



REPUBLIC OF KENYA



**Mwaura v Kenya Orient Insurance Limited; Vegpro Kenya Limited (Interested Party)  
(Civil Suit E013 of 2021) [2024] KEHC 9992 (KLR) (9 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9992 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E013 OF 2021  
RN NYAKUNDI, J  
AUGUST 9, 2024**

**BETWEEN**

**FLORENCE WAITHERA MWAURA ..... PLAINTIFF**

**AND**

**KENYA ORIENT INSURANCE LIMITED ..... DEFENDANT**

**AND**

**VEGPRO KENYA LIMITED ..... INTERESTED PARTY**

**RULING**

1. Before me for determination is the Plaintiff's application dated 22<sup>nd</sup> May, 2024 premised to be brought under the provisions of Art. 159 of the Constitution, Order 8 Rule 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The applicant seeks orders as follows:
  - a. Spent
  - b. That this honorable court be pleaded to grant leave to the Plaintiff/Applicant to amend her plaint.
  - c. The costs of this application be provided.
2. The application is supported by six grounds and an affidavit sworn by Kiongo P. Murimi. The grounds relied upon are as follows:
  - a. That the Plaintiff intends to raise issues that go to the core-substance of the suit herein and the Plaintiff ought to be given an opportunity not only to raise these issues at the Preliminary stage as well.
  - b. That the amendments sought are triable issues and necessary in the interests of justice in that the amended pleadings will then bring out with finality and clarity to the court the precise



and full lines of the claim being pursued by the Plaintiff/Applicant and enable the court to adjudicate over the matter in one suit once and for all.

- c. That the defendant/respondent will not be prejudiced in any way if the amendments sought are allowed, rather justice will be done holistically.
  - d. That the matters sought to be amended and pleaded were within the immediate knowledge of the Plaintiff/Applicant when preparing the plaint but were inadvertently not captured in the Plaint.
  - e. That the instant application has been brought timeously.
  - f. That it is just and fair that the Plaintiff/Applicant is granted leave to amend her Plaint as sought.
3. In response to the application, the Defendant together with the interested party filed responses. According to the defendant, the application is without merit for reasons that it is an afterthought as it has been brought too late in the day, four (4) years after the suit. The defendant averred that the applicant has not explained the inordinate delay in bringing forth this application. That Article 159 of the Constitution is not a shelter for litigants who sleep on their rights at the expenses of justice.
  4. The defendant further averred that the application herein is an attempt to clandestinely seal the loopholes that were exposed during hearing of her case since the same has been brought forth. That the above proposed amendment introduces a new and inconsistent cause of action which would change the action into one of a substantially different character that can only be subject to a fresh action which they urge this Honorable to dismiss.
  5. The interested party on the other hand filed a replying affidavit in which the court was urged to note that the instant application is an afterthought since the Plaintiff has already testified. That during cross examination, the Defendant poked holes in the Plaintiff/Applicant's case and the Plaintiff/Applicant now wants to patch up those holes by amending the Plaint. She averred that the trial has reached an advanced stage where allowing the Plaintiff/Applicant to amend her Plaint would prejudice the interested party who obtained judgment in the primary suit way back in 2021 and has not been able to enjoy the fruits of his judgment.

### **The Applicant's submissions**

Learned Counsel Mr. Murimi for the Applicant filed submissions dated 30<sup>th</sup> July, 2024 in support of his arguments. According to Counsel, he erroneously filed the matter in the name of the Plaintiff, Florence as per the motor vehicle registration documents of motor vehicle registration number KCC 815W which were available as at the time of the filing of the suit and not in the business name of Jimflo Exporters & Importers Limited which is the insured owner of the subject motor vehicle. It was submitted for the Plaintiff/Applicant that the mistake by the Plaintiff's Counsel was unintended and inadvertent since all documents had not been availed by the Plaintiff as at the time of filing of the suit. It is on this basis that the Plaintiff seeks an amendment of the Plaint to capture the full details of her name and the capacity in which she is suing. In support of his arguments, Learned Counsel Mr. Murimi cited the provisions of Order 8 rule 1 & 3 and the decision in *Ochieng & others v First National Bank of Chicago Civil Appeal No. 147 of 1991* (unreported) as cited with approval in *St. Patrick's Hill School Ltd v Bank of Africa Kenya Ltd* (2018) eKLR.

### **Respondent's Submissions**

6. Learned Counsel Mr. Omwenga filed written submissions for the Respondent dated 29<sup>th</sup> July, 2024. In Counsel's view, this is a declaratory suit seeking to enforce the judgment in Eldoret CMCC NO.



681 of 2020 – Vegpro Kenya Limited v Florence Waitehra Mwaura. The judgment in which the Plaintiff/Applicant is seeking to enforce against the defendant/respondent was entered against her in her personal capacity as Florence Waithera Mwaura. The same can only be enforced in the similar capacity as Florence Waithera Mwaura and not Florence Waithera Mwaura T/A Jimflo Exporters and importer as proposed in the draft amended Plaintiff. Counsel argued that amending the Plaintiff in this matter will change the nature of the suit completely as the party against which the judgment in the primary suit was entered will not be the same as the party who is seeking to enforce the very judgment. In support of this, counsel cited the decision in *Tripat Singh Mangat (Suing on his behalf and on behalf of Mangat I,B Patel (MIBP) Limited) v Manjeet Singh Bhachu & 3 others* (2021) eKLR.

## Resolution

7. I have considered the notice of motion, affidavit evidence in support, replying affidavit in opposition of the reliefs prayed for by the applicant and both learned counsels' submissions to the issues in question. For purposes of clarity, it is instructive to highlight the provisions of the law

## The Law

8. Order 8 Rule 3 of the *Civil Procedure Rules* provides for amendment of pleadings with leave of court as follows: -
  - (1) Subject to Order 1, rules 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.

Further, Order 8, rule 5 gives the court the general power to amend.

    - (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
9. The doctrine of amendment of pleadings is very fundamental to the smooth operation of the justice machinery. It assures the court that the issues in question as between the parties are brought forward at once for determination on the merits. It is a settled position of our civil law that amendments can be brought at any stage of the proceedings so long as they are not vexatious, frivolous or an abuse of the court process. The court notes that the interest of justice requires the court to balance the rule of law, procedural justice and the need for legal certainty in the finality of claims. It is also understood that human beings sometimes are vulnerable and can make blunders, or omissions in the course of drafting pleadings tailored towards the prayers to vindicate the violation of rights in question. The independent court or tribunal under Art. 50(1) of the *Constitution*, is tasked to conceive the provisions on amendments as a mechanism to prevent any possible abuse of the court process and to allow the court to act efficiently, effectively, fairly bearing in mind Art 50 on the right to a fair hearing and Art. 48 on access to justice. The superior courts have laid down legal principles for guidance on how to navigate the exercise of judicial discretion whenever faced with an application of amendment of pleadings.
10. The Court of Appeal outlined the principles in amendment of pleadings in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR as follows: -

“The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed *Civil Procedure Rules* under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's



Precedents of Pleading - 12<sup>th</sup> Edition, in the case of *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal No. 149 of 1991 as follows: -

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

11. In *Ochieng and Others v First National Bank of Chicago* Civil Appeal Number 147 of 1991, the Court of Appeal set out the principles to be applied in considering applications for leave to amend as follows: -

- “ a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b) the amendments should be timeously applied for;
- c) power to amend can be exercised by the court at any stage of the proceedings;
- d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;
- e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of the current period of limitation”.

12. Quite on those same lines the court in In *Institute For Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the court held:-

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”



