



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.E126 OF 2018

KK LODGIT LIMITED.....PLAINTIFF

-VERSUS-

GEMINIA INSURANCE COMPANY LTD.....1ST DEFENDANT

AFRO-ASIAN INSURANCE SERVICES.....2ND DEFENDANT

RULING

1. Before me is the plaintiff's Notice of Motion dated 26/11/2020. It is brought under **Order 8 Rules 3, 5 (1) and 7 and Order 51 Rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act.**

2. In the Motion, the plaintiff has sought leave to amend its plaint dated 18/9/2018 as per the draft amended plaint annexed to the Motion.

3. The grounds for the application are set out in the body of the Motion and in the supporting affidavit of **Philip Nyachoti** sworn on 26/11/2020. The grounds are that; the plaintiff need to amend the plaint in order to supply the correct particulars of the Policy Reference Number of the Insurance Policy that is the subject matter of this suit; that the proposed amendment will enable the plaintiff to fully plead its claim against the defendants in respect of the subject Insurance Policy; that the proposed amendment will bring out the real matters in controversy in this suit for determination.

4. The plaintiff contended that the late amendment was necessitated by the 1st defendant's late amendment to its defence. That no prejudice would be suffered by the 1st defendant if the amendment is granted as the proposed amendments arise out of the same facts in respect of which relief is claimed by the plaintiff.

5. The 1st defendant opposed the application vide grounds of opposition dated 8/12/2020. It was contended that while the plaintiff claimed that it intends to provide the proper particulars of the Policy Reference Number with respect to the subject Policy Contract, it had failed to produce the Policy Contract bearing the reference number M/33/1330814/1 and Unique Market Reference Number B 1160X 04911DK 2013.

6. That if the amendment is allowed, it would only serve to create further confusion as to the correct Policy Contract which is a highly contested issue in this suit and that it would be in the interests of justice that the application is dismissed.

7. The other defendants did not oppose the application.

8. The Court has considered the depositions and submissions on record. The issue for determination is whether leave to amend should be granted.

9. **Section 100 of the Civil Procedure Act** provides: -

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

10. In **St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] Eklr**, it was held: -

“The law as regards the grant of leave to amend is well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs. (See Eastern Bakery v Castelino (1958) EA 461). The main principle is that an amendment should not be allowed if it causes injustice to the other side (see “Chitaley, P.BB”). On the same subject, in the case of Abdul Karim Khan v Mohamed Roshan (1965) EA.289 (C.A), the court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and entirely alters the nature of the defence or plaint.”

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. From the foregoing, it is clear that courts will readily grant leave to amend pleadings in order to determine the real issue(s) in dispute. The only caveat is that a proposed amendment should not cause prejudice or an injustice to the opposing party. Such prejudice or injustice must be one that cannot be compensated by an award of costs. Further, the Court will not permit an amendment that completely changes the nature of a party’s case.

13. The amendment sought by the plaintiff is to change to Insurance Policy Reference number cited at paragraph 9 of the plaint. The defendant adamantly opposes this amendment on the ground that the plaintiff has not produced the Policy Contract bearing the reference number M/33/1330814/1 that it seeks to introduce.

14. The introduction of the correct reference number does not change the plaintiff’s case. To the contrary, it will clarify as to the specific policy number that is in question in this dispute. The court does not see any injustice or prejudice that the 1st defendant will suffer as a result of the amendment which cannot be compensated by an award of costs. It will only be in the interest of justice that the parties are allowed to prepare their pleadings as accurately as possible so as to set out their entire cases before trial.

15. Additionally, the grounds raised by the 1st defendant can properly be agitated at the trial of the suit. The 1st defendant will have the opportunity to further amend its defence, if it so wishes.

16. The upshot of the foregoing is that the plaintiff’s application dated 26/11/2020 is allowed in terms of prayer Numbers 2 and 3. Costs of the Motion to abide the outcome of the suit. The defendants are granted leave to amend their respective defences, if any, within 14 days of the date of this ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JUNE, 2021

A. MABEYA, FCI Arb

JUDGE