



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 357 OF 1992

FRANCIS WAITHAKA NGOKONYO 1ST PLAINTIFF

SUDI ABDALLA 2ND PLAINTIFF

ANDREW MUGA 3RD PLAINTIFF

VERSUS

TELKOM KENYA LIMITED DEFENDANT

RULING

1. At the end of the hearing of this matter, counsel for the Plaintiffs made an oral application to Court to amend the already Amended Plaintiff of one of the Plaintiffs herein namely **Andrew Muga**. Counsel indicated to the Court that he had intended to make the application as regards Mr. Muga's age at the previous session of the hearing of the suit. This Court had ordered, on that occasion, that Mr. Muga depon to an Affidavit as to his age in relation to his date of birth. That Affidavit was sworn on 13 June 2013 and filed herein on 14 June 2013. As I understood it from Mr. Murugu, learned counsel for the Plaintiff, the reason why the age of the Plaintiff, Mr. Muga, was relevant, related to the calculations as to future years of service that he could have expected to work for the Defendant prior to retirement. Counsel maintained that all the documents that had been exchanged as between this Plaintiff and the Defendant were based upon his being 50 years of age. The Amended Plaintiff filed herein on 13 April 2006 detailed the Plaintiff's age as being 52 years old. That required amendment.
2. In his brief submission before this Court on a point, Mr. Wasikafor the Defendant, noted that the I. D. card of this Plaintiff annexed to the Affidavit of 13 June 2013 stated that he had been born in 1940. Counsel suggested that his age should be amended to read 51 years of age and not 50. In a short reply, Mr. Murugu reiterated that all the documents exchanged had stated Mr. Muga's date of birth to be 1941 and not 1940. He requested of this Court that the amendment be allowed to read 50 years of age in paragraph 9 of the Amended Plaintiff.
3. **Order 8 rule 3** of the *Civil Procedure Rules, 2010* allows for the amendment of pleadings with the leave of the Court. The same reads as follows:

“8. (1) Subject to Order 1, rule 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) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading of such as to cause any reasonable doubt as the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) 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 cause of action in respect of which relief has already been claimed in the suit by the party apply for leave to make the amendment”.

4. The principles to be followed by Court in applications for leave to amend were extensively quoted by my learned brother **Azangalala J.** in the case of **African Airlines International Ltd v Eastern & Southern African Trade Development Banking (P. T. A.)** [2006] e KLR as follows:

“With regard to amendment of pleadings, it is now settled that a party should be allowed to make such amendments as may be necessary for determining the real question in controversy. (See Rule 5 (1) of Order VIA of the Civil Procedure Rules). It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. (See **Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Ors** CA No. 222 of 1998 (UR). Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or rejoinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs. (See **Central Bank of Kenya Ltd v Trust Bank Ltd and 4 others** [Supra]. In my view the proposed amended plaint is clearly intended to consolidate the plaintiff’s claim as the plaintiff cannot be allowed later to reopen the same matters pleaded in the proposed amendment in another suit.”

5. I have perused the Affidavit sworn by the said **Andrew Muga** on 13 June 2013. I note that the ID card annexed thereto reads that his Date of Birth is 1940. However, the card was issued with on 14 June 1996, long after his employment with Defendant ended. The deponent is unable to produce anything more than his School Leaving Certificate dated December 1960 as regards proof of age. In those colonial days, Birth Certificates were unavailable to the general public. However, learned counsel for this Plaintiff has submitted that all the documentation exchange between this Plaintiff and the Defendant detail that this Plaintiff was born in 1941. I have perused the same and particularly relevant is the Kenya Posts and Telecommunications Corporation Pension Computation at page 20 of this Plaintiff’s bundle of documents. In the heading to that document, it records:

“MR. ANDREW MUGA – GRADE – SAM

DATE OF BIRTH – APRIL, 1941.”

Bearing in mind that the Defendant itself has used 1941 as the date of birth of the 3rdPlaintiff in computing pension payments due to him upon his termination of employment, I believe that it is now estopped from denying the amendment as proposed to the 3rdPlaintiff's Amended Plaintiff.

6. Accordingly, I allow the oral application of Counsel for the 3rdPlaintiff, Mr. Andrew Muga in *HCCC No. 811 of 1992* to amend his Amended Plaintiff in the first line of paragraph 9 to read “50 years old” in place of “52 years old”. In view of the numerous amendments to the original Plaintiff made in this matter, I direct the said 3rdPlaintiff do file and serve a Further Amended Plaintiff within 30 days of the date hereof. Leave is given to the Defendant to amend its Amended Defence filed herein on the 27 April 2006, if need be, within 14 days of service of the Further Amended Plaintiff upon it. In all the circumstances, there will be no Order as to costs.

DATED and delivered at Nairobi this 24th day of June, 2013.

J. B. HAVELOCK

JUDGE