



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 106 OF 2011

ROSE J. CHEROGONY.....APPELLANT

VERSUS

MICHAEL GAKURU NDINDI.....RESPONDENT

(An appeal from the ruling of the Honourable Mr. Okao, P.M In Nairobi (Milimani) CMCC no. 2408 of 2008 delivered on the 10th February 2011)

JUDGEMENT

1. Rose J. Cherogony, the Appellant herein, filed a material damage suit against Joseph Waweru Maina and Mt. Elgon Hardware Ltd before the resident magistrate's court, Nairobi vide the plaint dated 18th March 2008. In the aforesaid plaint, the Appellant sought for payment of kshs.208,610 plus costs and interest.
2. The particulars of the aforesaid sum are stated in paragraph 7 of the plaint. It is alleged that on or about the 23rd day of may 2005, the Appellant's motor vehicle registration no. KAZ 844A had a collision with motor vehicle registration no. KZN 330, allegedly owned by Mt. Elgon Hardware Ltd near City Stadium, Nairobi. As a result of the collision, the Appellant's motor vehicle was extensively damaged at the rear. On the 5th day of August 2009, the Appellant filed an amended plaint in which she enjoined Michael Gakuru Ndindi the Respondent herein, as the third defendant. The Respondent entered appearance and filed a defence to resist the Appellant's claim. On 1st November 2010, the Respondent filed an application to have the claim against him struck out because he was enjoined to the suit without leave of court and that by that time the cause of action against him was time barred. The application was heard and allowed on 10th February 2011. Being dissatisfied with the aforesaid ruling, the Appellant preferred this appeal.
3. On appeal, the Appellant put forward the following grounds:
 - a. ***THAT the learned trial magistrate erred in law in failing to appreciate that the respondent was enjoined in the said suit by way of an amendment to the plaint.***
 - b. ***THAT the learned trial magistrate erred in law in failing to find that the appellant did not require leave to amend the plaint so as to enjoin the respondent.***
 - c. ***THAT the learned trial magistrate erred on law in allowing the respondent to escape the appellant's claim through a technicality.***
 - d. ***THAT the learned trial magistrate erred in law in failing to allow the appellant's claim as against the respondent to go for trial.***
4. When the appeal came up for hearing, this court with the concurrence of learned counsels gave

direction to have the appeal disposed of by written submissions. I have re-evaluated the arguments presented before the trial court. I have further considered the written submissions.

5. In grounds 1 and 2, the Appellant has accused the trial magistrate for failing to appreciate the fact that the Respondent was enjoined to the suit by way of amendment to the plaint which required no prior leave from court. The Respondent is of the view that the Appellant was required to obtain leave before enjoining the Respondents as the 3rd defendant since pleadings had closed. After taking into account the rival arguments, the trial magistrate in his ruling held that the Appellant erred when he enjoined the Respondent to the suit after pleadings had closed. A critical examination of the trial court's record will reveal that by the time of enjoining the Respondent as the 3rd defendant, pleadings relating to Mt. Elgon Hardware Ltd, the 2nd defendant therein, had closed. However, pleadings relating to Joseph Waweru Maina, the 1st defendant, had not closed. He had not been served hence, he could not have entered appearance nor file a defence. With great respect, I think the learned trial magistrate fell into error.

6. In the circumstances, the Appellant did not need to obtain leave to file an amended plaint.

7. The other ground which was ably argued is whether or not the learned principal magistrate erred when he found that the claim against the Respondent was statute barred at the time of enjoining him to the suit. According to the Appellant, the learned principal magistrate erred because the amendment did not bring in a new cause of action nor new sets of facts. The Respondent supported the view that the action against him was time barred hence the trial court magistrate cannot be faulted. There is no doubt that the Respondent was enjoined to the suit more than 3 years after the cause of action arose. With respect, I am of the view that the learned principal magistrate fell into error when he ruled that the claim as against the Respondent was statute barred. The legal position is that so long as the pleading sought to be amended was filed within the statutory period the subsequent amendments will not be treated as fresh causes of action. The date of filing of the original pleading will stand. It was therefore wrong for the learned principal magistrate to rule otherwise. There is no dispute that the original suit before amendment was filed within the statutory period. I find the appeal to be with merits.

8. The appeal is allowed. The order striking out the Appellant's suit against the Respondent is set aside and is substituted with an order dismissing the motion dated 1st November 2010 with costs to the Appellant. For the avoidance of doubt, the suit as against the Respondent herein (3rd defendant), is reinstated. The Appellant to also have costs of the appeal.

Dated, Signed and Delivered in open court this 11th day of December, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent