



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 60 OF 2017

JUMBO NORTH (E.A) LIMITED.....APPELLANT

VERSUS

MARTIN RATEMO NIXON.....RESPONDENT

(An Appeal from the Judgment of the Chief Magistrate Honourable

C. Obulutsa in Eldoret CMCC No. 530 of 2016, dated 3rd May, 2017)

JUDGMENT

The appellant filed this appeal being dissatisfied with the ruling of the trial court in Eldoret CMCC No. 530 of 2016. The respondent filed a plaint on 19th May 2016 seeking for general damages, special damages and costs of the suit and interest. After the respondent and his witnesses testified the respondent amended his plaint dated 11th November 2016, filed a supplementary list of documents and amended the plaintiff's statement. The appellant claims that the respondent did not seek leave to amend.

The issue was orally canvassed and the court delivered a ruling on 03/05/2017 in favour of the respondent. This resulted in the present appeal.

APPELLANT'S CASE

The appellant submitted that the grounds of appeal would be consolidated into three grounds.

The appellant submitted that the trial magistrate was not right in allowing the respondent to file a supplementary list of documents after the close of pleadings. The trial court did not take into consideration that the parties had been given full opportunity to file documents before the hearing commenced. Leave of the court was necessary. He cited the case of *Alois Oceano D'sumba v Rajnikant Narshi Shah and New Ocean Trading (K) Ltd (2017) eKLR* on introduction of additional evidence.

The appellant submitted that the trial magistrate failed to abide by the mandatory provisions of order 11 of the Civil Procedure rules. It cited the case of *Johama Kikemoi Too v Hellen Tum, Eldoret ELC No. 957 of 2012 eKLR* in support of this submission.

The appellant submitted that the trial court erred in allowing the plaintiff to amend a medical report already produced in court as an exhibit. When the doctor was cross examined there was no indication that the respondent had other documents or evidence it intended to rely on. The respondent had no capacity to amend the medical report. The failure to obtain leave of court was fatal. A medical report contains the findings of a physical examination and it is not subject to amendment.

The appellant submitted that the decision was in contravention of the law and the court should set aside the ruling and order the matter be remitted for trial before another magistrate.

RESPONDENT'S CASE

The respondent submitted that he sought leave on 9th November 2016 to amend his plaint and the appellant's advocate did not object to the same and he also sought leave to amend his defence. The respondent proceeded to amend his plaint and filed the proper supporting documents. The appellant did not file an amended defence and when the matter came up for hearing on 5th April 2017 he objected to the recalling of Dr. J.C Sokobe. The court dismissed the objection vide a ruling given on 3rd May 2017.

The respondent cited *Order 8 Rule 5* of the *Civil Procedure Rules* in support of the amendment. He further stated that *Order 3 Rule 2* provides a checklist of documents which must accompany a plaint and that it applies mutatis mutandis to amendment of plaints. Counsel for

the appellant did not object to the amendment of the plaint or filing of the further list of documents.

By virtue of the court order made on 9th November 2016 granting parties leave to amend their pleadings, it meant that pleadings were reopened. The respondent cited the case of **Bosire Ogero v Royal Media Services (2015) eKLR** on amendment of pleadings. He further relied on *Section 100 of the Civil Procedure Act*.

The respondent submitted that the appellant had not demonstrated how the amendments would prejudice it considering they would be entitled to further cross examine the witnesses. He cited the case of **Bencaster Investment Limited v John Murithi & 8 others (2014) eKLR** in support of this submission.

The respondent further submitted that the trial magistrate directed himself properly by relying on *Section 146(4) of the Evidence Act*.

The respondent submitted that the appeal lacks merit and should be dismissed with costs.

ISSUES FOR DETERMINATION

- a) Whether the Respondent sought leave to amend the pleadings
- b) Whether the trial court erred in allowing the respondent file the amended pleadings and a supplementary list of documents after close of pleadings

WHETHER THE RESPONDENT SOUGHT LEAVE TO AMEND THE PLEADINGS

The respondent submitted that he sought leave of the court on 9th November 2016. The proceedings for that particular date as per page 80 contain a request for leave, and there is also no objection from counsel on amendment and filing of further documents. The proceedings show that there was leave sought to amend despite the appellant claim that there was none.

It is apparent that leave was sought and that counsel had no objection to the filing of further documents.

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE RESPONDENT FILE THE AMENDED PLEADINGS AND A SUPPLEMENTARY LIST OF DOCUMENTS AFTER CLOSE OF PLEADINGS

Order 11, Rule 7(1)(c) provides;

(1) At least thirty days before the hearing date of the suit, a Trial Conference shall be convened by the court for the following purposes—

- (a) planning of trial time;
- (b) exploring the most expeditious way to introduce evidence and define issues;
- (c) granting leave to amend pleadings within a specific period not exceeding fourteen days;

In **Alois Oceano D'sumba v Rajnikant Narshi Shah & another [2017] eKLR** the court held;

The above provisions are clear on the requirement for parties to file documents within certain parameters. If documents are not available as at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences. That is the one of the purposes for the directions that a court gives under the provisions of Order 11 of the Civil Procedure Rules. Any party wishing to introduce new or additional evidence must in similar light seek leave of the court to file such statements and/or documents before the hearing of the plaintiff's case.

In the case of **P.H. Ogola Onyango t/a PittsConsult Consulting Engineers vs Daniel Githegi g/a Quantalysis [2002] eKLR Waweru J.** stated as follows: -

“Indeed discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the court no doubt has jurisdiction to allow a party to introduce a document or documents once the opposing party has closed its case. To allow him to introduce documents after the plaintiff has closed his case will occasion the plaintiff serious prejudice that cannot be cured by cross-examination. In Civil litigation there must be a level playing field. That field cannot be level were one party permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed.

Order 3 Rule 2 of the Civil Procedure Rules provides;

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—

- (a) the affidavit referred to under Order 4 rule1(2);

(b) a list of witnesses to be called at the trial

(c) written statements signed by the witnesses excluding expert witnesses; and

(d) copies of documents to be relied on at the trial including a demand letter before action: Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.

An amendment of the plaint would apply to the accompanying documents. Further, the appellant's advocate did not object to the amendment and filing of further list of documents. The trial court therefore did not err in allowing the respondent file the amended pleadings and the further list of documents.

In conclusion the appeal fails in its entirety as the plaintiff's advocate sought leave and the defendant was accorded leave to file an amended defence and chose not to. Further, the appellant has not shown how it is prejudiced by the amendments. I find that the appellant will be able to cross-examine the doctor further and thus does not stand to be prejudiced in any way.

The appeal lacks merit and is dismissed with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF SEPTEMBER, 2019

In the presence of:

Mr. Kome holding brief for Ms Odua for the Appellant

Mr. Yego for the Respondent absent

Ms Sarah – Court Assistant