



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 497 OF 2012

PRIMIX ENTERPRISES LIMITED.....PLAINTIFF

=VERSUS=

FIDEI HOLDING LIMITED.....1ST DEFENDANT

KIKI INVESTMENT LIMITED.....2ND DEFENDANT

GEORGE N KARIUKI.....3RD DEFENDANT

POLICY HOLDERS COMPENSATION FUND(STATUTORY MANAGER,

UNITED INSURANCE.....4TH DEFENDANT

RULING

1. On 13/2/2019, the plaintiff brought a notice of motion dated 12/2/2019 seeking leave of the court to amend its plaint. The application was supported by an affidavit sworn on 12/2/2019 by Primerose Mwelu Nyamu, a director of the plaintiff company. The proposed amendments seek to change the date of the alleged sale agreement between the 1st defendant and the plaintiff to read “**2nd February 2015**” instead of “**year 2009**”. (see Paragraph 6 of the Draft Further Amended Plaint). The 1st and 4th defendants opposed the application. The 2nd and 3rd defendants did not oppose the application.

2. The case of the plaintiff/applicant was that at the time of filing this suit, it did not have the sale agreement which it is relying on. As such, it erroneously pleaded that it purchased the suit property in the year 2009. It contended that it lost touch with Ms Sera Kivuva, the advocate who had handled the sale and therefore could not access a copy of the sale agreement.

3. The 1st and 4th defendants opposed the application through an affidavit sworn on 20/4/2019 by Christopher Onyango. He deposed that the intended change was not *bona fide* and was prompted by the applicant’s realisation that in the year 2009, United Insurance was under statutory management and no valid sale agreement could be executed without the statutory manager’s approval. They contended that the change of date was tailored to align the plaintiff’s claim within the period prior to the date when United Insurance was put under statutory management because the plaintiff had relied that in 2009 the suit properties were already vested in the statutory manager and no sale could have taken place between the plaintiff and the 1st defendant without the approval of the statutory manager. They further contended that the proposed amendments were an abuse of the process of the court. The 1st and 4th defendants further contended that if allowed, the amendments would introduce a totally different, new and inconsistent case and change the fundamental character of the suit.

4. At the plenary hearing of the application, Ms Macheru, counsel for the plaintiff/applicant, submitted that the intended amendments affected only paragraph 6 of the Amended Plaint. She added that the sale agreement was not available at the time of filing suit because the plaintiff’s advocate had been struck off the roll of advocates.

5. Mr Wafula, counsel for the 1st and 4th defendants opposed the application. He submitted that whereas the Civil Procedure Rules give the court powers to allow amendments, the powers should be exercised judiciously so as not to occasion prejudice to the other parties. He added that 2005 is the year when United Insurance was placed under statutory management. He urged the court to dismiss the application.

6. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence on the subject of amendment of pleadings. Most importantly, I have looked at the Draft Further Amended Plaint attached to the application, which the court is invited to deem duly amended.

7. Jurisdiction to grant leave to amend pleadings is contained in Order 8 rule 3 of the Civil Procedure Rules. That legal framework grants the court discretionary jurisdiction to allow amendments at any stage of the proceedings on such terms as to costs or otherwise as the court

considers just. Over the years, our courts have developed jurisprudential principles which guide the exercise of that jurisdiction. Firstly, amendments would be allowed if such amendments are necessary for determining the real questions in the suit. Secondly, amendments would be allowed to avoid a multiplicity of suits over the same cause of action or transaction. Thirdly, the plea for leave to amend ought to be brought without undue delay. Fourthly, no new or inconsistent cause of action should be allowed through amendments. Lastly, where there is no injustice to be suffered by the other party, amendments should be allowed. See **Central Kenya Limited v Trust Bank Ltd (2000)** and **Ochieng and 2 others v First National Bank of Chicago Civil Appeal No. 149 of 1991**.

8. Order 8 rule 7 sets out the mode which amendments should take. Firstly, amendments are shown by striking out in ink all deleted words in a manner that leaves them legible. Secondly, all added words are underlined in red ink. Lastly, colours other than red are to be used to reflect further amendments to the already amended pleadings.

9. I have carefully examined and considered the proposed further amendments as contained in the Draft Further Amended Plaintiff attached to the Affidavit sworn in support of the application. The applicant seeks to introduce further amendments to paragraph 6 of the Amended Plaintiff so that the words “**in the year 2009**” are struck out and the words “**on the 2nd February 2015**” (sic) are introduced. The application was vehemently opposed by the 1st and 4th defendants. The present suit was filed in 2012. It is apparent that the date of “**2nd February 2015**” which the applicant seeks to introduce through the proposed further amendments is inconsistent with the cause of action in the present suit which was filed in the year 2012. For this reason, the application for leave to amend is rejected. The notice of motion dated 12/2/2019 is accordingly dismissed. The applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF SEPTEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Macheru advocate for the plaintiff

Court Clerk - June Nafula