REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 251 OF 2018

PROF. DR. AMIN MOHAMED A.H. MOHAMED .....1ST PLAINTIFF

PROF.DR. KARIMMOHAMED A.H. MOHAMED

T/A SWS ACULASER WEIGHT LOSS INSTITUTE.....2ND PLAINTIFF

VERSUS

PBM NOMINEES LIMITED.....1ST DEFENDANT

SOMA PROPERTIES LIMITED.....2ND DEFENDANT

COPY EXPRESS LIMITED.....3RD DEFENDANT

RULING

This Ruling is in respect of the Notice of Motion dated 8th December, 2020 by the plaintiff/applicant seeking the following orders;

i) THAT this Honourable Court be pleased to grant leave to the Plaintiff to amend the Plaint dated 22nd October, 2018 as per the annexed copy of the draft amended plaint.

ii) THAT the Amended Plaint annexed hereto be treated as the Applicant's Plaint and that the same be deemed as having been duly filed and served.

iii) THAT the Plaintiff/Respondent be at liberty to file an Amended Defence if they so wish.

iv) THAT the costs of the application be costs in the cause.

Applicants' Case:

The application is premised on the grounds on the face of the application and the supporting affidavit of **PROF. DR. AMIN MOHAMED A.H MOHAMED** sworn on 8th December, 2020. The applicants aver that the proposed amendments are intended to bring before this Honourable Court the real matters in controversy as between the parties. It is the applicants' contention that the amendment sought neither seeks to introduce new evidence nor is it prejudicial to the respondents. They maintain that the proposed amendment is significant and if not allowed will occasion them substantial loss and hardship. It is deponed that the proposed amendment is necessitated by relevant information for the fair and just determination of the real issues in controversy in the present suit. The deponent further maintain that the failure by the previous advocate to include pertinent issues in the plaint dated 22nd October, 2018 should not be visited on them.

The applicants submitted that the court has broad discretion under Section 100 of the Civil Procedure Act and Order 8 rule 5 (1) of the Civil Procedure Rules to grant the orders sought since the case is still at the pre-trial stage. The applicant' referred to the case of **ANDREW OUKO VS KENYA COMMERCIAL BANK LIMITED & 3 OTHERS [2014] eKLR** where the court held that until such time that judgment is delivered, the door for amendment remains open. It is the applicants' contention that the proposed amendment seeks to include special damages suffered and the relevant liable parties thereof. It is their further argument that the inclusion of special damages was not disputed by the respondent and noting that parties are bound by their pleadings, then, this court should allow the amendment.

The applicants maintain that the proposed 4th and 5th defendants are proper and necessary parties in the proceedings to enable the court effectively and completely adjudicate and determine the issues in question without duplicity of suits. They also argue that the firm of Macharia Mwangi & Njeru Advocates has no authority to act on behalf of the proposed 4th and 5th Defendants. Reference has been made to the case of **CENTRAL BANK OF KENYA LIMITED VS. TRUST BANK LIMITED [2000] 2 E.A 365** at page 368 where the Court of Appeal opined;

It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the court will not later permit him to reopen the same subject of litigation (see O.II rule 1 of the Civil Procedure Rule) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, Beoco Ltd v. Alfa Laval Co. Ltd [1994]4 ALL ER. 464).

The applicants have further submitted that the respondents have failed to demonstrate the particular prejudice they are likely to suffer if the application is allowed. The applicants maintain that any prejudice if any, can be resolved by either a corresponding leave to amend their defence or costs. To this end they have made reference to the case of **KAMPALA COACH LIMITED VS FIRST COMMUNITY LIMITED & ANOTHER [2016] eKLR** where Karanja J. held that**;**

"In the result, it is my finding that it is only fair and just to join the proposed 2nd Plaintiff as well as the proposed 3rd and 4th Defendants to avert a situation where adverse orders affecting them would be issued without them being given an opportunity to be heard. The proposed 3rd and 4th Defendant's will not be prejudiced in any way since any defence available to them will be open to them as if the proceedings are being instituted at the time of allowing the amendment. See Atieno vs. Omoro (1985) KLR 677."

1st and 2nd Defendant's Case

The 1st and 2nd defendants filed a replying affidavit in opposition to the applicants' application sworn by **SARIT SHAH** on 3rd June, 2021. Their argument is that the proposed amendments are not necessary in the determination of the issues in controversy and will only cloud the same. It is deponed on behalf of the 1st and 2nd defendants that the proposed amendments introduces a new cause of action against the 4th and 5th defendants thus changing the present cause of action. They have made reference to the case of **BEATRICE GIKUNDA VS CFC LIFE ASSURANCE LIMITED (2020) eKLR**. The 1st and 2nd defendants aver that no privity of contract has been disclosed between the applicants and the proposed 4th and 5th defendants and therefore no cause of action can arise as against them.

It is their further argument that despite the long, unexplained and inexcusable delay in making the present application the applicants have failed to seek for joinder of parties in the Notice of Motion. Citing the case of **Galaxy Paints Co. Ltd vs Falcon Guards Limited (2002)**, the 1st and 2nd defendant submit that the court ought not to grant a relief that has not been prayed. It is for the above reasons that the 1st and 2nd defendants contend that the application is an afterthought, misplaced and an abuse of the court process. On whether the proposed amendments change the cause of action, the 1st and 2nd defendants submit that introduction of their insurers fundamentally change the cause of action from negligence to that of subrogation under the insurance contract. They have further made reference to the definition of Cause of Action by **Edwin E Bryant** as cited in the Law of **Pleading under the Codes of Civil Procedure 170 (2d ed. 1899)** and referred to by Kemei J. in **KENYA RE INSURANCE CORPORATION LTD VS SMK & 2 OTHERS [2019] eKLR:**

"What is a cause of action" Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be – (a) a primary right of

the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction; or (c) it may be that there are doubts as to some duty or right, or the right beclouded by some adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property."

It is further submitted on behalf of the 1st and 2nd defendants that there is no privity of contract as between the applicants and the proposed 4th and 5th defendants. This they argue is because the applicants were not party to the contract for insurance as between the existing defendants and the proposed 4th and 5th defendants. Reliance is made to the court of appeal decision in **AINEAH LILUYANI VS AGA KHAN HEALTH SERVICES [2013] eKLR** where the Court held that**;**

Privity of contract is a long-established part of the law of contract. In the earlier part of the last century, it was identified by Viscont Haldane LC as one of the fundamental principles of the English Contract Law. See Dunlop Pneumonic Tyre v. Selfridge and Co. Ltd.[1]The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him.

The two respondents further contend that the introduction of the 4th and 5th defendants will result to a misjoinder of parties. Their argument is that in the absence of a decree or a judgment against them, the applicants ought to issue a statutory notice to the proposed 4th and 5th defendants informing them of the suit against their insureds. In support, they have referred to the case of **KENYA RE INSURANCE CORPORATION LTD VS SMK & 2 OTHERS (supra).**

3rd Defendant Case;

The application is vehemently opposed by the 3rd defendant via Grounds of Opposition dated 28th June, 2021. The 3rd defendant state that the applicants do not have the locus to institute proceedings against the proposed 4th and 5th defendants as there exists no privy of contract as between them. Moreover, the 3rd defendant states that since the doctrine of subrogation is not available to the plaintiff they cannot call upon the 3rd and 4th defendants to indemnify them for any alleged loss.

The 3rd defendant has submitted that the application is premature as the applicant can only seek indemnity from the proposed 4th and 5th defendant upon judgment. Relying on the reasoning of the court in **JOSEPHAT NJUGUNA KARIUKI VS SIMON KARICHU IRUNGU (2004) eKLR** and in **IDRIS FARIDA & 2 OTHERS VS KARITHI PETER (2018) eKLR** as cited by Angawa J. in **LALCHAND SHAH & ANOTHER VS KENINDIA INSURANCE COMPANY LIMITED (2005) eKLR** where she stated;

"The insurance company according to law are never enjoined as a party in a tort suit. This is because the cause of action against an insurance company arises after liability and quantum has been determined by a court of law. All the party suing requires to do before trial is to issue a statutory notice to the insurance company to notify them that a suit will be filed against their insured where the tort case is finalized and there are no pending appeals, review application and any issues, the insurance company on behalf of its insured would be obliged to pay. If it fails to do so, the plaintiffs are to file a declaratory suit in the High court seeking for the court to pronounce that they are owed the award."

