



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 574 OF 2011**

**MANJI KUNVERJI RAMJI ..... PLAINTIFF**

**V E R S U S**

**NOMURA INSURANCE BROKERS LTD ..... 1<sup>ST</sup> DEFENDANT**

**ZURICH INTERNATIONAL LIFE LTD .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Plaintiff's Notice of Motion dated 18<sup>th</sup> September 2013 seeks the following orders-
  - i. **THAT leave be granted to the Plaintiff to withdraw the suit against the 2<sup>nd</sup> Defendant;**
  - ii. **THAT leave be granted to the Plaintiff to amend the plaint as per the draft attached hereto;**
  - iii. **THAT on leave being granted to the Plaintiff, the draft amended plaint herein attached, be deemed to be the amended plaint filed with the leave of the Court;**
  - iv. **THAT the Defendant may amend its defence within 14 days of the order made.**
2. The application was vigorously opposed by the 1<sup>st</sup> Defendant.
3. The Plaintiff filed this action on 26<sup>th</sup> October 2011 against the two Defendants. Plaintiff pleaded that the 1<sup>st</sup> Defendant was the Chief Agent of the 2<sup>nd</sup> Defendant which was based in the United Kingdom, England. The 2<sup>nd</sup> Defendant was offering retirement benefit package to individuals internationally. The following paragraphs of the Plaint will assist to understand Plaintiff's claim-
  - **That on the 31<sup>st</sup> May, 1991 the Plaintiff, approached the 1<sup>st</sup> Defendant who was the "Chief Agent" of the 2<sup>nd</sup> Defendant and showed his interest in the retirement package plan offered by the 2<sup>nd</sup> Defendant who has their registered Offices in "United Kingdom".**
  - **That on the 5<sup>th</sup> March 1991, the 2<sup>nd</sup> Defendant gave a quotation to the Plaintiff wherein it was agreed that:**
    - i. **The Plaintiff being 39 years old, opted for a 20 year plan and hence the selected retirement age being 59 years old.**

- ii. **The annual contribution details were calculated at 750 Sterling Pounds for the next 20 years which amounted to 15,000 Sterling Pounds on the expiry of 20 years.**
- iii. **The type of Policy was VISTA and the 1<sup>st</sup> payment of 750 Sterling Pound was made on the 1<sup>st</sup> July 1991 until the final payment on the 1<sup>st</sup> July 2009.**

- **That on the 1<sup>st</sup> March 2010, the 2<sup>nd</sup> Defendant notified the Plaintiff that this Policy was nearing its maturity date of 1<sup>st</sup> July, 2010 and he had the option of extending the term of the Policy, or take value of the investment account as a lump sum or take a different policy. The Plaintiff opted to take the value of the Investment Account and then demanded for the expected amount on the maturity date.**
- **That on the 6<sup>th</sup> June, 2011 the 2<sup>nd</sup> Defendant made payment of Sterling Pounds 1,831,35 @ 142 (Kshs. 260,051/70) being the full and final payment of the Retirement Investment Account of which the Plaintiff disputed and claimed to be less than what was due and hence being guilty of mis-representation and breach of the contract made on the 31<sup>st</sup> May, 1991.**
- **The Plaintiff claims against the Defendants arose on the 1<sup>st</sup> July, 2010 when it declined to meet its obligation to pay amount due and hence Plaintiff claims for damages for breach of contract and the full settlement of what the Plaintiff is rightfully entitled to.**

In the final prayer the Plaintiff prayed for special and general damages against the Defendant without specifying which Defendant in particular the prayers were directed to.

4. It is the above pleading that Plaintiff seeks to amend.
5. The 2<sup>nd</sup> Defendant has todate not been served with the Summons and Plaint. The 1<sup>st</sup> Defendant who was served filed its Defence on 6<sup>th</sup> December 2011. 1<sup>st</sup> Defendant in that Defence denied Plaintiff's claim and further pleaded-

**“The first Defendant avers that the Plaintiff discloses no cause of action as against it.”**

#### **PLAINTIFF'S SUBMISSIONS**

6. Learned Counsel for Plaintiff Mrs. Moolraj submitted that the Plaintiff seeks to withdraw the suit against 2<sup>nd</sup> Defendant. That the other amendments sought are necessary to correct errors to enable the Court determine the real question in issue. The Plaintiff by his affidavit dated 10<sup>th</sup> September 2013 sworn in support of the application in that regard deponed as follows-
2. **My erstwhile advocate misguided me in filing suit against the second Defendant and, after having filed the suit, did not take steps to serve the summons on the 2<sup>nd</sup> Defendant, leaving the case in limbo.**
3. **I am advised by my advocate now on record, and I verily believe this to be true that, I do not have a good case against the 2<sup>nd</sup> Defendant and I should withdraw it.**
4. **The Plaintiff as drawn and filed does not reflect my complaint against the Defendant and it is absolutely necessary to amend the plaintiff to bring out the issues of the case and the matter in controversy between the parties.**
7. Plaintiff summarized the issues the Court should consider as-

