



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 111 OF 2018

**PETER ODIWUOR NGOGE T/A O.P. NGOGE &
ASSOCIATE ADVOCATES.....PETITIONER/APPLICANT**

VERSUS

**THE STATUTORY MANAGER OF
UNITED INSURANCE CO. LTD.....RESPONDENT**

AND

INSURANCE REGULATORY AUTHORITY.....INTERESTED PARTY

RULING

1. By way of a notice of motion application dated 16th March 2020, the Petitioner, Peter Odiwuor Ngoge T/A O. P. Ngoge & Associates Advocates, seek to amend the petition dated 23rd March, 2018.

2. The application is based on the grounds on its face and the Applicant's affidavit sworn on 16th March, 2020. In brief, the Applicant's case is that the amendment is intended to clarify the real issues in dispute between him and Respondent, the Statutory Manager of United Insurance Co. Ltd. Further, that the Respondent and Interested Party, Insurance Regulatory Authority, will not suffer any prejudice if he is permitted to amend his petition.

3. The Respondent opposed the application through grounds of opposition dated 21st September, 2020 as follows:

- a) That the amended petition seeks to introduce a new claim thus prompting a new cause of action different from the current one;*
- b) That the Petitioner was aware of the said Section of the law prior to the institution of this suit; that he now claims to introduce in the amended Petition in order to bring a claim against the Interested Party;*
- c) That allowing the said amendment as per the application 16th March 2020 would be aiding a negligent pleader to defeat an accrued defence;*
- d) That the Plaintiff's instant application and grounds thereof is an afterthought, concocted and manufactured with a sole intention of frustrating and obstructing the course of justice;*
- e) The Petitioner/Applicant's Notice of Motion Application is devoid of any merit;*
- f) The Petitioner/Applicant's Notice of Motion is not well taken, it is misconceived, untenable, frivolous, vexatious and an abuse of the court process.*

4. The Interested Party opposed the application through grounds of opposition dated 26th January, 2021 as follows:

a) That the Amended Petition is fatally defective as it seeks to introduce a completely new cause of action against the Interested Party who is clearly not a necessary party to the suit.

b) That the amendments are immaterial and not necessary to determine the real questions in controversy between the Petitioner and the Respondent.

c) That the Application is incompetent and a blatant abuse of the court's processes and therefore ought to be dismissed.

5. The Applicant filed submissions dated 28th October, 2020 which echoed the position taken in his pleadings. The Applicant states that by virtue of Article 22(1) of Constitution he has an automatic right to amend the petition. He contends that his constitutional rights and fundamental freedoms have been violated by the Respondent and the Interested Party as a result of the issuance of fraudulent post-dated cheques by the Respondent.

6. The Applicant additionally submit that the amended petition seeks to clarify the real issues in dispute between him and the Interested Party and that this has been done with a view to getting a clear response from the Interested Party who has been evading the proceedings. It is the Applicant's position that the proposed amendment does not introduce new causes of action not connected to the post-dated cheques. Further, that the Respondent and the Interested Party have not specifically identified the new causes of action that have been introduced. It is thus the Applicant's case that the Respondent and Interested Party will not be prejudiced considering that they have a right to respond to the amended petition.

7. Through submissions dated 15th January, 2021 the Respondent contend that a perusal of the draft amended petition reveals that it seeks to make the Interested Party the 2nd Respondent. Further, that the amendment seeks to introduce provisions aimed at making the Respondent and the Interested Party jointly and severally liable. It is therefore the Respondent's case that the amendment introduces a new party and new claim. According to the Respondent, the facts the Applicant relies on in support of his application were within his knowledge at the time of the institution of this suit.

8. The Respondent argues that the right to amend pleadings is not absolute but is available at the discretion of the court depending on the circumstances of each case. The argument is supported by the decisions in the cases of **Kajiado Multi-Transporters Sacco Limited v Governor, Kajiado County & 2 others [2016] eKLR** and **Peter Letotin Lemoosa v Raeli Chepngetich Langat & 5 others [2017] eKLR**.

