considered as the amendments will enable the matter to be effectively determined by Court. They asserted that it is wrong for the Respondents to contend that since leave was granted before for amending the plaintiff, none should be given again. In any case, the Applicant submitted that the proposed amendment was conceded to by both parties herein on directions by the Court to do so on 27th June 2014 in a consent duly filed. The Applicant further submitted that the Respondent, by its own volition, consented to the amending of the further Amended Plaintiff by deletion of the 4th paragraph of the Further Amended Plaintiff and insertion of the date 3rd November 1998 vide a letter dated **25th July 2014.** The consent was duly filed and is part of record. They cannot therefore oppose it now. They cited Section 120 of the Evidence Act, Laws of Kenya, on estoppel. The section stipulates that,

“When one person, has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief,

neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.’

[7] The Applicant referred the court to the case of **Nurdin Bandari vs. Lombank Tanganyika Ltd [1963] EA 304** which held *that*

“the precise limits of equitable estoppels are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another a clear and unequivocal representation which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in the belief of the truth of the representation, acted upon it.”

Additionally, the Applicant relied on the case of **Century Automobiles Ltd vs Hutchings Biemer Ltd (1965) EA 305**. Therefore, the Respondent consented to the amendment of deleting and inserting 3rd November 1998 as the rightful date and is estopped from opposing the same.

The defendant opposed the amendment motion

[8] The Defendant opposed the Motion for amendment. It submitted that the application is not merited and should be dismissed. In support thereof, they gave an account of the events in this case. They stated that this suit was instated against the Defendant on 14/03/2002 in relation to a dispute arising out of a contract of insurance allegedly between the Plaintiff and the Defendant in 1998. It is now about 13 years since the institution of this suit in 2002, without the Plaintiff making any attempt to prosecute his claim save for the numerous applications to incessantly amend the plaint. He first applied for amendments vide Notice of motion filed on 25th February 2011 which was after 10 years since the filing of the suit. The amendment was on alleged insufficiency of calculations relating to the loss of user of the motor vehicle in dispute. But he made substantial amendments to the whole Plaint to an extent of introducing a new cause of action. Nonetheless, he was fortunate to be granted leave to amend. The amendment as the Plaintiff claimed was to enable the real issues in controversy to be determined by the court. However vide a Notice of motion filed on 12 June 2012 the Plaintiff sought to further amend his amended plaint dated 18th April 2011 on grounds that the amended plaint did not bring out sufficiently the true position of issues in dispute between the plaintiff and the defendant. Again, leave was granted.

[9] Despite the above instances where the Plaintiff had applied to amend his amended Plaint, he has once again applied to amend his further amended plaint on grounds of typographical errors. According to the Respondent, the plaintiff is using the application for amendment to defeat justice and that is an abuse of court process. Whereas the application is based on the grounds inter alia that the amendments are to remove typographical errors, the proposed amendments are in fact substantial as they seek to introduce new facts not raised in the subsequent Plaints. See **Wikipedia** which defines typographical error as mistakes made in the typing process (such as a spelling mistake) of printed material. This is a device or mechanism used by the plaintiff to abuse court process.

[10] The Respondent argued that the proposed amendments highlighted at paragraphs **7(A), 7(E) - 7(H)** refer to new facts aimed at altering the cause of action in this matter and not corrections of a typographical nature. This is contrary to **Order 2 Rule 6(1)** of the Civil Procedure Rules which is to the effect that

“...no party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit”

They submitted further that a Plaint is required to include the whole claim and any claim omitted is deemed to have been relinquished. The fact that the court accommodated the Plaintiff to amend

his Pleint twice should have been sufficient opportunity for the Plaintiff to include all the necessary omissions or facts it intended but to bring a subsequent suit. This is an outright abuse of the court process aimed at dragging this matter further. See **Order 3 Rule 4** of the **Civil Procedure Act**;

1. **Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim.**
2. **Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished.**
3. **A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.**

[11] They contended that the Plaintiff has had sufficient opportunity to make his claim; 13 years is a long time. The Plaintiff has instead opted to employ delay tactics at the expense of the Defendant who has been massively prejudiced not only by the institution of this suit but also the amount of time it has taken to prosecute it. The Defendant is a commercial entity and its reputation and goodwill has been negatively affected by this never-ending suit. It is the Defendant's legitimate expectation that litigation should come to an end; to allow this application amounts to prolonging this matter which is contrary to the overriding Objective in the Civil Procedure Act and the judicial process as a whole which advocates for expeditious disposal of suits. See the case of **Andrew Wabuyeke Biketi vs. Chinese Centre for The Promotion of Investment Development & Trade in Kenya Limited & 2 Others [2015] eKLR**, where Justice Gikonyo in disallowing an application for amendment stated as follows;

“...the court has discretion to order amendment at any stage before judgment. And amendment should be freely allowed provided it is not done mala fide, and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs”.

