



Gitahi (Suing as the Legal Guardian of Miriam Nyawira Mbari) v Outspan Hospital & another (Civil Suit E007 of 2022) [2024] KEHC 16041 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL SUIT E007 OF 2022
DKN MAGARE, J
DECEMBER 20, 2024**

BETWEEN

ISSAK MBARI GITAHU (SUING AS THE LEGAL GUARDIAN OF MIRIAM NYAWIRA MBARI) PLAINTIFF

AND

THE OUTSPAN HOSPITAL 1ST DEFENDANT

DR. GODFREY MACHARIA KIRUHI 2ND DEFENDANT

RULING

1. The Applicant filed the Chamber Summons application dated 4/10/2024. The application seeks to amend the plaint. The draft defence is annexed.
2. The application seeks the following reliefs:
 - (a) That leave be granted to the Plaintiff to amend his pleadings to include the following individuals as Defendants in the pleadings:
 1. Dr. Peter Murimi – 3rd Defendant
 2. Dr. Massimo Nderitu Muhotie – 4th Defendant
 3. Dr. Obadiah Mbubah – 5th Defendant
 4. Dr. Kevin Murage Ndiragu – 6th Defendant
 5. John Muiru Maina – 7th Defendant
 - (b) That Witness Summons be issued compelling the following individuals to attend and testify in person when the hearing date is granted:
 1. Dr. Godfrey Macharia Kiruhi – 2nd Defendant



2. Dr. Peter Murimi – 3rd Defendant
 3. Dr. Massimo Nderitu Muhotie – 4th Defendant
 4. Dr. Obadiah Mbubah – 5th Defendant
 5. Dr. Kevin Murage Ndiragu – 6th Defendant
 6. John Muiru Maina – 7th Defendant
3. The application is said to be brought under the provisions of Sections 1A, 3A, 100, 22, 23 and 24 of the *Civil Procedure Act*, Order 1 Rule 10 (2), (4), 3, 6, 14, Order 8, Rules 3, 4, 5, 7 and 8, Order 16 Rule 6 and 7 of the Civil Procedure Rules, Article 159 of *the Constitution* and the grounds on the face of the application and the supporting affidavit of Issak Mbari sworn on 4./10/2024.
 4. There is no response filed to the application as at the date of writing this Ruling. The parties did not also file submissions.

Analysis

5. The application seeks to amend pleadings to join parties. The Plaintiff desires to add more defendants as parties through amendment.
6. The Plaintiff also seeks witness summons to issue to compel the Defendants as joined to attend and testify in court. I do not think this is a plausible relief for this court to grant. Upon adding a party, such a party is at liberty to decide the manner in which they proceed. It is not upon a party to impose how the other should prosecute their case. I say so also because there is no necessary number of witnesses expected by law to prove a fact. A court can take up one witness to prove a point that more than two witnesses would still prove and where crucial witnesses are not called, an adverse inference may be drawn against a party who fails to avail such witnesses. This enhances expeditious justice by saving the court of the burden of playing hide and seek with witnesses who being compellable are deliberately not called to testify and/or produce evidence.
7. Under Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya), it is provided as follows:-

“No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.”
8. I am equally persuaded by the reasoning of Odunga, J (as he then was) in *Bernard Philip Mutiso v Tabitha Mutiso* [2022] eKLR where the learned judge stated as follows:
 53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.



9. In Order 8 Rule 5(1) of the Civil Procedure Rules, 2010, the court has power to amend pleadings. Order 8 Rule 5(1) provides as follows:

For the purpose of determination, the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any documents to be amended in such a manner as it directs and, on such terms, as to costs or otherwise as are just.

10. Amendments are as a general rule permissible. 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 Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36 (1) at paragraph 76, states the following on amendment 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...

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...”

11. Even where the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action. The discretion of courts to amend pleadings was summarized by the Court of Appeal in *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal No. 149 of 1991 thus:

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that 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 Limitation Acts.”

12. It is therefore clear that amendments of pleadings should be freely allowed unless they are bound to cause prejudice to the other party. Further, amendments should be allowed even in situations of delay if the other side can be compensated by award of costs. The rider in amendments, in my view, is against changing the character of the whole case and in a manner to deprive the other side of its legal rights. Amendments therefore, are geared towards a just determination of all issues in controversy conclusively within the same suit.
13. The applicant herein wishes to amend his plaint to add defendants. The defendants sought to be added as parties are said to be the doctors who were involved in Plaintiff's surgery. The Plaintiff's case in



support of the application is that the defendants, on 19th July 2024, served the Plaintiff's Counsel with a list of documents, statements and medical records totalling 309 pages and which revealed the new information of the doctors who were involved in the surgery of the plaintiff.

14. Clearly, the parties who are sought to be joined as defendants are said to be the doctors who were involved in the surgery leading to this court case. The application is not opposed. In my analysis, I do not see the manner in which the amendments will generate a completely new cause of action or prejudice the Defendants. The defendants have also not demonstrated the prejudice that would be occasioned to them if the application is allowed as they will have a right to amend their Defence, if they deem it necessary.
15. The application is thus merited.

Determination

- a. The application dated 4/10/2024 is allowed.
- b. The Plaintiff shall file and serve the Amended Plaint within 14 days.
- c. The Defendants to file and serve the Amended Defence within 14 days of service, if need be.
- d. For the avoidance of doubt, the prayer for issuance of witness summons is declined.
- e. Costs will be in the cause.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF DECEMBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

Represented by:-

Joseph Mwai Advocates for the Plaintiff/Applicant

Wambugu & Muriuki Advocates for the Defendants

Court Assistant – Jedidah

