



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 309 OF 2011

WK.....1ST PLAINTIFF

MWK.....2ND PLAINTIFF

(Suing as the Administrators of the Estate of

Dr WK) WWK (A minor suing through Hon WK,

Her Guardian and Next Friend.....3RD PLAINTIFF

VERSUS

BRITISH AIRWAYS TRAVEL INSURANCE.....1ST DEFENDANT

FINANIAL INSURANCE CO. LTD.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 18th January 2018 was filed on 22nd January 2018 pursuant to the provisions of Order 8, Rule 3, (1), (2) & (3); Rule 5 (1), Article 159 (2) (d) of the Constitution, Section 3A Civil Procedure Act and all other enabling provisions of the law). It sought the following orders:-

1. THAT the court be pleased to allow the Plaintiffs to amend their plaint dated 7th October 2010 and filed in court on 13th October 2010 as proposed in the annexed draft.

2. THAT the costs of this application be provided for.

2. In her Ruling of 16th January 2015, Ogo J struck out the Plaintiffs' suit against the 2nd Defendant herein. The 1st Defendant did not file any Written Submissions in this matter. Judgment was entered against it on 24th June 2011. The Plaintiffs' Written Submissions were dated 9th July 2018 and filed on 10th July 2018.

3. In their application which was supported by the affidavit of 1st Plaintiff, the Plaintiffs had sought to amend their Plaint dated 7th October 2010 and filed on 13th October 2010 to delete the 1st Defendant's name "British Airways Travel Shops Ltd" and substitute the same with the name "British Airways Travel Shops Ltd A Subsidiary Company of British Airways Group". It was also their contention that the amendment would include important information that was contained in the Policy document which would clarify the amounts they were claiming from the 1st Defendant who sold the Policy and hence enhance the understanding of their claim.

4. They averred that it had become necessary for them to amend their Plaint because the amounts they were claiming were contained in different documents and were not clearly shown in their Plaint.

5. They referred this court to the case of **African Airlines International vs The Eastern & Southern African Trade Development Banking (PTA) [2006] eKLR** where Azangalala J (as he then was) allowed an application for amendment of plaint.

6. Order 8 Rule 3 (1), (3) and (5) of the Civil Procedure Rules provides 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.

3. An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

5. An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment..."

7. It is clear from the aforesaid provision that:-

1. A party may amend his pleadings at any stage of the proceedings;

2. The application for amendment may be allowed on such terms as the court would deem fit to impose;

3. The application can be allowed if it is one where an opposing party can be compensated by way of costs.

4. An application for amendment may be allowed even if the effect is to substitute a new party.

5. The application can be allowed irrespective of whether its effect will be to add or substitute the cause of action if the cause of action arises substantially from the same facts as a cause of action in respect of which the relief has already been claimed in the filed suit.

6. The mistake sought to be corrected must be genuine and not misleading or to cause reasonable doubt as to the person intended to be sued.

8. It is trite law that any amendment should ordinarily and/or freely be allowed if it is necessary for the determination of the real matter in dispute and if the opposing party can be compensated by way of costs or on such terms as the court would deem fit to impose.

9. This court was not required to interrogate whether or not such a party existed or not. Its duty rested with allowing the Plaintiffs leave to enjoin a party from whom they believed they could obtain the relief they were seeking.

10. In the instant case, the Plaintiffs ably demonstrated that the amendments of the description of the 1st Defendant and the clarification of their claim was necessary for the determination of the real question in controversy between the parties herein. Notably, the pleadings had been served upon an entity the Plaintiffs had contended was not a subsidiary of the British Airways Group.

11. As there was no appearance or defence by the 1st Defendant, this court took the firm view that it would not suffer any prejudice if the amendment sought by the Plaintiffs herein was allowed. It was also not necessary to award the 1st Defendant any costs as clearly it had not suffered any prejudice.

DISPOSITION

12. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 21st May 2018 was merited and the same is hereby allowed on following terms:-

1. THAT the Plaintiffs do file and serve their Amended Plaint upon the Defendant within the next thirty (30) days from the date of this Ruling i.e by 30th January 2019.

2. THAT all subsequent pleadings will be filed as provided in Order 7 of the Civil Procedure Rules, 2010.

3. THAT there will be no order as to costs.

13. It is so ordered.

DATED and DELIVERED at NAIROBI this 11th day of December 2018

J. KAMAU

JUDGE