

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CIVIL SUIT NUMBER E030 OF 2023

CHARLES KINYUA KARANJA 1ST
PLAINTIFF

KENNETH KARANJA KINYUA 2ND
PLAINTIFF

VERSUS

ICEA LION GENERAL INSURANCE 1ST
DEFENDANT

NCBA INSURANCE AGENCY LIMITED 2ND
DEFENDANT

JECINTA MUMBUA MUTUKU 1ST
INTERESTED PARTY

OTIENO PETER KAYI 2ND
INTERESTED PARTY

RULING

(On the application dated 26th January 2025)

The plaintiff in the above Notice of Motion application brought under the provisions of Section 1A, 1B & 3A of the Civil Procedure Act, Order 8 and 51 of the Civil procedure Rules, sought for orders that; this court be pleased to grant leave to the plaintiffs to amend the plaint dated 30th November 2023 as set out in the draft plaint annexed and that the amended plaint be deemed as filed upon payment of the requisite court fees.

The application is based on the grounds on the face of the application and further supported by the affidavit of CHARLES KINYUA KARANJA dated 26th January 2025.

The plaintiffs aver that the interested parties herein filed a suit against them in Kajiado CMCC No E281 of 2022 arising from a road traffic accident involving the plaintiffs motor vehicle registration number KCX 060X and obtained judgement in the sum of Ksh. 6,698,070 plus cost and interest. The plaintiff stated that they had taken an insurance policy cover from the 1st defendant through the 2nd defendant and were issued with a cover of up to Ksh.50,000,000 in case of third-party person (death).

The 1st plaintiff stated that during the taking of the said policy, he was issued with an insurance quotation by the 2nd defendant of the amount of Ksh. 50,000,000 and thereafter paid a one-off annual premium of

Ksh.162,954 and further asked to pay a top up of Ksh.16,795 making a total annual premium of Ksh.179,749.

The plaintiff contend that he was never issued with a copy of the policy document until the accident occurred despite several requests.

The plaintiff avers that the 1st defendant paid the interested parties Ksh.3,000,000 and asked the plaintiff to settle the balance plus cost and interest as its liability was capped at Ksh.3,000,000.

It is contended, that the application for amendments of the claim is necessary and just especially in view of the 2nd defendant application to be removed from the suit which if allowed would occasion irreparable damage against the plaintiff should the court find it liable for acting without the 1st defendants' instructions while issuing the plaintiff with a policy cover of Ksh.50,000,000 in case of third-party person (death). In addition, the applicant contends that amendment shall not in any way prejudice the defendants but will instead enable the court to effectually and completely adjudicate and settle all the questions in dispute involved in the suit.

The application is opposed by the 2nd defendant vide replying affidavit **of Jackson Kingori** sworn on 7th February 2025. It is stated that the application should be dismissed for the reason that the same was filed late without justifiable explanation and in reaction to the 2nd defendant application dated 31st may 2024 seeking to be struck out of these proceedings. That to accede to the application for amendment is to permit the plaintiff to prosecute their case by way of adjusting their case as the matter proceeds which should not be countenance by this court.

The 2nd defendant contend that the amendment proposed by the plaintiffs are the exact same reliefs sought against the 1st defendant whereas it is common grounds that the 2nd defendant is an agent of a disclosed principal and allowing the application against an agent where there is a disclosed principal is contrary to well established principles of agency law whereas there are no factors vitiating the liability of the principal in this matter. The 2nd defendant further aver that there is no, and there never has been, any contractual relationship between the 2nd defendant and the plaintiffs as the proposed amendments to the plaintiff claim seeks to enforce the contract between the plaintiff and the 1st defendant against the 2nd defendant which is not privity to the said contract. That it is trite law that a contract cannot confer or impose obligations on any person other than the parties to the contract and cannot be enforced either by or against a third party.

The 2nd defendant therefore prays that the application should be dismissed, with cost.

Plaintiff/applicants submissions

The plaintiffs submit that this court should permit the proposed amendment as it is enjoined to freely allow amendment in order to determine the real issue in dispute in so far as the same does not occasion prejudice or injustice to the opposing party. The case of **K.K Lodgit Limited vs Geminia Insurance Company Ltd & another (2021) eklr** is cited. The plaintiff submits that the dispute, the subject of this case is the extend of liability covered or insured in case of third-party death or injury and given the role played by the 2nd defendant, it is submitted that the 2nd defendant is a necessary party in the present suit in spite of being an agent of a disclosed principal as it will assist the court in fairly and conclusively determining the issue of liability.

As to whether an agent should be impleaded where the principal is disclosed, the plaintiff referred this court to the case of **Mwanyalo Fulgence Lenjo & another vs Cfc Stanbic Bank Ltd (2016) klr** and **Mathenge & another vs Belle Holdings Limited & another (2023) klr**.

2nd Defendants submissions

The 2nd defendant submits that the plaintiffs' application seeks to amend the plaint to introduce reliefs against the 2nd defendant in addition to the 1st defendant and nothing else. On the principles to be considered when dealing with the application for amendment of pleadings counsel relied on the case of *Silvester K. Kaitany vs Nyayo Tea Zone Development Corporation & another; National Land Commission & another [2021] klr* and *Ochieng & others vs First National Bank of Chicago, Civil Appeal No 147 of 1991*. The principles under which the court may grant leave to amend pleadings are;

- a. The power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b. The amendments must 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 cost can be compensate the other side.
- e. The plaintiff will not be allowed to reframe his case or his claim if by amendment of the plaint the defendant would be deprived of his right to rely on the limitation Act subject however to the powers of the court to still allow an amendment notwithstanding the expiry of the current period of limitation.

The 2nd defendant further referred to the case of *Central Bank Ltd vs Trust Bank Ltd & 5 others [2000] eklr* where the court stated that amendment should be allowed where it is;

- i. Necessary for determining the real question in controversy

- ii. To avoid multiplicity of suit provided there has been no undue delay
- iii. Only where no new or inconsistent cause of action is introduced i.e if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action
- iv. That no vested interested or accrued legal rights is affected
- v. So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in cost.

It is submitted that the plaintiff application is for dismissal as there has been undue, unjustified and inordinate delay of 14 months in filing of filing the said application which in the defendant's view was an afterthought and prompted by its application to be removed from the proceedings for being wrongly sued. The defendant reiterates that an agent cannot be sued or held liable where there is a disclosed principal. The case of **Set and Sit Contractors Limited vs Odhiambo t/a Loi Enterprises [2023] KEHC 24731**, where the court held that;

“legally, the appellant which is a company, is a legal person and can act through its agents, and in this case the said George Momanyi, who is a director of the said company, was such an agent. An agent of a disclosed principal cannot be sued...” in Antony Francis Wareheim vs Kenya Post Office Savings Bank, the court held; “it was also prima facie imperative that the court should have dismissed the respondent claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued.”

The 2nd defendant contend that as things stand, the plaintiff claim is on the basis of contract law, which cause of action is inapplicable to the 2nd defendant for lack of privity of contract. Further the reliefs sought by the plaintiff in the plaint reveal that the cause of action is based on an insurance policy issued by the 1st defendant to the 1st plaintiff and to determine the amounts the 1st defendant is liable to pay pursuant to the said policy do not require the presence of the 2nd defendant in the proceedings. That the 2nd defendant would be highly prejudiced by an amendment that would allow the plaintiffs to pursue claim against it contrary to the well-established principles of agency law.

The 2nd defendant therefore prays that the application be dismissed with the attendant costs.

Analysis and Determination.

I have considered the submissions by counsel for the plaintiff and the 2nd defendant on the instant application.

The Law applicable for amendment of pleadings are governed by section 100 of the Civil Procedure Act, Order 8 of the Civil Procedure Rules and the decision of the courts made variously on the subject. 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 proceedings 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 proceedings”

Order 8 rule 5 provide that

“an amendment may be allowed under sub- rule 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”.

Courts have held that 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.

The general rule 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 where the other party can be compensated by costs. In ***Eastern Bakery v Castelino (1958) EA 461*** where the court stated;

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.

In the present case, the plaintiff seeks leave to amend the plaint dated 30th November 2023 to include reliefs as against the 2nd defendant. In paragraph 15 of the plaint, the plaintiff avers that the **defendants** (both the 1st and the 2nd) not only deliberately misrepresented the insurance policy but also breached the terms of the contract. The plaintiff proceeded to particularize misrepresentation and breach of the contract in details.

It is clear that although the law permits amendments of pleadings to add and even introduce a new cause of action as long as the same does not prejudice the other party, the plaintiff in this case only seeks to include the reliefs sought against the 2nd defendant and not introduce a new cause of action. The 2nd defendant is already a party to the proceedings having filed a defence to plaintiff claim and denied allegations of misrepresentation and a breach of contract, stating at paragraph 5 of its defence that;

“ ... in further response thereto, the 2nd defendant avers that the 1st defendant declined the plaintiffs proposal for the provisions of insurance cover for inter alia third- party persons death/injury risk with liability for the insurance capped at the sum of Ksh 50, 000,000 for lawful reasons to be elaborated...”

It is therefore important to establish by way of evidence whether a proposal was made by the plaintiff and accepted by the 1st defendant for which an additional top up was paid. It is also important to establish the extent of the 2nd defendant involvement in the insurance contract between the plaintiff and the 1st defendant.

It is true, as a matter of general principle of law that where a principal is disclosed, the agent should not be sued. However, it is not the case where the agent, as is in this matter is accused of alleged wrong doing leading to a breach of contract. The issues raised by the plaintiff/applicant touches on all the defendants and need to be interrogated in a full hearing with the full participation of the 2nd defendant.

Although section 5 (iv) of the Insurance (Motor Vehicle Third Party Risks) Act limits liability cover arising out of accidents claims to 3,000,000, it does not prohibit the insured and the insurer from negotiating a higher limit subject to payment of premiums. Whether there was such a negotiation as alleged by the plaintiff and denied by the defendants, is a matter that can only be determined during the hearing.

The amendment sought does not change the character of the pleadings nor introduce a new cause of action against the 2nd defendant but seeks to include the reliefs borne out of the pleadings. Indeed, there are no allegations of bad faith against the plaintiff/applicant in seeking leave to amend the plaint which in my view is necessary to conclusively determine the issue before the court.

Consequently, the application dated 26th January 2025 is allowed. The plaintiff/applicant is granted leave to amend the plaint dated 30th November 2023.

That the draft amended plaint be and is hereby deemed as duly filed upon payment of the requisite court fees.

The 2nd defendant is granted leave to file an amended defence if need be within 14 days of today's date.

That costs shall be in the cause.

**DATED AND DELIVERED AT KAJIADO THIS 18TH DAY OF
NOVEMBER 2025**

JOHN T LOLWATAN