9. The Respondent further submits that a court's unfettered discretion to allow amendment of pleadings can only be exercised in line with the principles set out by the Court of Appeal in **Central Kenya Ltd v Trust Bank & 4 others, CA No. 222 of 1998**. The Respondent asserts that the Applicant has delayed in seeking the amendment and that the application is made in bad faith. The Respondent points out that the parties filed submissions on the petition in 2018 and the Interested Party had expressly stated that it was not interested in participating in these proceedings. Reliance is placed on the decision in **John Mulwa Kang'aatu v Pan African Insurance Co. LTD [2015] eKLR** for the submission that an unexplained delay in seeking an amendment of pleadings should not be entertained by the court.

10. The Interested Party filed submissions dated 26th January, 2021 and submit that although Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 allows parties to amend their pleadings, this rule is not absolute. It is urged that an application for leave to amend a petition should not be frivolous or prejudicial to the opposing party. Further, that a party can only be allowed to make such amendments as are necessary for determining the real issues in controversy. Reliance is placed on the Court of Appeal decision in **Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago [1995] eKLR** as stipulating the factors to be considered before an application for amendment of pleadings can be allowed.

11. The Interested Party further submits that its functions are clearly spelt out in Section 3A(1) of the Insurance Act and those function does not include the management or interference with the affairs of an insurer placed under statutory management. It is the Interested Party's contention that the appointed statutory manager is the person mandated to ensure distribution of the company's assets to all known creditors of the company and it is therefore a stranger to the suit. The Interested Party placed reliance on the decision in **Merry Beach Limited v Barclays Bank of Kenya Limited & another [2018] eKLR** and urged the Court to find that the proposed amendment is frivolous.

12. The only question to be answered in this ruling is whether the Applicant has convinced the Court that he is deserving of leave to amend his petition. The law guiding amendment of constitutional petitions is found in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter the Mutunga Rules). Rule 18 provides that:

A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.

13. The cited rule is clear that an amendment can only occur with the leave of the court. In order for the court to exercise its discretion and allow an amendment it must examine the factors of each case to ascertain whether the general principles governing the amendment of pleadings have been met. The Court discussed the question of amendment of pleadings and factors to be considered in the case of **Institute For Social Accountability & another v Parliament of Kenya & 3 others [2014] eKLR** and held that:

"17. The issue of amendment of pleadings is not novel and has been the subject of numerous court decisions, the common denominator being that as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally Eastern Bakery v Castelino (1958) EA 461; Ochieng and Others v First National Bank Of Chicago CA Civil Appeal Number 149 of 1991, Kenyatta National Hospital v Kenya Commercial Bank Ltd & Another [2003] 2 EA.

18. 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.

19. Rule 18 of the Rules clearly stipulates that the court may permit an amendment at any stage of the 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.”

14. The Court of Appeal outlined the applicable principles for 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 - 12th Edition, in the case of Joseph Ochieng & 2 others vs. 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.”

The learned judge in rejecting the application for amendment was no doubt exercising a judicial discretion which must be exercised rationally.”

15. The Applicant’s case is that the amendment is intended to clarify the real issues in dispute. He states that he wants to hold the Interested Party complicit in the alleged violation of his rights by the Respondent and that this is not a new cause of action. On the other hand, the Respondent argues that the Applicant seeks to introduce a new claim and was aware of the law he seeks to rely on at the time of filing his petition. Further, that there was undue delay in applying for the amendment and no reasons have been advanced for the delay in seeking the amendment.

16. The legal parameters governing an application to amend pleadings as established in the cited decisions are clear. The amendment should not introduce a new or inconsistent cause of action, it should not be delayed, it should not affect any vested interest or accrued legal right, and it should not prejudice or cause injustice to the other party.

17. A reading of paragraphs 14A, 14B, 14C, 14D, 14E and 14F of the draft amended petition reveals that the core issue remains the alleged violation of the Applicant’s constitutional rights as a result of the dishonoured cheques issued to him by the Respondent. What the Applicant simply seeks to do is to create a nexus between the Respondent’s actions and the Interested Party’s statutory mandate. No new cause of action is being introduced and neither will any of the parties be prejudiced.

