



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO.2902 OF 1993**

**NATIONAL SOCIAL SECURITY  
FUND.....1ST PLAINTIFF**

**NATIONAL SOCIAL SECURITY FUND BOARD OF  
TRUSTEES .....2ND PLAINTIFF**

**VERSUS**

**UNITED INSURANCE CO.  
LIMITED.....DEFENDANT**

**RULING**

This is an application expressed to be brought under the provisions of Order VI A Rules 3 and 5 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all the enabling provisions of the Law. The Plaintiff is the Applicant and seeks leave to amend its plaint. The Application is sought on the grounds that:

- 1) *The Plaintiff desires to amend the plaint to plead a fact material to the suit;*
- 2) *the amendment sought is necessary to enable the Court properly adjudicate over the issues in controversy;*
- 3) *the amendment sought if allowed will not prejudice the Defendant .*

In support of the application Counsel for the Plaintiff argued that the amendment sought will crystallize the issues in dispute and allow the court to try and dispose of the case fully and that if the application is allowed the Defendant will suffer no prejudice. It will in any event be at liberty to amend its defence if necessary. Counsel further submitted that an award of costs shall sufficiently compensate the Defendant. Anticipating the Defendants' Opposition to the application, Counsel argued that an amendment may be allowed even if the effect is to deprive a Defendant of the defence of Limitations. For this proposition reliance was placed on the case of Faulkner –v- Agricultural Development Corporation (1978) KLR 49 where the Court of Appeal held that under Order VIA rule 3(2), an amendment might be made after a period of Limitation had expired.

It was further submitted for the Plaintiff that amendments should be freely allowed at any stage of the proceedings subject to costs and if no prejudice or injustice will be caused to the other side.

This is what my brother, Mwera J. and Ibrahim J. restated in the un reported cases of V.V. Shah –v- Barua Estates Ltd & Another:

Nairobi HCCC No.5944 of 1993 and Birking Industrial Services Ltd – v- Kenya Breweries Ltd: Nairobi HCCC. NO.681 OF 2000 respectively.

In Waljee’s (Uganda) Ltd –v- Ramji Punjabhai Bugerere Tea Estates Ltd (1971) E.A. 188 on which Counsel for the Plaintiff also placed reliance, the Court quoted Lord, Esher in Steward –v- North Metropolitan Tramways Co. (1886), 16 Q.B.D. 556 as follows:-

***“the rule of conduct of the Court in such a case is that however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs....”***

The Court of Appeal had said as much in Eastern Bakery –v- Castelino (1959) E.A. 461.

In opposition to the Plaintiff’s application Counsel for the Defendant submitted that amendment should not be granted as a matter of course; the facts to be introduced must be looked at and an amendment should not introduce a new cause of action. Counsel argued that the subject transaction took place way back in 1992 and the proposed amendment if allowed will deprive the Defendant of the defence of Limitation. For this proposition Counsel also relied on the case of Eastern Bakery –v- Castelino (supra) where at page 462 the Court giving the incident in which leave may be refused said:

*“where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of Limitation accrued since the issue of the Writ .”*

Counsel submitted that the injustice and prejudice that the Defendant will suffer if leave to amend is allowed will not be compensated by costs. Reliance was placed on the Court of Appeal decision in Nairobi C.A. No.149 of 1991: Joseph Ochieng & Another -v- First National Bank of Chicago.

The Defendant’s further argument was that the proposed amendments are not made in good faith and will compromise the Defendant’s rights and that the application has not been made timeously.

The above are the rival positions taken by the parties. Having considered the same I take the following view of the matter. An Applicant seeking leave to amend his pleading asks the Court to exercise a discretion. In my view the only decision I have to make is whether or not in the circumstances of this case I should exercise my discretion in favour of the Plaintiff. The objection made to the leave being sought is based mainly on the following:

- 1) That the proposed amendment seeks to substitute the initial cause of action with another***
- 2) That if leave is granted the Defendant will be denied a defence under the Limitation of Actions Act.***
- 3) That application has come too late .***

It is our law that amendments may be allowed even if the effect would be to introduce a new cause of action and even if the effect would be to deprive a Defendant of a defence under the Limitation of Actions Act. It is also our law that amendments may be allowed at any time before judgment provided that the damage which may arise as a result of the amendment can be cured by way of costs. The Defendant has submitted that if leave to amend is granted it would cause injustice to the Defendant . The main prejudice that the Defendant may be occasioned in my view is losing the defence of Limitations under the Limitation of Actions Act. This per se is not sufficient to refuse leave to amend. I have perused the proposed amended plaint, the same cause of action is pleaded but in a different manner. In any event even if a different cause of action was shown I would still hold that the same arises out of the same facts or substantially the same facts in respect of which the initial relief was sought. I have not found that the delay in filing this application has caused the Defendant damage or injury which cannot be cured by an

award of costs. Under Order VIA Rule 3 amendments may be allowed at any stage of the proceedings provided that the damage which may arise as a result of the amendment can be cured by way of costs. The Defendant has not demonstrated that if leave to amend is granted it will suffer any injustice or injury that cannot be compensated by costs. Any other complaints the Defendant has to the proposed amendments may still be dealt with by amendment to the defence.

In the result I allow the leave sought to enable the Court to finally determine the real issues in dispute. The Plaintiff's application dated 25th June 2002 is therefore allowed in terms of prayers 1, 2 and 3. The Defendant shall have the costs of this application. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2004.**

F. AZANGALALA

AG. JUDGE

Read in the presence of: