



REPUBLIC OF KENYA



**Co-operative Bank of Kenya Limited v G4S Kenya Limited (Commercial Case 427 of 2013)
[2024] KEHC 11398 (KLR) (Commercial & Admiralty) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11398 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL CASE 427 OF 2013
MN MWANGI, J
SEPTEMBER 20, 2024**

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED PLAINTIFF

AND

G4S KENYA LIMITED DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 22nd January, 2024 filed by the defendant pursuant to the provisions of Order 2 Rule 15(b) & (d) of the *Civil Procedure Rules 2010*, seeking orders that the plaintiff's amended plaint dated 23rd October, 2023 be struck out.
2. The application is premised on the grounds on the face of the Motion. The defendant contended that the amended plaint filed by the plaintiff introduces a new cause of action and alters the nature of the suit. This is because the suit as originally filed was for negligence and breach of contract, but the plaintiff in the amended plaint asserts that the claim has been brought by its insurer under the doctrine of subrogation. The defendant further contended that since the alleged loss occurred on 1st October, 2010, a claim under the doctrine of subrogation ought to have been filed on or before October 2016. The defendant contended that for the said reason, the claim under subrogation is time barred. It was stated by the defendant that there has been inordinate delay in making the amendments in the amended plaint since this suit was filed in the year 2013.
3. In opposition to the application, the plaintiff filed a replying affidavit sworn on 15th February, 2024 by Wincate Macharia, a Legal Officer at AIG Kenya Insurance Company Limited, the plaintiff's insurer, who stated that parties to a suit have the right to amend their pleadings with leave of the Court. She averred that the plaintiff sought leave from the Court in the presence of the defendant who did not raise any objection, and the same was granted. Ms. Macharia stated that the amendment to the plaint



does not alter the cause of action or the nature of the suit but clarifies that AIG Kenya Insurance Company Limited, which fully compensated the plaintiff for the loss, is the true party seeking recovery. She explained that under the principle of subrogation, the insurance company files the suit in the name of the insured party as is the case herein.

4. The instant application was canvassed by way of written submissions. The defendant's submissions were filed by the law firm of Hamilton Harrison & Mathews on 20th March, 2024, whereas the plaintiff's submissions were filed on 8th April, 2024 by the law firm of L.W. Wang'ombe & Company Advocates.
5. Mr. Makori, learned Counsel for the defendant cited the decisions in *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR, and *Garley Enterprises Ltd v Agricultural Finance Corporation & another* [2018] eKLR and submitted that it is well settled that amendment to pleadings would not be allowed if it alters the nature of the suit or introduces a new cause of action. He pointed out that in this case, the original plaint sought compensation in favour of the plaintiff for alleged negligence on the part of the defendant, who filed this suit on its own behalf. He further submitted that as at 11th October, 2023 when Hon. Tanui granted the plaintiff leave to amend its plaint, it neither disclosed the nature of the amendments that it sought to introduce, nor did it serve the defendant with the original plaint and summons to enter appearance.
6. Counsel relied on the case of *Mwema Musyoka v Paulstone Shamwama Sheli* [2020] eKLR, and stated that under the doctrine of subrogation, an insurer's claim arises when the insurer indemnifies and pays the insured. He stated that in this case, the plaintiff produced a credit note dated 6th January, 2011 confirming that it was indemnified by the insurer on the said date, which means that the insurer's cause of action against the defendant arose on 6th January, 2011 and not on 1st October, 2010 when this suit's cause of action arose. Mr. Makori referred to the provisions of Section 4(1)(e) of the *Limitation of Actions Act* and the case of *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* (*supra*), and asserted that the plaintiff's insurer's cause of action against the defendant ought to have been filed on or before 6th January, 2017.
7. Ms. Simiyu, learned Counsel for the plaintiff relied on the decisions in *Leli Chaka Ngoro v Maree Ahmed & S.M. Lardbib* [2017] eKLR, and *Octagon Private Investigation Security Services v Lion of Kenya Insurance Co.* [1994] eKLR and submitted that the doctrine of subrogation affords the insurance an opportunity to recover any amounts expended by it on behalf of, or to its insured, so as to allow an insurer to step into the shoes of the insured and be entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated. She further submitted that stating that the amendment in question introduces a new cause of action is akin to claiming that parties cannot be joined in a suit as per the provisions of the *Civil Procedure Act* and *Rules*.

Analysis And Determination.

8. I have considered the application filed herein, and the grounds on the face of it. I have also considered the replying affidavit filed by the plaintiff and the written submissions by Counsel for the parties. The issue that arises for determination is whether the instant application is merited.



Whether the instant application is merited.

9. Order 8 of the [Civil Procedure Rules, 2010](#) provides for amendment of pleadings. Order 8 Rule 1 of the said [Rules](#) states that –

A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed."

10. Order 2 Rule 13 of the [Civil Procedure Rules, 2010](#) on the other hand provides that –

The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.

11. It is not disputed that by the time the plaintiff filed the amended plaint dated 23rd October, 2023, the defendant had not yet filed a defence to this suit. Therefore, pursuant to the provisions of Order 2 Rule 13 of the [Civil Procedure Rules, 2010](#), pleadings had not closed. As such, the plaintiff did not need leave of Court before amending its plaint.

12. In the application herein, the defendant prays for this Court to strike out the plaintiff's amended plaint dated 23rd October, 2023. Striking out of pleadings is provided for under Order 2 Rule 15(1) of [Civil Procedure Rules, 2010](#) which states that -

- "1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that -
 - a. it discloses no reasonable cause of action or defence in law; or
 - b. it is scandalous, frivolous or vexatious; or
 - c. it may prejudice, embarrass or delay the fair trial of the action; or
 - d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
2. No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.
3. So far as applicable this rule shall apply to an originating summons and a petition."

13. Striking out of a suit and/or pleading is a draconian and drastic measure which should be resorted to sparingly, with caution. It is only where a pleading cannot be salvaged by an amendment that Courts will resort to that procedure. In the oft cited case of [Yaya Towers Limited v Trade Bank Limited \(In Liquidation\)](#) (Civil Appeal No. 35 of 2000), the Court of Appeal stated thus-

A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which



is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.

14. The Court of Appeal in *Crescent Construction Limited v Kenya Commercial Bank Limited* [2019] eKLR, held as follows-

However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honored legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.

15. The defendant claims that the amended plaint introduces a new cause of action, since the cause of action in this suit as per the original plaint arose on 1st October, 2010, and it was for breach of contract and negligence. The defendant contended that the cause of action as per the amended plaint arose on 6th January, 2011 when AIG Kenya Insurance Company Limited indemnified the plaintiff. The defendant also stated that the insured's claim under the doctrine of subrogation is time barred since more than six (6) years have elapsed since the said cause of action arose.

16. The Court of Appeal in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, outlined the principles to be considered in amendment of pleadings 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* - 12th 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.”

17. As was held in the above decision, amendments to pleadings should not introduce new or inconsistent causes of action or issues, they should be made timeously, they should not affect any vested interest or accrued legal right, and they should not prejudice or cause injustice to the other party.
18. In this case, it is not disputed that the plaintiff's suit vide the original plaint dated 27th September, 2013, was for alleged negligence and breach of contract. On perusal of the said plaint, it is evident that the plaintiff filed the said suit on its own behalf seeking compensation for loss and damages suffered as a



result of negligence and breach of contract on the defendant's part. The plaintiff however amended the plaint on 23rd October, 2023 introducing AIG Kenya Insurance Company Limited under the doctrine of subrogation as the owner of the suit, after the said insurance company compensated the plaintiff as its insured, for the loss suffered.

19. From the facts stated in the preceding paragraph, I hold that the amendments in the plaint do not introduce a new cause of action. Instead, they introduce the doctrine of subrogation which allows an insurer to pursue a claim on behalf of its insured, in the name of the insured, upon the insurer compensating the insured for the loss suffered.
20. AIG Kenya Insurance Company Limited however compensated the plaintiff on 6th January, 2011 for the loss suffered, therefore time within which it could pursue a claim against the defendant on behalf of the plaintiff under the doctrine of subrogation started running on 6th January, 2011. The defendant has relied on Section 4(1) of the *Limitation of Actions Act* in support of the application herein. The said provisions state that –
 - “The following actions may not be brought after the end of six years from the date on which the cause of action accrued -
 - a. actions founded on contract;
 - b. actions to enforce a recognizance;
 - c. actions to enforce an award;
 - d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”
21. Bearing in mind the above provisions, and that the claim under the doctrine of subrogation would be based on contract, AIG Kenya Insurance Company Limited ought to have pursued its claim against the defendant on behalf of the plaintiff under the doctrine of subrogation on or before 5th January, 2017. This means that as at 6th January, 2017, the insured's claim (AIG Kenya Insurance Company Limited) against the defendant was time barred.
22. In the case of *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago (supra)* the Court of Appeal held as follows-
 - “The cause of action arose in 1984, more than 11 years ago...In my judgment if I were to allow at this late stage the proposed amendments, the defendant would be deprived of its undoubted right to plead limitation.”
23. Bound by the above decision, this Court finds that if this suit is allowed to proceed on the amended plaint dated 23rd October, 2023, the defendant will be deprived of its undoubted right to plead limitation.
24. In the circumstances, I am persuaded that the instant application is merited. As a result, I make the following orders –
 - i. The plaintiff's plaint amended on 23rd October, 2023 and filed on 26th October, 2023 is hereby struck out.



ii. Costs are hereby awarded to the defendant

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mrs Hani for the defendant/applicant

Mr. Andiwo for the plaintiff/respondents

Ms B. Wokabi – Court Assistant.