**“(1) Will the amendment prevent Defendant to plead the Statute of Limitation.**

2. **Does the amendment bring out a new cause of action.”**

8. On first issue Learned Counsel submitted although an action founded in tort may not be brought after 3 years as provided under Section 4(2) of the Limitation of Actions Act Cap 22, Section 26 of that Act provides that where there is fraud time does not begin to run until such fraud is discovered. That in any case Plaintiff only realized that there was misrepresentation by the Defendants when he failed to receive the retirement benefits he expected and that that was in June 2011, the same year when this suit was filed. Plaintiff in this regard relied on the case **CAPITAL FISH (KENYA) LIMITED formerly FISH PRODUCTS (KENYA) LIMITED -Vs- KENYA POWER AND LIGHTING COMPANY LIMITED (2007)eKLR** in which the Judge referred another case as follows-

**"Lord Denning in his character said as follows in Mitchell v Harris Engineering Co. (1967)12 Q.B 703 at p. 718 in this respect:**

**‘Some of the Judges in those cases spoke of the Defendant having a “right” to the benefit of the Statute of Limitations: and said that “right” should not be taken away from him by amendment of the writ. But I do not think that was quite correct. The Statute of Limitations does not confer any right on the Defendant. It only imposes a time limit on the Plaintiff. Take the statute here in question. It is Section 2 of the Limitation Act, 1954. It says that in the case of actions for damages for personal injuries for negligence, nuisance or breach of duty “the action shall not be brought” after the expiration of three years from the date on which the cause of action accrued. In order to satisfy the statute, the Plaintiff must issue his writ within three years from the date of the accident. But there is nothing the statute which says that the writ must at that time be perfect and free from defects. Even if it is defective, nevertheless the Court may, as a matter of practice, permit him to amend it. Once it is amended, then the writ as amended speaks from the date on which the writ was originally issued and not from the date of the amendment. The defect is cured and the action is brought in time. It is not barred by statute ... In my opinion, whenever a writ has been issued within the permitted time, but is found to be defective, the Defendant has no right to have it remain defective. The court can permit the defect to be cured by amendment: and whether it should do so depends on the practice of the court. It is a matter of practice and procedure.’”**

9. Plaintiff further submitted that although the Plaintiff was filed in the year 2011, it was not without defects.
10. On second issue Plaintiff's Learned Counsel submitted that the Plaintiff showed 1<sup>st</sup> Defendant played an integral part in the Plaintiff's claim and accordingly to amend as sought would not amount to bringing a new cause of action against the 1<sup>st</sup> Defendant. That this is because it was the 1<sup>st</sup> Defendant who introduced Plaintiff to the retirement package and that the amendments sought brings that fact out.

### **1<sup>ST</sup> DEFENDANT'S SUBMISSIONS**

11. It was submitted by Learned Counsel Mr. Nanji on behalf of the 1<sup>st</sup> Defendant that there was no cause of action against 1<sup>st</sup> Defendant in the Plaintiff and the only pleading directed to the 1<sup>st</sup> Defendant was that it was the Chief Agent of the 2<sup>nd</sup> Defendant and that Plaintiff approached 1<sup>st</sup> Defendant as such an agent. That other than that the claim for breach of contract was against the 2<sup>nd</sup> Defendant. Learned Counsel gave a definition of ‘**cause of action**’ and said **“it is a factual situation the existence of which entitles one person to get remedy against another.”** This definition, Learned Counsel submitted, showed that according to the Plaintiff's plaint there was no cause of action against the 1<sup>st</sup> Defendant. Bearing that in mind Learned Counsel invited the Court to look at the amendments that are now before Court. The amendment according to him presented a new plaint which now brings out a new claim against 1<sup>st</sup> Defendant. Defendant relied on the case **EPAINETO -Vs- UGANDA COMMERCIAL BANK [1971]EA 185** where it was held-

**“A proposed amendment which introduces a new cause of action after the expiry of a period**

**of limitation must be rejected.”**

12.1<sup>st</sup> Defendant’s Learned Counsel argued that the amendment sought would bring causes of actions which were statute barred. 1<sup>st</sup> Defendant referred to the case WELDON –Vs- NEAL LJR [1887] where the Court held in the case BERAHANE TESTAMARIM –Vs- THE ATTORNEY GENERAL MOMBASA HCCC NO. 65 OF 1997 (unreported):

**“not be just and fair to the defendant in this case to allow leave for an amendment which will bring in an alternative cause of action which is already time-barred by statute.”**

Learned Counsel concluded by submitting that to allow the amendment sought it would amount to giving Plaintiff’s claim a new lease of life which would be prejudicial to the 1<sup>st</sup> Defendant.

### ANALYSIS

13. The amendment sought by the Plaintiff will remove the 2<sup>nd</sup> Defendant from these proceedings. The whole claim will then fall on the shoulders of the 1<sup>st</sup> Defendant, if the amendment is allowed. The amendment sought in short reads as follows-

- **At all material times, the Defendant was acting as an insurance agent and broker for various local and overseas companies and was canvassing business for such companies in consideration of commission or brokerage fee paid by the said companies.**
- **In or about March 1991, the Defendant, through one of its directors, Mr. Bharat Patel approached the Plaintiff and convinced him to invest in a Retirement Package marketed by Eagle Star International Financial Services, based in the Isle of Man, and gave a written quotation, indicating that at the age of 59, the Plaintiff would earn British Sterling Pounds 16,272, with a growth of 12%, annual contribution being Sterling Pound 750 per year, with the death benefit being Sterling Pounds 85,000.**
- **The Plaintiff is not learned and, relied entirely on the expert advise of the Defendant, who did not inform him of the nature of the investment or the risk involved including the fact that the Plaintiff may substantially lose the money invested.**
- **The Plaintiff, on the advise given, invested in Vista Policy Number 9138706, with Eagle Star International Financial Services, now Zurich International Life Limited and, paid each year a contribution of UK Sterling Pounds 750 to Zurich International Life Limited. The total sum paid from 1991 to 2001 during the term of the policy amounted to UK Sterling Pounds 15,000.**
- **All along, the Defendant assured the Plaintiff that his investment was doing well.**
- **On 1<sup>st</sup> September 2010, the Plaintiff wrote directly to Zurich International Life Limited, enquiring about the proceeds of his investment and was shocked to be advised that the current value of his policy was 2296.46 only.**
- **At no time did the Defendant advise the Plaintiff of the value of his policy. The defendant as the Plaintiff’s financial advisors did not keep track of the investment made and failed to adequately and responsibly advise the Plaintiff on action that could be taken to protect his investment.**
- **The Plaintiff avers that the Defendant, with a view to earn commission or brokerage fees, completely misrepresented to the Plaintiff the nature of the investment selected for the Plaintiff by the Defendant and the risk involved. During the current of the policy, at no time did the defendant inform the plaintiff that the value of his investment was declining or**

**advise him to opt for early retirement. The Defendant in breach of the trust placed in him and the professional duty as the Plaintiff's financial advisor, completely misguided the Plaintiff, resulting in enormous loss and damage to the Plaintiff.**

14. One can indeed understand that with that proposed amendment, which seeks relief solely on 1<sup>st</sup> Defendant that the 1<sup>st</sup> Defendant rightly vigorously opposed the amendment. The Civil Procedure Rules under Order 3(1) (2) and (5) provides guidance. It is as follows-

**“3. (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, 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.**

**(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.**

3. **Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.**

4. ....

5. ....

6. **An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”**

15. Rule 3(1) gives the Court the general power to allow amendment to pleadings. That power was discussed in the case **FARMLANDS CO. LIMITED –Vs- CAPTAIN WAWERU THUKU & ANOTHER (2006)eKLR** as follows-

**“The Plaintiff in support of its application quoted portions relied on in the case of Mechanized Systems Limited v Guardian Bank Limited HCCC 2 of 2005 as follows:**

**‘In a commentary in Mulla Code of Civil Procedure, 13<sup>th</sup> edition, volume 1, at p. 726, it is observed-**

**‘As a general rule, leave to amend will be granted so as to enable the real question in issue between the parties be raised on the pleadings, where the amendment will occasion no injury to the opposite party except such as can be sufficiently compensated for by costs or other terms to be imposed by the order. It does not matter whether the original omission arose from negligence or carelessness ...**

**Broadly stating it, there is no injustice in granting the amendment if the opposite side can be compensated costs. It is only when costs would not be adequate compensation that amendment will be refused. It is immaterial whether the error sought was accidental or not. There is no rule limiting amendments to accidental errors ...’”**

16. Rule 3(2) provides that such amendment can be allowed outside the limitation period. A case in point was discussed in **CAPITAL FISH** Case (Supra) as stated above and also it was stated-

**“See also Motokov v Auto Garage Ltd & Others (No.2) (1971)E.A. 353). Chanan Singh, J in deciding a similar application in Barclays Bank DCO v Shamsudin [1973]E.A 451 substantially followed the provisions of Order VIA Rule 3 at a time when those provisions**

had not been enacted. What I am trying to bring out is that the Courts had recognized the need for allowing certain amendments which were outside the period of limitation and or which sought to introduce a new cause of action even before Order VIA Rule 3 of the Rules was enacted. Such amendments are those which flowed from the same facts as the originally pleaded claim. The rationale of allowing such amendments is that they do not cause any prejudice to the other party who is take to have knowledge of such cause at the time the original pleading is filed. In considering similar provisions under the English Rules, the Learned Authors of The Supreme Court Practice 1988 said as follows at page 351:

