



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 511 of 2002**

**FIRST ASSURANCE COMPANY LTD ..... PLAINTIFF**

**VERSUS**

**SIERRA INSURANCE AGENCY LIMITED.....1<sup>ST</sup> DEFENDANT**

**TREVOR JOHN SHERWIN .....2<sup>ND</sup> DEFENDANT**

**PATRICIA ANNE SHERWIN .....3<sup>RD</sup> DEFENDANT**

**PHILLIP SHERWIN .....4<sup>TH</sup> DEFENDANT**

**R U L I N G**

I have before me two applications which were argued together. The first application was filed on 9.11.2004 by the plaintiff and seeks leave to further amend its pleadings. The second application was filed on 27.11.2006 by the defendant and seeks dismissal of the suit for want of prosecution. I will first consider the application by the defendant which seeks dismissal of the suit for want of prosecution. The application is brought primarily under Order XVI rule 5(d) of the Civil Procedure Rules. Under that paragraph if within three months after the adjournment of the suit generally the plaintiff or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal. The defendant has elected the latter option as it was entitled to do. The application which is supported by an affidavit of the defendants' advocate K. H. Osmond sworn on 26<sup>th</sup> November, 2006 is based on the principal grounds that when the suit came up for hearing on 6.6.2003, it was stood over generally since the plaintiff's counsel did not appear and when the suit was next listed for hearing on 10.2.2005 it would not proceed because the plaintiff's counsel was bereaved. In these premises, the defendant is of the view that the plaintiff is not interested in pursuing his suit which should be dismissed for want of prosecution. The supporting affidavit is an elaboration of these grounds.

The plaintiff opposed the application on the basis of a replying affidavit of Zachariah Ngome the plaintiff's counsel sworn on 14.12.2006. It was deponed in the replying affidavit that the plaintiff has been keen to prosecute this matter save that the court file could not be traced for some time and when the same was traced efforts were made to conclude the plaintiff's pending application. In these premises, the plaintiff is of the view that the application for dismissal for want of prosecution should be declined.

I have read the supporting and replying affidavits. I have also perused the record. Finally I have given due consideration to the submissions of counsel. Having done so, I take the following view of the matter. The plaintiff filed its application for leave to further amend its pleadings on 9.11.2004. When the same came up for hearing on 10.2.2005 it was stood over generally as counsel for the plaintiff was bereaved. There appears to have been no action by the plaintiff until 30.11.2006 when the court was

moved to list the said application for hearing. In the meantime however, the registry seems to have had a problem tracing the file and by its letter dated 25.7.2006 the plaintiff was informed that the file was traceable and a hearing date for the pending application could be taken. That letter appears to have been received by the plaintiff's advocates on 4.8.2006. Nearly 4 months thereafter the plaintiff succeeded to fix its said application for hearing on 7/3/07. In these circumstances, I am unable to find that the plaintiff is guilty of inordinate delay. In the premises, it would be unjust to dismiss its suit for want of prosecution. The court is reluctant to determine the rights of litigants without a proper hearing of the dispute on merits and where no injustice will be occasioned to the defendant the court will lean in favour of maintaining the suit rather than dismissing it unheard.

In the result, I decline to dismiss the suit for want of prosecution. The defendant's application is dismissed but costs of the application shall be in the cause.

The first application dated 22.10.2004 is by the plaintiff. It seeks one primary order which is that leave be granted to the plaintiff to further amend its plaint to add Trevor John Sherwin, Patricia Anne Sherwin and Philip Sherwin as defendants. The application has been brought under Order 1 Rules 10 (2) and (4), and 13, Order VIA Rules 3(1) (5) and (8) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. The application is based on the following grounds:-

**(a) That the plaintiff intends to join the said Trevor John Sherwin, Patricia Anne Sherwin and Philip Sherwin.**

**(b) That at the time of first amending the plaint, the names of the said parties were erroneously deleted.**

**(c) That the addition of the said persons as defendants in the suit is essential to enable the court effectually and completely adjudicate upon the suit.**

**(d) That the said amendment shall not cause the defendant any prejudice.**

The application is supported by an affidavit of the plaintiff's advocate Zachariah Ngome sworn on 25.10.2004 to which is annexed, a draft of the proposed amended plaint. It is deponed in the said affidavit that, for a proper prosecution and disposal of this suit and to effectually and completely adjudicate upon and settle all questions involved in the suit and in the interest of justice it is necessary that the proposed additional defendants be joined to the suit.

The application is opposed and there are Grounds of Opposition filed by advocates for the defendant. During arguments counsel for the defendant submitted that previously Hon. Justice Ondeyo had struck out this suit against the proposed defendants and as the plaintiff did not appeal against the said decision or apply for review of the same, it could not bring this application which is a back door attempt to challenge the said order of Ondeyo J. The defendant further contends that the proposed amended plaint makes it clear that the business between the plaintiff and the defendants was conducted between incorporated bodies whose liability is limited and no reason is advanced to lift the veil of incorporation. For that argument counsel relied upon the case of **Salomon – vs – Salomon & Company Limited [1886 – 9] All ER 33**. The Grounds of Opposition were therefore narrowed down to the above.

I have read the supporting affidavit and the proposed amended plaint annexed thereto. I have also given due consideration to the submissions of the Learned counsels appearing. I have further perused the ruling of Ondeyo J referred to by counsel for the defendant. Having done so I take the following view of the matter. Ondeyo J in her ruling dated 17.3.2003 struck out amended plaint then filed by the plaintiff in so far as it related to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. They are the same parties sought to be joined to this suit. The Learned Judge's – reason for striking out the said defendants was that the amended plaint on the last page failed to indicate that it was to be served upon the said defendants and was therefore confusing and defective. It is clear therefore that the basis of the striking out was a technical one. The merits of the respective parties were not determined. That decision of Ondeyo J in my humble view is not a bar to the filing of another application for leave to join the same parties to this suit. The defendant's second limb of

its objection is based on the decision in the case of **Salomon –vs – Salmon (Supra)**. I do not think there is any dispute on the principle established by that case. However, I do not think it would be open to the defendant at this stage to justify its arguments against the proposed amendments on the basis of the principle set in the **Salomon and Salmon** case. I need not say more lest I prejudice the trial or subsequent arguments based on the same principle.

The matter is now settled – that the court may allow amendment at any stage of the proceedings on such terms as to costs or otherwise as may be just and where amendments are sought before hearing, the same are freely allowed if they can be made without injustice to the opposite side and courts have held before that normally there can be no injustice if the opposite side can be compensated by an award of costs. (See the case of **Eastern Bakery – vs – Castelino [1958] EA 461**).

The defendant did not file a replying affidavit. There is therefore no evidence that the proposed amendments will occasion it any prejudice or injury, that cannot be compensated by an award of costs. From material availed to me, I discern no prejudice to the defendant if the further amendments sought are allowed. Being of that discernment, I allow the plaintiff's application dated 22.10.2004 in terms of prayer 1 thereof on payment of the requisite court fees. The plaintiff should comply with rule 10(4) of Order 1 of the Civil Procedure Rules including service of the further amended plaint upon the existing defendant. The existing defendant may if it deems fit file an amended defence within 14 days of service of the further amended plaint. The existing defendant shall have the costs of this application.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>nd</sup> DAY OF MARCH, 2007.**

**F. AZANGALALA**

**JUDGE**

**22/3/07**

Read in the presence of:-