



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 312 OF 2016**

**DR. CHRIS OBURA.....PLAINTIFF**

**VERSUS**

**RICHARD KEMOLI.....DEFENDANT**

**RULING**

1. This ruling is in respect of an application made by way of a Notice of Motion dated 29<sup>th</sup> August 2018 in which the plaintiff ( hereafter the applicant) seeks leave to amend his plaint in terms of the draft amended plaint annexed to the application and that the list of documents and witness statement filed on 28<sup>th</sup> November 2016 be expunged and that in their place, the court adopts the fresh list of documents and witness statement annexed to the application.

2. The application is expressed to be made under *Section 1A, 1B and 3A of the Civil Procedure Act (the Act); Order 8 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules, 2010*. It is supported by the grounds stated on its face and the depositions made by the applicant in the affidavit sworn on 29<sup>th</sup> August 2018 and the annexures thereto.

3. The applicant contends that his claim revolves around an injury he sustained on 30<sup>th</sup> December 2015 while playing golf together with the defendant and two other persons; that owing to the nature of the injuries he sustained, he continues to receive treatment and physiotherapy sessions and for this reason he needs to amend his plaint to include in his special damages claim the medical expenses he has so far incurred and to place on record new evidence in the form of receipts and invoices for treatment expenses he had not incurred by the time he filed his witness statement and list of documents; that there is need to replace the plaintiff's current witness statement with another one which is cross referenced to his list of documents for convenience of the court and the parties during the trial; that the proposed amendments will assist the court to effectively determine the dispute between the parties and if the application was allowed, the defendant is not likely to suffer any prejudice.

4. The application is opposed through grounds of opposition dated 25<sup>th</sup> September 2018. The points taken in opposition to the motion are that the application is made in bad faith as the plaintiff intends to use confidential information obtained in the mediation proceedings to amend his plaint; that there has been inordinate delay in filing the application; that if the application is allowed, the defendant will suffer injustice and prejudice as confidential information obtained in the mediation proceedings will be used to his disadvantage and lastly, that the application amounts to an abuse of the court process.

5. The application was argued orally before me on 8<sup>th</sup> November 2018. Learned counsel *Mr. Ngoloma* appeared for the applicant while learned counsel *Mr. Baiya* represented the defendant.

In their submissions, learned counsel reiterated and expounded on the grounds relied on by their respective clients to support and oppose the application.

6. I have carefully considered the application, the supporting affidavit and annexures thereto, the grounds of opposition filed by the respondent and the rival submissions by counsel for the parties.

7. Under *Section 100 of the Civil Procedure Act and Order 8 Rules 3 and 5 of the Civil Procedure Rules*, this court has wide and unfettered discretion to allow amendment of pleadings at any stage of the proceedings before judgment if the proposed amendments will assist the court determine the real question in controversy between the parties and it will not occasion prejudice to the opposing party which cannot be compensated by an award of costs.

8. Like in all other cases, the discretion donated to the court by the aforesaid provisions of the law must be exercised judiciously in accordance with established legal principles and the facts of each case. The principles that guide the court in the exercise of discretion in applications such as the instant one were well captured by the Court of Appeal in ***Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others, CA No. 94 of 2003 [2014] eKLR***, where the court reproduced the principles stated in *Mulla, the Code of Civil Procedure 18<sup>th</sup> Ed*,

Vol. 2 at pages 1751-1752 as follows:

- i) All amendments should be allowed which are necessary for determination of the real controversies in the suit;*
- i. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;*
- ii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;*
- iii. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;*
- iv. Amendment of a claim or relief barred by time should not be allowed;*
- v. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;*
- vi. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;*
- vii. The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;*
- viii. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”*

9. Applying the above principles to the present application, i find that in this case, it is clear from the application and the draft amended plaint that the proposed amendments are confined to the plaintiff's claim for special damages. The proposed amendments do not seek to change or in any way alter the plaintiff's cause of action and only seeks to plead the medical expenses which the plaintiff says he has incurred subsequent to filing the suit.

10. Though the defendant has maintained that the application was filed in bad faith with the intention of assisting the plaintiff to use confidential information obtained in the mediation proceedings to his disadvantage, he did not single out or specify the alleged confidential information the plaintiff was allegedly seeking to introduce through the instant application.

11. I honestly find it difficult to understand how an application seeking to amend pleadings to include further medical expenses allegedly incurred after filing suit and to introduce evidence in the form of receipts to prove the said expenses can be said to have been filed in bad faith. The fact that the application was filed after the mediation process collapsed is neither here nor there since applications to amend pleadings can be made at any stage of the proceedings before judgment.

12. In my view, allowing the prayers sought in the application will assist the court determine the real issues in controversy between the parties and will save time and enhance efficiency in the hearing of the dispute. I agree with the plaintiff's claim that allowing the application will not occasion the defendant any prejudice that cannot be compensated by way of costs.

13. For the foregoing reasons, I find merit in the Notice of Motion dated 29<sup>th</sup> August 2018 and it is hereby allowed in terms of prayers 1 and 2. The proposed amended plaint shall be filed and served within the next 14 days as well as the proposed list of documents and witness statement.

14. The defendant is awarded costs of the application.

It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI this 20<sup>th</sup> day of December, 2018.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Miss Nduta Kamau holding brief for Mr. Ngoloma for the Applicant

Miss. Amboko holding brief for Mr. Kuyo for the defendant

Miss Kavata: Court Assistant