



No. 2948

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 133 OF 2000

JENIPHER GUMBA OYOO.....PLAINTIFF

-VERSUS-

KENINDIA ASSURANCE COMPANY LTD.....DEFENDANT

RULING

Before me is an application dated 14th April, 2011 in which the plaintiff who is the applicant seeks in the main, the following prayers:-

- **That leave be granted to the plaintiff to further amend the plaint and correct the spelling of the name of the insured herein to read P. N Mashru Limited instead of H. P Mashru Limited.**
- **That the draft further amended plaint be deemed as duly filed and served.**
- **Cost of the application be in the cause.**

The grounds in support of the application are that there is a court order of 5th October, 2010 correcting the defendant's name in the original suit, **Kisii HCCC No. 243 of 1998**. The amendment sought is a mere correction of a spelling and mis-positioning of the insured name and as corrected in the original suit. That the mistake was in the order in which the insured's name is normally positioned, and the use of the initial "H" instead of "N" in the said mis-positioning of letters. The inherent jurisdiction and overriding objective of the court. That the mistake herein was a bonafide mistake which does not void the proceedings and that the plaintiff was under a reasonable misapprehension resulting in a misnomer in the original suit. The identity of the person sued in the original suit and hence the insured herein can be ascertained from the pleadings and proceedings. The delay in bringing the instant application was excusable and finally that the defendant will suffer no prejudice if the application is allowed.

The pleadings and affidavit in support of the application gives the background to the application which appears to be that the plaintiff filed an original suit being **Kisii HCCC No. 243 of 1998** against the insured **H.P Mashru Limited** and judgment was delivered against it on 19th November, 1999. Subsequently, the plaintiff filed this declaratory suit against the defendant as the insurer of the judgment debtor in the original suit in a bid to recover the decretal sum which then stood at kshs. 864,004/=. By an application dated 3rd June, 2009, the defendant sought to have this suit struck out with costs on the grounds that it was scandalous, frivolous and vexatious or was otherwise an abuse of the process of the court because it had never insured **H. P Mashru Limited** but **P. N Mashru Limited** and it was in respect of motor vehicle KSH 031 and not KSH 030. Finally the policy did not cover or apply to passengers. Accordingly, the decree in the parent suit had been obtained against **H. P Mashru** which was not defendant's insured, for injuries suffered by a passenger who was not covered in connection with the use of motor vehicle KSH 030 which vehicle had not been insured by the defendant.

It would appear that it was through this application that for the very first time the plaintiff became aware of the issue of the correct spelling and or positioning of the insured's initials that were **P. N Mashru Ltd** as opposed to **H. P Mashru Ltd**. Since the application had already been fixed for hearing, the plaintiff then had to wait for the hearing and court's ruling on the defendant's application aforesaid before moving the court to correct the mistake in the original suit and thereafter as herein.

The defendant's application was heard inter partes and the ruling was delivered on 25th May, 2010 when **Musinga J.** dismissed the application holding thus "*...Considering that all along the defendant had not raised the issue of its insured's name as well as the policy number, it will be prejudicial to the plaintiff for this court to strike out the suit for that reason alone. In any event, the plaintiff can amend her plaint as may be deemed appropriate...*". Pursuant to the ruling on 15th September, 2010, the plaintiff mounted an application in the original suit to correct the names of the insured which she deemed a misnomer and on 5th October, 2010, the court allowed the application. In view of the numerous applications herein and the fact that this was an old matter, and in view of the court's overriding objective under sections 1A and B of the Civil Procedure Act, **Ms. Obaga**, learned counsel for the plaintiff felt that it was prudent and expedient to fix this case for hearing and then make an oral application to amend the misnomer herein instead of a formal application. The suit was duly fixed for hearing on 14th April, 2011 and when **Ms. Obaga** made the move by way of an oral application to have the name of the defendant's insured amended from **P.N Mashru Ltd** to **H.P Mashru Ltd** in all the paragraphs of the plaint, it was met with stiff opposition by **Mr. Odhiambo** learned counsel for the defendant. He insisted on a formal application for the amendment contemplated, hence the instant application. **Ms Obaga** submitted that name of the defendant in the original suit had already been corrected and it is only fair that the court makes a similar correction herein, this being a declaratory suit arising out of the original suit. Such correction will not affect the substance of the issues and or subsequent proceedings in any event nor will it cause prejudice to the defendant as all along it had proceeded on the assumption that the insured was **P. N Mashru Ltd** and the issue of the misspelling of the name was only raised as an afterthought.

As expected, the application was opposed by way of grounds of opposition dated and filed in court on 4th May, 2011. In those grounds, the defendant contended that the averments contained in the application ran counter to the previous pleadings in the original and present suit. The overriding objective in civil litigation militates against the granting of the prayers in the application, the amendment will have the effect of reviving an expired cause of action through the backdoor, the application had been brought after a very long delay of over 10 years, that the amendment sought is intended to defeat the defendants defence on record, the plaintiff is estopped from disowning a court process which she had initiated and benefited from. The plaintiff having obtained a judgment against **H.P Mashru Ltd**, and filed this suit on the basis of the decree and judgment she obtained against the said **H.P Mashru Ltd**, cannot now introduce amendments which impleads a party, **P. N Mashru Ltd** who was never a party to the original suit. The mandatory statutory notice envisaged by the provisions of section 10(2) of the **Insurance (motor vehicles third party risks) Act** had never been served on the defendant in respect of any suit which was filed against **P. N Mashru Ltd**. The proposed amendment would greatly prejudice the

defendant as the decree which is sought to be enforced against it was filed against a person who was not their insured.