13. In making observation of the above case law, it is clear that all amendments ought to be allowed which satisfy the conditions of not working in justice against the adversarial party or being of necessity for the purposes of determining the real questions in controversy between the litigants. What the trial court also has to bear in mind is to conceive and appreciate the grounds of oppositional or replying affidavit by the respondent must demonstrate that the amendment so sought by the applicant would cause him/her an injury which will not be compensated in costs. This brings into focus the test of the amendment of pleadings to be allowed without occasioning injustice or prejudice to the other side. It is therefore a question of judicial considerations and unfettered discretion accompanied with circumspection on the unique facts of the case. This calls for the session judge to evaluate and scrutinize every case and every application for amendment to be tested within the boundaries of the pleaded facts and circumstances of the case. In the instant application, I am of the considered view that the applicant's amendment does not create a new case or a new cause of action which is statute barred under the [Limitation of Actions Act](#). Essentially, the amendment if allowed does not amount or constitute a new cause of action. It is the case for the applicant that the amendments sought are necessary in the interest of justice to bring out with finality and clarity to the cause of action. I am privy to the assertions made by the Respondent and the Interested party in their replying affidavits. The highlights of the affidavits are about timeliness of filing the application for amendments and the fact of the applicant having closed its case. It is also not in dispute that pleadings on the matter closed sometime back as purposed in Order 11 of the [Civil Procedure Rules](#). This therefore calls for the question whether the opposition to the application by the defendant and the interested party meets the test of the amendments occasioning injustice or prejudice. This court appreciates the position taken by the Respondent and the interested party for undisputedly the trial of the claim has since commenced. However, notwithstanding that stage of the proceedings, I take the view that merely because the applicant is permitted to amend the plaint does not mean that her claim which has been made by way of an amendment would succeed and be granted by the court. I also take judicial notice of the guidelines in the [Civil Procedure Act](#) and Rules which govern the administration of civil disputes in our legal systems. While affirming the aforesaid provisions, our procedural and substantive justice is underpinned under Art. 50 of the [Constitution](#) on fair trial rights and Art. 48 on access to justice. The policy of litigation in Kenya is postulated in the filings of pleadings, affidavits, written statements in support of the claim or to contest the claim of the Plaintiff or vice versa. That therefore, prima facie empowers the court to exercise discretion judiciously for the interests of justice in any given dispute and not be held hostage by giving more weight to certain grounds like length of time taken to seek leave of the court to amend a pleading. I am of the considered view on this kind of arguments and submissions as against amendments that the court's unfettered discretion can always allow filing of additional written statements or affidavits to contest the claim lodged on amendments of the plaint or the counterclaim. It has not been shown that in respect of this claim the Plaintiff intentionally relinquished the portion of her claim which she now seeks leave of this court to bring an amendment. The correct test therefore is whether the amendment is a new suit or a fact founded on a new cause of action distinct from the foundation of the former suit. My reading of the notice of motion and affidavits does not support that by this amendment there will be two claims different from the original cause of action. The comprehensive reading of the [Civil Procedure Act](#) and the Rules has the catchy words like "he shall not afterward sue" meaning that the amendments which have been omitted by inadvertence should be allowed at any stage of the proceedings before final



judgment. The applicant herein has a right to apply for an amendment before the conclusion of her suit. To that extent Order 18 Rule 10 of the [Civil Procedure Rules](#) provides that

“The court may at any stage of the suit recall any witness who has been examined, and may, subject to the Law of Evidence for the time being in force; put such questions to him as the court thinks fit.”

14. So far as Section 146(4) of the Law of [Evidence Act](#) is concerned, the court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination, and if it does so, the parties have the right of a further cross examination and re-examination respectively.”
15. The legal position therefore in respect of scope and ambit of the law is clear and made so more by the ratio of the foresaid decisions of the court as stated elsewhere in this ruling. In the overall view of the matter, the draft amended plaint be served upon the respondent and the interested party within 14 days from today’s date. The Respondent and the interested party be at liberty to cause an amendment to their respective statement of defence within the equal timeline of 14 days upon being served by the applicant. That in allowing this amendment, each party is at liberty to apply on filing of additional witness statements or any such disclosures within the confines of the amendments. In affirming this application on amendments of the Plaint, Order 18 Rule 10 of the [Civil Procedure Rules](#) and Section 46 of the [Evidence Act](#) are open to be invoked by the parties in consonant with Section 1(a) of the [Civil Procedure Rules](#).
16. In the result, the application succeeds with costs to the Respondent and the interested party

**DATED AND SIGNED AT ELDORET THIS 9<sup>TH</sup> DAY OF AUGUST, 2024**

**R. NYAKUNDI**

**JUDGE**