18. It should be appreciated that courts are required to generally exercise their discretion in favour of the party seeking an amendment unless it is demonstrated that such an amendment will cause an injustice to the other party that cannot be remedied through an award of costs. My statement finds support in the holding in the case of **Ann Muthoni Karanu v La Nyavu Gardens Limited** [2015] eKLR that:

“[9]...The test for amendment of pleadings was perfectly put in Cobbold vs. Greenwich LBC 9th August, 1999 (unreported decision): referred to in the notes to the White Book (Civil Procedure 2003 Edn) Vol. 1. At paragraph 17.35. Peter Gibson LJ is stated to have said:

“The overriding objective (of the Civil Procedure Rules) is that the court should deal with cases justly, that includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed.”

19. Another ground upon which the Respondent opposes the amendment of the petition is that the Applicant seeks to introduce a new party. The applicable law on addition of other parties in constitutional petitions is found in Rule 5 (d)(i) & (ii) & (e) of the Mutunga Rules which provides that:

5. The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

(a) ...

(b) ...

(c) ...

(d) 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 just—

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

(e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.

20. It is clear from the cited rule that the addition of a party in a petition is allowable with objective of ensuring that all necessary parties are before the court as it seeks to answer the real questions that are necessary for purposes of bringing the issues in the controversy to a close.

21. On its part the Interested Party contended that the draft amended petition seeks to introduce a new cause of action against it and that the amendments are not material to the determination of the real questions in controversy. In making my determination, I find it necessary to reproduce paragraph 14A of the draft amended petition which states as follows:

“14A) WITHOUT PREJUDICE TO THE ABOVE, Your Humble Petitioner Aver that it is the statutory obligation of the Insurance Regulatory Authority, under section 3A of the Insurance Act, Chapter 487 of the Laws of Kenya, to ensure that no bounced cheques are issued by Insurers to their victims, in settlement of valid Insurance Claims implying that the 2nd respondent herein was statutory bound to ensure that the said bounced post-dated cheques, which were fraudulently issued to the petitioner herein by the said United Insurance Co. Ltd (now in moratorium) are fully paid to the Petitioner herein and settled by the Statutory Managers of United Insurance Co. Ltd as a matter of priority in satisfaction of the said valid Insurance claim which was fully settled by consent of the parties as aforesaid.”

22. The Interested Party submits that it is a stranger to these proceedings. The reproduced section of the Applicant’s draft amended petition clearly shows the case laid against the Interested Party by the Applicant. Whether the Interested Party has the responsibility attributed to it by the Applicant is an issue to be determined at the hearing of the petition. It would be prejudicial to the positions of the parties were I to make comments on the role of the Interested Party at this stage. The only thing I can state at this point is that the inclusion of the Interested Party as a respondent is necessary as it will enable the Court determine once and for all the issues surrounding the dishonoured cheques. This position is in line with the principle that courts will normally allow parties to make such amendments as may be necessary to avoid a multiplicity of suits.

23. In the case of **Rogers Mogaka Mogusu v George Onyango Oloo & 2 others [2014] eKLR** it was held that:

“14. Applying the above principles here, I am of the view that the ends of justice will be achieved and the principles and values enunciated in Chapter Six of the Constitution will better be served if the amendment is allowed and the issues in contest dealt with wholly. At this point, this Court is not concerned with the substantive merits of the Petitioner’s case as those are matters that will be canvassed at the hearing and I am therefore satisfied that the amendment will help the Court conclusively determine the issue before it and declining the amendment at this stage may only lead to the filing of another suit and such an approach would negate the principles of judicial authority enunciated in Article 159(2) of the Constitution that all suits should be expeditiously determined.”

24. In view of what has been stated above, it follows that the proposed amendment of the petition is merited as it seeks to enable the Court to wholly hear and determine the matters in dispute. I am also persuaded that the proposed amendments will not occasion any prejudice to the Respondent and Interested Party. The application was brought within two years from the date of the filing of the petition and I therefore find that it was filed without inordinate delay. I therefore hold that the proposed amendments are necessary in the interest of administration of justice.

25. The notice of motion application dated 16th March, 2020 is therefore allowed. The Applicant is directed to file and serve an amended petition within 7 days from the date of this ruling. Upon service the respondents will have 21 days within which to file and serve their responses to the petition. The costs for the application shall abide the outcome of the petition.

Dated and signed at Nairobi this 6th day of July, 2021.

W. Korir,

Judge of the High Court

Dated, countersigned and delivered virtually at Nairobi this 8th day of July, 2021.

J. A. Makau,

Judge of the High Court