



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 362 OF 2009

THE CO-OPERATIVE INSURANCE
COMPANY OF KENYA LIMITED.....PLAINTIFF

VERSUS

PAEM AGENCIES COMPANY LIMITED.....DEFENDANT

RULING

1. The Plaintiff's Notice of Motion application was dated and filed on 10th July 2013. The application was brought pursuant to the provisions of Order 8 Rules 3, 5 and 7 of the Civil Procedure Rules and Sections 1A and 1B of the Civil Procedure Act. It sought the following prayers:-

1. **THAT the Plaintiff be granted leave to amend its Plaintiff in terms of the Amended Plaintiff.**
2. **THAT the costs of this application be in the course.**

PLAINTIFF'S CASE

2. The Plaintiff's application was premised on the grounds that the proposed amendments would bring out the real issues in controversy and aid the court in arriving at a just determination based on material facts and that the Defendant would not be prejudiced in any way by the proposed amendments.

3. The application was supported by the affidavit of Lucy Machel that was sworn on 10th July 2013. She reiterated the grounds on the face of the application and her Further Affidavit of Lucy Machel that was sworn and filed on 26th June 2014.

4. The Plaintiff sought to amend its name which had since changed to CIC and to amend paragraph 4A to read as follows:-

“The said policy did not cover passengers and it did not have a Passenger Legal Liability (PPL) Extension.”

5. In its written submissions dated and filed on 2nd July 2014, the Plaintiff submitted that the court had the discretion and power to allow amendment of pleadings at any time before judgment. It argued

that the proposed amendments were intended to deal with the issue of whether or not the existing policy covered third parties. It averred that the proposed amendments did not raise any new cause of action and would not prejudice the Defendant.

6. To buttress its case, the Plaintiff relied on the cases of **Eastern Bakery v Castelino (1968) E.A 461**, **Suleiman v Karasha (1989) KLR** and **Andrew Ouko v Kenya Commercial Bank Limited & 3 Others (2014) eKLR**. The common thread in these cases was that the court has the discretion to allow for amendment before judgment, and that the same should not be prejudicial or cause an injustice to either party to the matter.

DEFENDANT'S CASE

7. In opposing the application, on 19th June 2014, the Defendant filed its Replying Affidavit sworn on its behalf by Emily M Mung'ala on 18th June 2014. It contended that the suit was filed over four (4) years ago on 22nd May 2009 and that the Plaintiff had therefore had the opportunity, in its Reply to Defence and Defence to Counterclaim filed on 20th July 2009, to raise the allegation that it now wished to introduce in the proposed Amended Plaint. It averred that the application was intended to frustrate the expeditious disposal of the instant suit and that if the same was allowed, it would gravely prejudice it.

8. The Defendant filed its submissions dated 14th July 2014. It submitted that even though the power of the court to allow for amendments was discretionary and wide, the discretion had to be judiciously exercised. It argued that there was delay by the Plaintiff in making the application and that the propriety of the application was that the provisions of Order 8 Rule 7 of the Civil Procedure Rules should be adhered to. It referred the court to the case of **Peter G N Ng'ang'a & Another v Kenya Finance Bank (In Liquidation, Liquidating Agent the Deposit Protection Fund) & 3 Others (2014) eKLR**.

9. It further averred that Plaintiff was a negligent pleader whose intent was to introduce amendments that were all along within its knowledge. It placed reliance on the case of **James Ochieng Oduol (sic) T/A Ochieng Oduol & Co Advocates v Richard Kuloba (2008) eKLR** in that regard.

10. It therefore prayed that the Plaintiff's application be dismissed with costs to it.

LEGAL ANALYSIS

11. The purpose of amending pleadings as provided under Order 8 of the Civil Procedure Rules, 2010 is to allow parties to include all issues of contention between them to enable the court determine the real issues which are in controversy or contention.

12. Although the court had wide and unfettered discretion, this power has to be exercised judiciously. Amendments are also to be allowed even if the affect would be to introduce a new cause of action.

13. However, before the court could consider the merits of the Plaintiff's application, it deemed it fit to consider the provisions of Order 8 Rule 7 (2) of the Civil Procedure Rules, 2010 which provide as follows:-

“All amendments shall be shown by striking out in red ink all deleted words (emphasis court), but in such a manner as to leave them legible, and by underlining in red ink all added words.”

14. Rules of procedure are the backbone of justice, as per the dicta of Maraga, J (as he then was) in **Shashikant C Patel v Oriental Commercial Bank (2005) eKLR**. This holding was reiterated in the case of **HCCC No 156 of 2008 New Look Estate Ltd & Another v Khira Omar Maalim & Another (2013) eKLR** where Havelock J stated as follows:-

“We should never lose sight of the fact that the rules of procedure, though they may be followed, are the handmaids of justice. They should not be given a pedantic interpretation which at the end of the day denies parties justice.”

15. The pleading attached to the Plaintiff’s application and marked as “LM 2” was headed **“Plaint.”** The procedure under Order 8 Rule 7 (2) of the Civil Procedure Rules, 2010 requires a plaintiff to strike out in red all deleted words when amending its plaint. It would follow therefore that there would be two (2) Plaints on record if the court was to allow the application herein.

16. The courts have moved from the era in which litigants would file pleadings without regard to procedure and term the same as mere technicalities-**See Cole v Ravenshear (1907) CA** and **Shashikant C Patel v Oriental Commercial Bank** (Supra).

17. Any pleadings and or documents relied upon by the parties should be self-explanatory. The court finds that the issue of the underlining of the amended parts in red and the heading of the draft pleading is not a procedural technicality that could be saved by the provisions of Article 159(2) (d) of the Constitution of Kenya, 2010. Rather it is a fundamental error that goes into the root of the Plaintiff’s application as it sought that the Amended Plaint be filed and served in terms of the draft Amended Plaint.

18. The question that arises is how the Defendant will refer to its response bearing in mind that it had already filed a Statement of Defence. This court made similar observations in the case of **HCCC No 1135 of 2001 Peter G.N. Ng’ang’a & Another vs Kenya Finance Bank Limited (In liquidation, Liquidating Agent)(2014) eKLR** when it dismissed the applicant’s application for the reason that the proposed pleading to be amended had not been headed **“ Amended Plaint.”**

19. The court does not look kindly at parties who do not adhere and follow the laid down procedures and rules. For the reason that the Plaintiff failed to comply with the provisions of Order 8 Rule 7 (2) of the Civil Procedure Rules, 2010, its application would not succeed.

DISPOSITION

20. In the circumstances foregoing, the upshot of this court’s ruling is that the Plaintiff’s Notice of Motion application dated and filed on 10th July 2013 was without merit and the same is hereby dismissed with costs to the Defendant.

21. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of October 2014

J. KAMAU

JUDGE