They submitted that the proposed amendments made by the plaintiff/applicant will not enable the court determine the real question in controversy but are rather aimed at defeating the efficient determination of the suit. The Application for amendment is thus frivolous and an abuse of the court process.

[12] The Respondent urged the court to honour the overriding objective under section 1A and 1B of the Civil Procedure Rules and dismiss this application which is only aimed at delaying the matter, wasting judicial and administrative resources available and heaving unnecessary expenses on the Defendant. The conduct of the Applicant is contrary to the statutory obligation of a party to assist the court to attain the overriding objective. Contrary to the submissions by the Applicant these are great prejudices to the Defendant and the court. The amendments are mala fides and not deserved. The court should exercise discretion in light of the Constitutional provisions and the Civil Procedure Act and disallow and dismiss this frivolous application.

See Justice J. B. Havelock in the case of **DANIEL NGETICH & ANOR V K-REP BANK LIMITED [2013] Eklr** when he stated that:

“...Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice; for, all amendments ought to be allowed which (a) do not work injustice to the other side, and (b) are necessary for the purpose of determining the real question in controversy between the parties; and all the authorities lay down precisely the same doctrine, that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally

correct, but the amendment would cause him an injury which could not be compensated in costs. The court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are clearly brought out, the other party is not prejudiced, the character of the suit or defence is not altered, and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work a clear injustice”.

[13] Again, and contrary to the submissions by the Applicant at paragraph 30 of his submissions dated 27/03/2015, it is not true that the amendment sought to be introduced was conceded to by both parties. The defendant only agreed to the amendments provided in the letter dated 27/07/2014 relating to an error in the dates to the effect that;

“...first line of paragraph 4 of the further amended plaint be and is hereby amended by deletion of the date 23/12/2015 and insertion thereat at the date November 1998”.

Paragraphs 7(A), 7(E) - 7(H) refer to new facts aimed at altering the cause of action in this matter and not corrections of a typographical nature. Based on the entire submissions, the authorities cited as well as the Respondent asked the court to dismiss the application herein.

DETERMINATION

[14] I have considered the extensive submissions made by the parties as well as the law on this subject. I take the following view of the matter. Judicial authorities on this subject are legion and I need not multiply them. Except to state that, ordinarily, amendments of pleadings should be allowed freely if such amendment is necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided that there has been no undue delay, no new or inconsistent cause of action is introduced, no vested interest or accrued legal right is affected and the amendment does not occasion prejudice or injustice to the other side which cannot be compensated in costs. Whereas there is no fixed number of the times when a party may seek to amend its pleadings, the court should, however, be wary of parties who use the right to amend to temporize or delay a case to the extent that the exercise of the right becomes a source of injustice. Courts of law are minded to note that the long proven adage that “justice delayed is justice denied” has now gained constitutional expression as a principle of justice in article 159 of the Constitution. The overriding objective also follows after the said principle. This case has been pending in court since 2002 and from the record the Plaintiff has not made any serious effort to set the suit down for hearing. He has nonetheless applied on several occasions to amend his plaint and notably the time span between the amendments has been quite sparse. In all these occasions he has been granted leave within the spirit of the court to generally allow amendments it considers necessary for the determination of the really issues in controversy. He has argued that the amendments will not prejudice the Respondent because they are merely intended to rectify a typographical error on the date in paragraph 4 of the Amended Plaint. Let me examine the record to verify this argument or otherwise.

[15] The Applicant averred that the defendant agreed to the amendments in the letter of consent dated 27/07/2014. I have looked at the said letter and it reads as follows;

“ First line of paragraph 4 of the further amended plaint be and is hereby amended by deletion of the date 23/12/1998 and insertion thereat [sic] of the date 3rd November 1998 ”.

[16] This letter was explicit that the error to be cured by amendment was the date only. But on perusal of the proposed amendments especially Paragraphs 7(A), 7(E) - 7(H) refer to new facts which will completely alter the cause of action. These are beyond the consent into a far distance out of bounds. I must admit that, even with most elastic and magnanimous interpretation of this letter, other than the date shown in paragraph 4, the other proposed amendments can never be corrections of typographical errors as alleged. Indeed they have introduced new cause of action

and may affect the defendant's accrued defence of limitation. Although it is not completely prohibited, but given the circumstances of this case, I do not think that there is any justification to abrogation the accrued rights and defences in favour of amendment. The amendments will certainly cause the Respondent prejudice which cannot be compensated in costs. The amendments fail the test of law. For those reasons, except the date in paragraph 4 all other amendments are declined. I refuse leave to amend to the extent I have stated. I, therefore, dismiss the application dated 3rd February 2015 with costs to the Respondent. Parties are also directed to comply with the practice directions for the division within 30 days and have the matter set down for hearing. It is so ordered.

Dated, signed and delivered in court at Nairobi this 19th day of June 2015.

F. GIKONYO

JUDGE