

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 5 OF 2006

CHEMELIL SUGAR COMPANY LTD.....PLAINTIFF

VERSUS

PHOENIX OF EAST AFRICA ASSURANCE

CO. LTD.....DEFENDANT

RULING

By its application dated 15-6-2012 the applicant prays to be allowed to amend the plaint to include special damages. The same is supported by the affidavit E.K. Ngala advocates dated 15-6-2016 in which he has deponed that it was an oversight on the part of the plaintiff/applicant not to have included special damages when filing the suit.

The defendant/respondent 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 the court would be going against the principles of limitation of time which the plaintiff was already in breach.

The parties have filed written submissions to support and oppose their positions. The question of amendment is enshrined under Rule 8 (3) (1) of the Civil Procedure Rules. The crux of this rule is that an amendment can be undertaken at any stage of the proceedings.

I have perused the draft amended plaint and the same is intended to include various suits which were filed against the applicant in various courts. It is presumed that the said suits have already been settled.

The question whether the suit is already in breach of the 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 defendant's 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 respondent stands to suffer. In any event this suit is yet to start and for all the issues in controversy to be spelled out it is necessary to allow the amendment.

Visram J as he then was clearly stated in **John K. Kabuchi -VS- Sure Motor Company Ltd, Nairobi HCCA No. 390/2002** that:

“Similarly order 6 rule 3 allows for amendments of pleadings “at any stage” of the suit. The courts discretion should be exercised judiciously with a view to achieving the ends of justice. In my view such an application to add or amend should not be rejected only on the ground that the suit should have to be reopened afresh. So if the hearing has to start all over again and if that is the best interest of justice, that is exactly what the court should do and where necessary condemn the guilty party with an order of cost. Hence the guiding principle in application for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings provides that the amendments or joinder as the case may be will not result in prejudice or injustice to the other party which cannot be properly compensated for in costs”.

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. The plaintiff/applicant shall amend and serve its plaint within 14 days from the date of delivery of this ruling. The defendant/respondent shall file its amended defence within 14 days after

the service of the amended plaint. The costs of this application shall be to the defendant/respondent.

Dated, signed and delivered at Kisumu this 23rd day of June 2014.

**H.K.
JUDGE**

CHEMITEI