When the application came before me on 2nd June, 2011 for interpartes hearing, parties agreed to canvass the same by way of written submissions. Subsequently they filed and exchanged written submissions and authorities which I have carefully read and considered.

It is common ground that this declaratory suit is yet to be heard and determined. Indeed it had come up for plenary hearing when attempts by the plaintiff to have amendments now sought to be introduced by the instant application, orally were thwarted by the defendant. It is also trite law that a court has the discretion to grant an application for amendment of pleadings at any stage of the proceedings with the main purpose being the determination of the real questions in controversy between the parties. Indeed **Musinga J.** so held in his ruling, a portion whereof has been reproduced elsewhere in this ruling. In a nutshell **Musinga J.** gave the plaintiff a lifeline to sustain her case against the defendant by telling her, that you can amend your plaint as you may deem appropriate. Nobody can blame the plaintiff after taking cue from that unsolicited advice, mounted the instant application.

The foregoing notwithstanding, the instant application is expressed to be brought under the provisions of order 8 rule 3, 5 and 7 of **the Civil Procedure Rules** and sections 1A, 1B and 3A of the **Civil Procedure Act**. These provisions of the law give the court wide discretionary powers to grant an application for amendment. However, it is trite law that discretionary powers must be exercised judiciously and not arbitrarily and or idiosyncratically. I have not seen anything in the defendant's grounds of opposition and written submissions as will militate against the granting of the application. Indeed all those issues raised by defendant are best left for the plenary hearing of the suit. For now we are least concerned with whether the averments contained in the present application and in the affidavit in support runs counter to the previous pleadings in the original suit and the instant suit. After all the original suit is not before me for comparison purposes. In any case that cannot be my task at this interlocutory stage. Whether the amendment will have the effect of reviving a dead cause of action, or will have the effect of defeating the defendant's defence, does not fall for consideration at this stage. The same goes for the issue of estoppel or service of the mandatory statutory notice envisaged in the provision of section 10(2) of the **Insurance (Motor vehicle Third Party Risks) Act**. All these are matters of evidence which can only be addressed at the formal hearing of the suit. They cannot form the basis for the denial of the application for amendment.

I also note that on the 5th October, 2010, I allowed the application filed by the plaintiff in the original suit in which she sought to correct the spelling of the name of the defendant to read **P. N Mashru Ltd** instead of **H. P Mashru Ltd**. To my mind the amendment sought by this application is a mere carry over of the amendments in the original suit. It would in my view be ridiculous to allow the amendments in the original suit and deny the very same amendment in this suit which is a child of the original suit. Much as there is an application to review my said order allowing the amendments in the original suit, that application has yet to be heard and determined. As it is therefore the order of amendment I made in the original suit still stands.

Of course delay in moving a court as appropriate on matters that involve the exercise of discretion on the part of the court may be a good ground for denial of such an application. There is no denial that the instant application has been delayed. However, the plaintiff has explained off perfectly reasons for the delay:-

- **The court had to make a ruling on the defendants' application dated 3rd June, 2009 seeking to strike out this suit.**

- **The misnomer in the original suit Kisii HCCC No. 243 of 1998 had to be corrected first.**
- **The court diary was closed by the time the order correcting the misnomer in the original suit was made.**
- **The earliest available hearing date as per the court diary was 14th April, 2011.**
- **The oral application for amendment was made orally but the court ordered that a formal application be made in view of the objections from the defendant.**

I buy all these reasons. The plaintiff cannot therefore be accused of deliberate or inordinate delay in filing the application in the circumstances. If anything, I think it is the defendant to blame for the stalemate for raising the issue of the motor vehicle insured by it too late in the day. Having filed its defence way back on 21st December, 2000, which defence did not at all address the issue of misnomer between **P.N Mashru Ltd** and **H.P Mashru Ltd**, it was not until 3rd June, 2009, nine years down the line, that the defendant for the very first time raised the issue. Indeed since the issue of the misnomer was raised by the defendant, the plaintiff had moved with speed and alacrity to deal with the same.

I do not think that any prejudice will be occasioned to the defendant if the application is allowed. This is because all along the defendant had proceeded on the assumption that the insured was **P. N Mashru Ltd**. Indeed it is not the defendant's name that is being sought to be amended but that of the insured and it will be upto the plaintiff to prove his case against it at the end of the day.

In the end, I allow the application in terms of prayers 2, 3 and 4.

Ruling dated, signed and delivered at Kisii this 23rd day of September, 2011.

ASIKE-MAKHANDIA
JUDGE