



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION –MILIMANI
CIVIL CASE NO. 1601 OF 2001

ATLANTIS INSURANCE BROKERS LTD :::::::::::::::PLAINTIFF

VERSUS

CRESCENT CONSTRUCTION CO. LTD :::::::::::::::DEFENDANT

RULING

This is an application expressed to be brought under the provision of Order 1 Rule 10, Order VIA of the Civil Procedure Rules and all other enabling provisions of the Law. The applicant seeks leave to be substituted as the Plaintiff in place of the present Plaintiff. The application is sought on the grounds that:

1. The suit herein was instituted by the wrong Plaintiff through a bona fide mistake as the subject matter herein involves Insurance Policies that were issued to the Defendant by the said Occidental Insurance Company Ltd.
2. It is necessary for the determination of the real matter in dispute for the Plaintiff's name to be struck out and substituted with Occidental Insurance Co. Ltd.
3. The Defendant will suffer no prejudice if the Plaintiff is substituted.
4. The claim involves a large sum of Kshs 19,642,726.00.

The affidavit is supported by an affidavit sworn by Venkatavaman Lakshminarayan on 2nd November 2004. The application is opposed and there are Grounds of Opposition.

The application was canvassed before me on 3rd December, 2004 by Mr. Chelegat Learned Counsel for the Applicant and Mr. Saende Learned Counsel for the Defendant. Counsel for the Applicant argued that on the grounds and reasons set out in the body of the Chamber Summons and the said supporting affidavit, the application should be allowed. He emphasized that the proposed amendment does not raise any new issues. Indeed the proposed Plaintiff, Occidental Insurance Company is disclosed in the pleadings. Counsel further submitted that the omission to institute this suit in the name of the proposed Plaintiff was made by the former Advocate on record through a genuine mistake and the Applicant should not suffer for the same omission. Reliance was placed on several authorities for the proposition that such an amendment should be allowed as the Defendant will suffer no prejudice.

Counsel for the Defendant opposed the application and relied on the Grounds of Opposition filed. He strongly argued that if the proposed amendment is allowed the Defendant will lose the defence of limitation. Reliance was placed on several authorities in which the Courts have held that an amendment should not be allowed if it will be prejudicial to rights conferred by Law on the Respondent and where there has been delay to bring the application. In Counsel's view the amount of the subject matter is irrelevant. He urged that the application be dismissed with costs.

The above are the rival positions taken by the parties. I have considered the positions. I have also considered the supporting affidavit and the Grounds of Opposition together with the authorities cited. Having done so I take the following view of the matter.

Order 1 Rule 10 is as follows:-

“(10) (1) Where a suit has been instituted in the name of the wrong persons as Plaintiff or when it is doubtful whether it has been instituted in the name of the right Plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as a Plaintiff upon such terms as the Court thinks fit.

AND 2 The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just order that the name of any party improperly joined whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined whether as Plaintiff or Defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit be added.”

Under this rule the Court exercises a discretion. The Court can exercise this discretion at any stage of the proceedings. The Court however should be satisfied that the suit has been instituted through a bona fide mistake and that the substitution or addition of a party will enable the Court determine the real matter in dispute.

In the exercise of the above discretion the Court will consider various circumstances and factors such as:-

- 1) Has there been undue delay***
- 2) Does the proposed substitution or addition change the nature or character or the cause of action.***
- 3) Does the proposed substitution or addition, adversely affect an adversary’s acquired right under the law.***
- 4) Will the adversary suffer irreparable injury?***
- 5) What is just in the circumstances?***

In my view the factors and circumstances to be considered go beyond what is given above. Ours is a developing jurisprudence and the considerations will change from time to time or will expand with time. I must however clarify that the existence of any or more of the above factors or circumstances will not automatically lead to the exercise of the Court’s discretion to allow a substitution or an addition of a party to existing proceedings.

Applying the above principles to the present case I have noted as follows:-

Paragraph 3 of the amended plaint filed on 16th November, 2001 is as follows:

“3. On diverse dates between the years 1994 to 1997 the Plaintiff entered into a running insurance brokerage agreement with the Defendant whereupon the Defendant was issued with Insurance policies by Occidental Insurance Company Limited particulars whereof are well within the Defendants knowledge.”

In answer to this paragraph the Defendant averred at paragraph 3 of its defence to

the amended plaint as follows:-

“3 Further and in the alternative in answer to paragraph 3 and 4 of the Plaint the Defendant states as follows:-

(a) If, which is denied there was a running agreement between 1994 and 1997 the amount claimed is irrecoverable and the Defendant is not answerable by virtue of the Limitation of Actions Act six years having elapsed since the alleged agreement and the alleged issuance of the policies.

(b) The Defendant for avoidance of doubt denies owing the Plaintiff the sum of Kshs 19,642,726/= as alleged in paragraph 3 of the Plaint.”

It is clear from the above averments that the Defendant has already pleaded Limitations. It is therefore not correct to allege that the proposed substitution if allowed will deny the Defendant the defence of Limitations.

The Defendant has also raised objection to the proposed substitution on the basis that the Applicant is guilty of un delay in bringing this application. I agree that there has been a delay of about 3 years. However, this case is still at a pre-trial stage. I do not see the prejudice the Defendant will suffer if the application is allowed notwithstanding the delay of 3 years.

The proposed substitution does not change the cause of action. Indeed as shown above, the fact that Occidental Insurance Company Limited issued the policies in question was pleaded way back on 10th November, 2001 and the Defendant responded to this averment in its defence to the amended Plaint way back on 14th November, 2001.

The proposed substitution will in my view not adversely affect the Defendant. The Defendant has not demonstrated that if the substitution is allowed it will suffer any injustice or injury that cannot be compensated by costs.

I have said enough to show that this application is not without merit. I will allow it to enable the Court to finally determine the real matters in dispute. I accordingly grant prayers 1 and 2 of the Chamber Summons dated 2nd November, 2004 and filed on 3rd November, 2004. The draft Re-amended Plaint will be deemed duly filed and served on payment of the requisite Court fees. The Defendant is at liberty to file an amended defence if necessary within Fourteen (14) days from the date hereof.

Costs of this application are awarded to the Defendant.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31st DAY OF JANUARY, 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-