**“... If the proceedings had been, from the beginning, properly formulated or constituted in the circumstances specified ... the defence of limitation would not have been available to the Defendant, and accordingly, if in its discretion, the Court thinks it just to grant leave to amend the defects in the writ or pleading within the scope of the circumstances specified ... so that such defects in the proceedings are treated as having been cured ab initio, the Defendant is not being deprived of the benefit of a defence which he would not have had if the proceedings had been so properly formulated or constituted in the first place. To contend that in the cases specified in these paragraphs, that the Defendant had an existing right which will be prejudiced by the amendment is to argue in a circle, since he only has an existing right if one presupposes that the Court will not use its powers to amend under O.20 r. 8 and O. 15 rr 6, 7 and 8 (see per Holroyd Pearce, LJ. In *Pantin v Wood* [1962]1 Q.B. 594, p. 609; [1962]11 ALL ER 94, 298).”**

17. In my view and considering the Law cited above and the authorities there is no sufficient ground presented by 1<sup>st</sup> Defendant why this Court should deny the Plaintiff the amendment sought, even if that amendment will lead to the Court allowing Plaintiff's claim to plead a cause which is caught by limitation. I am also of the view that the Plaintiff's claim in the original plaint is more or less the same to the one sought in the amendment, save that more details are pleaded in the amendment and save that the 2<sup>nd</sup> Defendant is taken out of the action. I do therefore reject 1<sup>st</sup> Defendant's submissions on Limitation of Action Act.

18. The above discussion also applies to the opposition that to allow the amendment would allow a new cause of action. Indeed the 1<sup>st</sup> Defendant is correct to submit that the original plaint had no substantial or at all a cause of action against it. I do believe 1<sup>st</sup> Defendant might have been successful in an application under Order 2 Rule 15(1) (a) where an action can be dismissed for not disclosing reasonable cause of action. Even though there is that power given to the Court to dismiss such an action the 1<sup>st</sup> Defendant was indolent in moving the case. Having been so indolent he acquiesced to the suit to continue in the form it was. Thereby the 1<sup>st</sup> Defendant has now given Plaintiff an opportunity to “Wake up” and seek to amend its plaint and now indeed to bring a cause against the 1<sup>st</sup> Defendant.

19. Since this suit was filed, there has been no action taken by any party to make it ready for trial. It follows therefore the 1<sup>st</sup> Defendant will not be prejudiced if the amendment is allowed. The 1<sup>st</sup> Defendant is entitled to amend its Defence appropriately once the plaint is amended.

20. Before concluding this discussion it is important to refer to the 1<sup>st</sup> Defendant's opposition to the removal of the 2<sup>nd</sup> Defendant from this case by the amendment sought. 1<sup>st</sup> Defendant's opposition is on the ground that the 2<sup>nd</sup> Defendant is a necessary party in this action. I respond on two grounds. Firstly as I understand the amendment sought the Plaintiff's claim is now against the 1<sup>st</sup> Defendant where the Plaintiff alleges that one of its Directors made misrepresentations to him leading to his loss. The Plaintiff's claim, as amended does not show the 2<sup>nd</sup> Defendant is a necessary party. On the second ground, I say that there is now no claim against the 2<sup>nd</sup> Defendant because the 2<sup>nd</sup> Defendant was not served with the Summons and Plaint. The Summons herein were dated 31<sup>st</sup> October 2011. Order 5 Rule 2(1) provides-

**“2. (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.”**

The twelve months long expired and since the summons were not served on the 2<sup>nd</sup> Defendant there are no valid summons capable of being served on the 2<sup>nd</sup> Defendant. To continue having the 2<sup>nd</sup> Defendant in this action therefore serves no purpose.

20. The application for amendment of the Plaintiff is in my view merited. I grant the following orders-

- a. **Leave is hereby granted to the Plaintiff to amend the Plaintiff as per the draft attached to Notice of Motion dated 18<sup>th</sup> September 2013.**
- b. **Plaintiff is ordered to file and to serve the amended Plaintiff within fourteen (14) days from today's date.**
- c. **The 1<sup>st</sup> Defendant is also granted leave to file and serve an amended Defence within fourteen (14) days of service of such amended Plaintiff.**
- d. **The Plaintiff shall pay the costs of Notice of Motion dated 18<sup>th</sup> September 2013 and the costs of the amended 1<sup>st</sup> Defendant's Defence, if any is filed.**

**DATED and DELIVERED at MOMBASA this 28<sup>TH</sup> day of AUGUST, 2014.**

**MARY KASANGO**

**JUDGE**