



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL CASE NO. 32 OF 2016**

**KAHUNDA KONO KARISA (DECEASED) WILLIAM BARUA NYAMBU (suing as legal  
Administrator of the Estate of KAHUNDA KONO KARISA (DECEASED)).... PLAINTIFF**

**VERSUS**

**EMMANUEL KAZUNGU CHAI.....1<sup>ST</sup> DEFENDANT**

**HASSAN KATANA CHARO .....2<sup>ND</sup> DEFENDANT**

**Coram: Hon. Justice R. Nyakundi**

**Matara Advocate for the plaintiff**

**Emmanuel Kazungu Chai in person**

**Hassan Katana Charo in person**

**RULING**

This is an application by the plaintiff for leave to amend the plaint. The notice of motion dated 4<sup>th</sup> June, 2019 made pursuant to Order 8 Rules 3, 5, and 7, Section 1A, 1B, 3A and 10 of the Civil Procedure Rules and Act is supported by an affidavit sworn by William Nyambu. The affidavit proceeds to allege as follows: -

- 1. That as the administrator of the Estate of the deceased prosecuting a fatal accident claim against the respondent under vicarious liability for compensation and award of general damages.**
- 2. That the initial plaint according to counsel has several to topographical errors or omissions which may adversely affect the outcome of the suit, since parties are bound by their pleadings.**
- 3. That if the orders are not granted, stand to suffer irreparable loss. That the orders sought are for the interest of justice and fairness.**

The respondent was served but he entered appearance defence.

**The Law**

The procedure on amendments of pleadings is regulated by Order 8 (1),(2), (3) and (4) and also Order 51 of the Civil Procedure Rules on enlargement of time.

The provisions under Order 8 provides as follows:

**“(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.**

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under subrule (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.

The principles in which amendment of pleadings may be admitted by the court has been defined in a number of authorities. In the case of **Ochieng and others v First National Bank of Chicago CA NO. 147 OF [1999]** whereas in **Eastern Bakery v Castello [1958] EA 461** the court held that:

**“It will be sufficient for purposes of the present case, to say that amendment 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 case of **Cropper v Smith [1884] 26 CLD al 700 Badiel LJ** held as follows on amendment and costs:

**“I have found in my experience that there is one panacea which heals every sore to litigation and that is costs. I have very seldom, if ever been unfortunate enough to come across an instance where a party had made a mistake in his pleadings which has put its other side to such disadvantage or that it cannot be cured by the application of that healing medicine.”**

In the instant application I will not wish to depart from the well tested laid down principles on amendments of pleadings. In considering whether this amendment should be allowed I am guided by the decision by my brother **Judge W. Korir** dated 24<sup>th</sup> April 2019 in which he declined to struck out an already filed amended plaint without leave of the court. I find no difficulty to allow an amendment to the plaint which in my view does not convert the suit from one character to another. The amendments sought by the applicant have been captured in the draft amended plaint. The main averments do not create a new cause of a claim to the initial pleadings against the respondent. The proposed amendment to the plaint as particularized in paragraph 1, 2, 2A, 3A, 4, 5, 5A and 7 containing a claim ion negligence and award of damages are consistent with the issues in the original plaint.

Accordingly, from the draft plaint an elaborate case has been made out by the applicant for me to conclude and exercise discretion for leave to amend for it would not occasion injustice to the respondent. With regard to costs, I order throw away costs of Kshs.10,000/= in favor of the respondent to be paid on or before close of pleadings. Further, the plaintiff has ten days to file and serve the amended plaint and correspondingly the same timeline is also applicable to the respondent to file defence to the claim.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 29<sup>TH</sup> DAY OF OCTOBER, 2019.**

.....

**R. NYAKUNDI**

**JUDGE**