



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPLICATION NO. 616 OF 2019

PETER NJOROGE KAMAU.....APPLICANT

-VERSUS-

MBURU MWANGI MOSES.....1ST RESPONDENT

PETER MACHARIA MWANGI.....2ND RESPONDENT

RULING

1. This ruling was precipitated by the Notice of Motion dated 16th September, 2019 brought by Peter Njoroge Kamau, the applicant herein, where he sought for the orders hereunder:

(i) THAT this Honourable Court be pleased to withdraw Chief Magistrate’s Case No. 6007 of 2017 and thereafter try or dispose of the same.

(ii) THAT leave be and is hereby granted to the applicant to amend his plaint as per the annexed draft amended plaint.

(iii) THAT leave be and is hereby granted to the applicant to file and serve a supplementary list of documents, witness statements and bundle of documents.

(iv) THAT in the alternative, the applicant be granted leave to file a suit against the respondents out of time.

(v) THAT the costs of the application be provided for.

2. The Motion draws support from the grounds laid out on its face and the facts deponed in the applicant’s affidavit. The respondents opposed the Motion by filing Grounds of Opposition dated 11th November, 2019.

3. When this court heard the Motion on 19th November, 2019 only the applicant’s advocate, *Mr. Kairu*, was in attendance and he chose to rely on the grounds set out on the face of the Motion and the facts in the supporting affidavit.

4. I have considered the aforesaid grounds and the facts deponed in the supporting affidavit; and the Grounds of Opposition; together with the oral submissions made by the applicant’s counsel.

5. It is noted that the main orders being sought in the application are two-fold; that is, an order for withdrawal of the suit and another for leave to amend the plaint and accompanying documents.

6. I will first deal with the order for withdrawal, brought under the provisions of **Section 18(1)** of the **Civil Procedure Act, Cap. 21** which expresses the following:

“On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

(i) try or dispose of the same”

7. The applicant stated in his affidavit that the subject matter of the dispute arose out of a road traffic accident which occurred on 5th August, 2015 involving his motor vehicle registration number KAW 520Q and the motor vehicle registration number KBD 690Q belonging to the 1st respondent and being at all material times driven by the 2nd respondent.
8. The applicant asserted that as a result of the accident, he sustained serious injuries, for which he received treatment at the Aga Khan Hospital and later sought for specialized treatment in the United States of America (USA).
9. It was the applicant's averment that the special damages set out in his original plaint filed before the subordinate court was limited to the medical expenses incurred at the Aga Khan Hospital, since at the time of lodging his claim, the medical evidence relating to expenses incurred in the USA was unavailable.
10. The applicant mentioned that he has since been able to recover the additional evidence, totaling the approximate sum of Kshs.30,000,000/ which amount falls outside the jurisdiction of the subordinate courts.
11. On their part, the respondents contended that the applicant ought to have considered the issue of pecuniary jurisdiction before bringing his claim, adding that there has been an inordinate delay in filing the application.
12. I have perused the original plaint annexed to the application and I find that the claim was instituted in 2017 which is well within the limitation period under the Limitation of Actions Act. The original plaint also discloses that the cause of action arose in Nairobi, Kenya.
13. In addition, there is nothing to indicate that the applicant is not a Kenyan citizen. In view of this, I am satisfied that the claim is properly before the Kenyan courts, contrary to the respondents' argument that both the substantive and adjective laws applicable would be those of the USA.
14. I have also perused the draft amended plaint annexed to the application and I find that the special damages particularized therein is a sum of Kshs.36,608,069.90/. The law is clear that the pecuniary jurisdiction of a Chief Magistrate currently stands at Kshs.20,000,000/ which therefore means that the special damages being sought exceed such pecuniary jurisdiction.
15. I am satisfied that the provisions of **Section 18(1) (b) (i)** (*supra*) would suitably apply to the applicant's claim.
16. The applicant seeks to amend his plaint to include the additional special damages and to incorporate additional medical and witness evidence to support his claim.
17. The respondents opposed the above request by arguing *inter alia*, that the amendments are a reflection of false accounts and is an afterthought aimed at occasioning prejudice to them.
18. The law on amendments is well settled. Under **Section 100** of the **Civil Procedure Act**, this court has general power to amend pleadings to correct any defect or error in a suit at any stage of the proceedings on terms as to costs or otherwise as it may deem just and all amendments should be made for the purpose of determining the real question or issues raised by or depending on the proceedings. The above provision is echoed by **Order 8, Rules 3 and 5** of the **Civil Procedure Rules, 2010**.
19. It is clear from the foregoing that the courts have wide and unfettered discretion to allow the amendment of pleadings at any stage of the proceedings before judgment is entered.
20. Upon my perusal of the draft amended plaint, I have observed that the applicant is seeking the removal of the 3rd defendant, namely Equity Bank, from the claim. Furthermore, the applicant is seeking to add to the particulars and amount of the special damages being sought. To my mind, these constitute reasonable grounds for amendment for the reasons that there is nothing to indicate that the cause of action has been altered or substituted and moreover, there appears to be no dispute that the applicant received further treatment in the USA for which he obviously incurred some costs which were not included in the original plaint.
21. I am also convinced that the amendments being sought after would prove relevant in enabling the court to have a clear picture of the issues in dispute which will in turn assist in the proper determination of the dispute.
22. While I have noted the respondents' assertion that they stand to be prejudiced if the order for amendment is granted, they neither demonstrated the manner in which such prejudice will occur nor showed that any prejudice cannot adequately be compensated through an award of costs. In any event, I am satisfied that the respondents will have an opportunity to amend their pleadings accordingly and challenge the applicant's evidence at the trial.
23. The upshot is that I find merit in the Motion and will allow orders (i), (ii) and (iii) of the same. The following orders are consequently made:

a) Chief Magistrate's Civil Case No. 2418 of 2017 is hereby withdrawn and the file shall be transferred to the High Court (Civil Division)-Nairobi for hearing and final determination.

b) The applicant shall amend, file and serve his pleadings upon the respondents within 14 days from today.

c) The respondents shall thereafter amend, file and serve their pleadings upon the applicant within 14 days from the date of service.

d) The parties shall thereafter ensure to amend where necessary, file and serve their requisite documents in compliance with the provisions of Order 11 of the Civil Procedure Rules.

e) The applicant shall then take a mention date from the registry to confirm compliance and take further directions.

f) Costs of the application to abide the outcome of the suit.

Dated, Signed and Delivered at Nairobi this 29th day of November, 2019.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondents