



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.41 OF 2011

DR. CHRIS O. OYOOAPPELLANT

VERSUS

FRANCIS OYARO OKWEMWA.....RESPONDENT

(Being an appeal from original judgment and decree of Kisumu Chief Magistrate's Court – (K. MUNEENI – PM)

in PMCC No..218 OF 2000.)

J U D G M E N T

In a plaint dated 27/10/95 at the Chief Magistrate's Court at Kisumu the appellant sued the respondent claiming Kshs.330,706/= being the value of the damage to his motor vehicle registration number KAE 758H. He claimed that on 15/8/95 he had lawfully parked the vehicle off the Jomo Kenyatta Highway near Imperial Hotel in Kisumu when it was hit and damaged by the respondent's motor vehicle registration number KRF 843 which was being driven negligently, recklessly and carelessly by the time. Also claimed were loss of user, costs and interest.

The respondent filed a defence on 28/2/96 and denied the fact of the accident or that he was negligent. In the alternative, he blamed the accident on the negligent driving by the appellant. A reply to defence was filed on 20/3/96. The suit was heard and judgment delivered on 26/1/11 dismissing it with costs.

The appellant was aggrieved by the judgment and decree and filed this appeal. The appeal has not been heard. While it is pending, the appellant has filed the present motion under Order 85 rules 3 and 5 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act seeking leave to amend the plaint. The amendment is in respect of cost of repairs. He wants it amended from Kshs.330,706/= to Kshs.388,633/=. It is his case that the cost of repairs according to Automobile Association of Kenya was Kshs.388,633/= and yet he had pleaded the cost to be Kshs.330,706/=. The Automobile Association of Kenya valuation with the cost of Kshs.388,633/= was produced before the trial court. The suit was dismissed because liability was not proved.

This case has had a long history. After it was originally filed at the Chief Magistrate's Court at Kisumu, it was transferred, on application, to the High Court on 14/1/95. On 26/7/99 another application was made which resulted in a transfer back to the Chief Magistrate's Court on 28/1/2000. Between 2000 and 2005 the case could not be heard because the court file had been lost. There was reconstruction of the

file with the consequent hearing and determination as indicated above.

On the application to amend the plaint, I received written submissions from Mr. Orengo for the appellant and Mr. Onsongo for the respondent. They both agree that, by dint of section 78(2) of the Civil Procedure Act and Order 8 rule 3 of the Civil Procedure Rules, the court may at any stage of the proceedings allow any party to amend his pleadings. Such amendment may be on

“such terms as to costs or otherwise as may be just and in such manner as may be directed by the court.”

In **CENTRAL KENYA LIMITED .V. TRUST BANK LIMITED AND OTHERS [1998] LLR 814** the Court of Appeal indicated that a party is allowed to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has to be no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side which cannot be compensated for in costs.

In **MULLA, THE CODE OF CIVIL PROCEDURE, 16TH EDITION** at page 1870, it is stated that:

“The amendments in pleading may be allowed even at the appellate stage, unless any irreparable harm is likely to be caused thereby to the opposite party.”

However, it is always convenient to the parties, and a mark of good faith, when the amendment is sought at the earliest opportune moment having regard to the progress of the case (**JULIA AKELO KUNGURU .V. SETH LUGONZO AND OTHERS, NAIROBI (MILIMANI) H.C.C.C. NO.197 OF 2001**).

The plaint was drawn by Olago-Aluoch & Company Advocates who represented the appellant during the trial. The cost of repairs was indicated at paragraph 6(a) as

“Kshs.330,706/= as per Estimate Report.”

In the prayers it was indicated in paragraph 8(a) as

“costs of repairs – Kshs.330,706/=.”

During trial, the appellant produced an Automobile Association of Kenya valuation report to show the cost of repairs to be Kshs.388.633/=. There was no request to amend the plaint. Had the appellant been successful in his case he would have been awarded the cost of repairs up to the pleaded amount of Kshs.330,706/=. In the affidavit sworn to support the motion there was no indication why the application to amend could not have been made earlier. What the appellant stated was that the amendment was being sought to enable the court effectually and completely adjudicate upon and settle all the questions in dispute; and that no prejudice was going to be occasioned to the respondent.

The case before the trial court proceeded on the basis that the appellant was claiming the pleaded Kshs.330,706/=. It is certain that if the amendment is allowed, it will be necessary to re-open the case to enable the formal receipt of evidence to prove the higher figure. Such evidence may require cross-examination. At page 1868 of **MULLA'S** book it is indicated that if the amendment shall cause the appeal

“to be remanded for fresh evidence, it should as a rule be refused. But it can be ordered at that stage,

if the opponent is not taken by surprise and no right of his is taken away.”

At page 1867 it is stated as follows:

“Amendment should not be refused on technical grounds. The proposed amendment even if belated may be allowed if it can be made without injustice to the other side. However, when no explanation is offered for the reasons of delay, it would not be just and proper to allow the amendment at the stage of appeal.”

I have considered the facts of this application in light of these legal principles. The application is being brought about 19 years after the suit was filed and when all the relevant facts were always known to the appellant. It is being brought when the parties are ready to argue the appeal. There was no explanation for the delay. The difference between the pleaded amount and that sought in the application to amend is only Kshs.58,000/=. This case is crying for final determination. I find that the application has no merit and dismiss it with costs.

Dated, signed and delivered this 31st March, 2014.

A. O. MUCHELULE

J U D G E