It is its further argument that the applicants as at now lack the *locus standi* to enjoin the proposed defendants as they have no cause of action as against them. Additionally, its submitted that the applicants were not privy to the insurance contract as between the proposed 5th defendant and itself and hence cannot sue for enforcement. The case of **AGRICULTURAL FINANCE CORPORATION V LENGITIA LIMITED (1985) KLR 765** was relied upon where the court cited **Halsbury's Laws of England, 3rd Edition, Volume 8 at paragraph 110:**

"As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it."

Analysis and Determination;

I have considered the reasons advanced by the plaintiffs for seeking leave to amend the plaint alongside the reasons advanced by the defendants for opposing the same. The sole issue for determination is whether the applicants' Notice of Motion for amendment

is merited.

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 proceeding 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 proceeding."

Order 8 Rule 1 of the Civil Procedure Rules, 2010 provides:

"(1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.

(2) Where an amended plaint is served on a defendant;

(a) if he has already filed a defence, the defendant may amend his defence; and

(b)the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaint whichever is later.

(3) Where an amended defence is served on a plaintiff;

(a) if the plaintiff has already served a reply on that defendant, he may amend his reply; and

(b) the period for service of his reply or amended reply is fourteen days after the service on him of the amended defence."

The Court of Appeal in the case of **CATHERINE KORIKO & 3 OTHERS V EVALINE ROSA [2020] eKLR** cited with authority the decision in **OCHIENG AND OTHERS -V- FIRST NATIONAL BANK OF CHICAGO, CIVIL APPEAL NUMBER 147 OF 1991** where the principles under which Courts may grant leave to amend the pleadings were set out. These include:

a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;

b) the amendments should 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 costs can compensate the other side;

e) 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 Limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.

In the case of **EASTERN BAKERY V CASTELINO [1958] EA 462 (CAU)** it was held at page 462 that: -

"The court will not refuse to allow an amendment simply because it introduces a new case….. The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character …….. or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ …….."**Further to the above, the Court of Appeal also stated in the case of Central Kenya Limited v Trust Bank Limited (2000)2 EA 365 that ;**

"..... a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side."

From the foregoing, it is clear that courts will readily grant leave to amend pleadings in order to determine the real issues in dispute. The only caveat is that a proposed amendment should not cause prejudice or injustice to the opposing party. Such prejudice or injustice must be one that cannot be compensated by an award of costs. Further, the Court will not permit an amendment that completely changes the nature of a party's case.

The applicants have sought to make two major amendments to their plaint dated 22nd October, 2018. The amendment sought by the plaintiff is to include the 4th and 5th defendants who are insurance providers and had at the material time provided insurance cover for the 1st and 2nd defendants on one hand and the 3rd defendants on the other hand respectively. Secondly, the applicants have sought to include a prayer of Kshs. 616,031,491 as special damages. The 1st, 2nd and 3rd defendants have opposed the application on the grounds that there is no privity of contract as between the plaintiff and the proposed defendants and therefore no cause of action. They further argue that the inclusion of the proposed defendants is premature as the doctrine of subrogation is yet to be invoked.

i) Joinder of Parties:

The provisions of Order 1 Rule 10 allow the Court to make such orders for joinder at any time in the course of the proceedings. It provides as follows: -

"The Court may at any stage of the proceedings either upon or without the application of either party under such terms as may appear to the Court to be just order that the name of any party improperly joined whether as a plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as a plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit be added."

The issue of joinder of all necessary parties was discussed at length by the Court of Appeal in **CIVICON LIMITED V KIVUWATT LIMITED & 2 OTHERS, CIVIL APPEAL NO. 45 OF 2014 [2015] eKLR** where the court cited with approval the case of **Gurtner vs Circuit (1968) I All ER 328 where** Denning, M.R stated as follows: -

"…The only reason which makes it necessary to make a person a party to an action is so that he may be bound by the result of the action, and the question to be settled therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party…"

Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained."

The cause of action in the present suit is a tort of negligence as between a tenant and the landlord which lead to a fire incident that led to alleged losses. A perusal of the pleadings does not indicate any relationship as between the plaintiff and the proposed defendants. Additionally, the insurance contract as between the defendants and their insurance company is not an issue in the present suit. The applicants contend that the proposed 4th and 5th defendants are proper and necessary parties in the proceedings to enable this court effectively and completely adjudicate and settle all the material questions arising.

The Court considers that Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act provides for the duty of an insurer to settle a decretal amount as follows:-

10. Duty of insurer to satisfy judgments against persons insured

(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or

cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in Section 5 (b) prescribed in respect thereof in the Schedule.

The above section is invoked when judgment has already been entered and the insurer is brought in to satisfy a decree arising out of an insured risk. For a cause of action to be sustained as against an insurance company, there ought to be a decree or judgment and an existing contract of insurance as between the insurance and the insured. The record presently bears witness that there is no decree or judgment as against the defendants since the suit is still at the pretrial stage.

On Privity of Contract, the Court of Appeal in **AINEAH LILUYANI VS AGHA KHAN HEALTH SERVICES (supra)** held that the essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him. However, there exists an exception to this general principle, the exception was well illustrated by the High Court in **DAVID NJUGUNA NGOTHO V FAMILY BANK LIMITED & ANOTHER [2018] eKLR** that;

“An exception to the Privity Rule suffices where the contract clearly intended to benefit a third party from their agreement and the third party would be able to rely on and or enforce the agreement if it is not carried out properly.”

There is no evidence of a contract of insurance on record apart from the implied admission of the defendants that the proposed 4th and 5th defendants had insured them. As the suit is currently pleaded, the joinder of the proposed 4th and 5th Defendants is not necessary for the Court to decide the issues between the Plaintiffs and the defendants. Moreover, the present application has not been brought under the provisions of Order 1 Rule 10. Although section 10 of the Cap 405 relates to motor vehicle insurance, it can be applied to other form of insurance policies where the issues in question are somewhat similar. The doctrine of subrogation cuts across all insurance policies. The court cannot rule out the possibility of the insurer rejecting to settle the claim against the defendants depending on the terms of the insurance policies. If this were to occur, the court would be called upon to deal with disputes between the defendants as opposed to determining the plaintiffs’ claim. There is no claim by the plaintiff that the defendants will not be able to satisfy any expected decree even if execution were to be enforced.

ii) <u>Special damages</u>

Secondly, the plaintiff seeks to delete the particulars of loss under Paragraph 17 and include a prayer for special damages amounting to Kshs. 616,031,491. On the inclusion of special damages as one of the prayers, the 1st and 2nd defendants’ argument is that the plaintiff has failed to give the justification for the increase of the amount prayed for.

Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at **paragraph 76,** state the following about amendments of pleadings:-

“…The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. …. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side…”.

The applicants attributed the failure to include the special damages to mistake by their previous advocates and averred that the defendants are not opposed to the same. A claim for special damages must be specifically pleaded and proved with a degree of certainty and particularity. I am convinced that this particular amendment is merited as it will enable the plaintiff to be heard and give evidence to support their claim and will enable this court to determine the issue justly and conclusively. Allowing the amendment will cause no prejudice on the part of the defendants as they are equally granted leave to amend their respective defences. The plaintiffs should be allowed to ventilate their claim against the defendants as a whole. Disallowing the request to amend the claim for special damages may lead to a fresh suit being filed yet the issues emanate from the same cause of action. The amendment mainly involves paragraph 17 of the plaint. The plaintiffs seek to replace the claim titled “particulars of loss and

damages" with a claim for particulars of special damages totaling Kshs.616,031,491. This amount is now being pleaded in the final prayers instead of kshs.51,619,742/- which had originally been pleaded.

Apart from change of the amount being claimed, I do find that the plaintiffs are not seeking to replace their original suit with a totally different claim. The claim is being made from the same alleged negligence by the defendants. The plaintiffs have computed their alleged loss and are entitled to pursue it in the same cause of action.

The upshot of the above is that the application dated 8th December, 2020 partly succeeds. The request to enjoin the 4th and 5th defendants is hereby dismissed. The application to amend the plaint and change the amount of special damages is hereby granted. The plaintiff to file the amended plaint within fourteen (14) days hereof. Costs of the application in the cause.

DATED AND SIGNED AT NAIROBI ON THE 17TH DAY OF MARCH 2022.

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S. CHITEMBWE

JUDGE