



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case No. 25 Of 2008

I G (Minor Suing Thro' Next Friend

And Mother P B. O Plaintiff

-Versus-

J N O 1st Defendant

E N 2nd Defendant

RULING

1. The application before the court is the Notice of Motion dated 14th November 2011 brought pursuant to Order 8 Rule 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The plaintiff/applicant seeks orders that leave be granted to amend the plaint to specifically plead medical expenses of kshs. 297,205/= and that the draft amended plaint which is annexed to the application be deemed as duly filed and served in view of the fact that the plaintiff paid filing fees for those special damages.
2. The application is premised on the grounds that at the time of filing the plaint the plaintiff was still undergoing treatment and receipts had not been provided for, further that the amendment was necessary to determine the real issues in dispute and finally that no prejudice would be occasioned to the defendants if leave to amend would be granted to the plaintiff. It is also supported by the affidavit of the plaintiff P B. O who states that on the 28th July 2008 they amended the plaint before closing of pleadings to add a 3rd defendant and also to include medical expenses. She also states that by that time the plaintiff had incurred huge medical bills of kshs. 297,205/= which was not specifically pleaded.
3. Later on the said amendment was struck out because the 3rd defendant was added without the courts leave and by virtue of that order the plaintiff's prayer for medical expenses was thrown out. She emphasizes that the defendant will not suffer prejudice if the application is allowed and, relying on the High Court decision of **Omar –vs- E. A Cargo Handling Services Ltd** (1985) KLR 837 that amendments may be allowed at any time before judgment, urges that it is in the interest of justice that the amendment be allowed.
4. The 1st and 2nd defendants in opposing the said application raised a preliminary objection dated 11 June 2012 as follows:-
 - i. The intended amendment is time barred as the cause of action arose on 4th April 2006 well outside the Limitation of Actions Act Cap 22 Laws of Kenya.
 - ii. That the intended amendment to bring on board a claim of kshs. 297,215 as captured in the draft amended plaint was never pleaded and same will amount to bring a new cause of action after the statutory period, citing the Court of Appeal decision in **Auto Garage & Ors –vs- Motokov** (No. 3)

(1971) E. A 514.

- iii. That the annexed draft plaint includes a third defendant who is deceased and no leave has been sought and obtained to bring out pleading out of time.

The defendants pray that the application be dismissed or struck out of the court record. Parties have exchanged written submissions in regard to the application.

5. The issue for determination is whether the plaintiff, by the proposed amendment, seeks to introduce a new cause of action and whether leave to amend should be granted. The majority decision of the Court in ***Auto Garage & Ors –vs- Motokov*** (Spry, V-P. and Law, JA.; Mustafa, JA. dissenting) that an amendment introducing a new cause of action should not be allowed so as to defeat a defence of limitation, must be taken to have been qualified by the provisions of Order 8 Rule 3(5) of the Civil Procedure Rules, 2010 (and its predecessor). As pointed out by *Mustafa, JA* in his dissenting opinion, the emphasis in East Africa was “increasingly being shifted on to the side of substantive justice”, and this shift has culminated in the constitutional entrenchment under Article 159 of the Constitution of Kenya, 2010 which requires courts to render justice without regard to technicalities of procedure. The justice of the case would be to allow the plaintiff to claim special damage arising from the same accident for which he has already filed suit for damages.
6. Moreover, as pointed out by the editor of the Law Report on ***Auto Garage & Ors –vs- Motokov*** in the Editorial Note: Order 7 Rule 11 of the Tanzania Civil Procedure Rules on which the decision was based, “*was amended by Gazette Notice 228 of 1971 to allow amendment to a plaint not disclosing a cause of action*”.

In Kenya, Legal Notice No. 119 of 1975, the Civil Procedure (Amendment) Rules, 1975 made on 9th September 1975, amended its Civil Procedure Rules to insert a whole new Order 6A on amendment of pleadings whose Rule 3(5), (which is in *pari materia* with Order 8 Rule 3(5) of Civil Procedure Rules, 2010), allows amendment whose effect is to add or substitute a new cause of action. Clearly, the ***Auto Garage & Ors –vs- Motokov*** is no longer good law.

7. Order 8 Rule 3(5) of the Kenya Civil Procedure Rules 2010 allows the court to grant leave to a party to amend his pleadings even though the said amendment would introduce a new cause of action provided the facts being pleaded in the amendment are substantially the same facts that were pleaded when the suit was first filed. Rule 3(5) of Order 8 is in the following terms:

“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”.

8. The claim for special damages is obviously a new cause of action different from the general damages for pain and suffering claimed in the plaint. As the Court of Appeal restated in ***Banque Indosuez –vs- D. J Lowe & Co. Ltd*** (2006) 2KLR 208, special damages must be specifically pleaded and strictly proved. But the pleading of such a new cause of action is expressly authorized by Order 8 Rule (3) 5 Civil Procedure Rules because the claim flows from the same facts relating to the motor vehicle accident from which the claim for general damages arose. Therefore, even though the said amendment would introduce a new cause of action it arises from the same facts as the cause of action for which general damages have already been claimed in the suit.
9. Moreover, the court may grant leave to a party to amend pleadings at any stage of the proceedings provided the said amendments would assist in determining the real issues in controversy as empowered by section 100 of the Civil Procedure Act. In this case, the plaintiff wishes to amend their plaint so as to introduce a claim for special damages which were referred to at paragraph 8 of the Plaint at the time of filing the plaint but not quantified as the plaintiff was still undergoing treatment and receipts had not been provided.

10. As is clear from draft amended plaint attached to the application the plaintiff sought to amend the plaint to introduce the named 3rd defendant (hereinafter intended 3rd defendant) who is now said to be deceased, and therefore the defendants' objection in that regard is well founded. However, following the plaintiff's subsequent submission that he does not seek to join the said 3rd defendant, the defendants shall only have to deal with the case as will be pleaded in the amended plaint on the basis of their respective personal capacities in relation to the cause of action. The issue of the intended 3rd defendant who is allegedly the registered proprietor of the accident motor vehicle and his representation in this case, is in the circumstances not before the court as the plaintiff has abandoned his earlier attempt to join him as a party.

11. As was held in **Kuloba –vs- Oduol** (2001) 1 E A 101 at page 110 per *Visram J.* (as he then was):-

“Even if the amendment seeks to set up a new cause of action which is outside the limitation period, I am of the view that it is an amendment which is permissible under Order VIA rule 3 of the rules as it is a claim emanating from the same facts. As to the question of prejudice, I am not satisfied that the defendant will be exposed by the amendment in any manner that cannot be compensated by costs”.

12. The defendants will suffer no prejudice in the specific pleading of the special damages, as these must, in accordance with case-law authority, be specifically proved, and the defendants will have opportunity before the hearing to specifically traverse the pleading by amended defence, if necessary. Accordingly, I grant the plaintiff's Notice of Motion dated 14th November 2011 as prayed save that the plaintiff will within 14 days file and serve the amended plaint on the defendant. As the Amended Plaint for which the plaintiff had paid filing fees for special damages was struck out, the plaintiff must pay for the filing fees on the amended plaint, unless he obtains leave of the court to sue as a pauper in accordance with the rules of the court. The defendants will have a corresponding leave to file an amended defence, if any, within fourteen days.

13. The plaintiff will pay the defendants the costs of the application.

Dated and delivered this 31st day of MAY 2013.

.....

EDWARD M. MURIITHI

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

Mr. Edwin Mongare – Court Clerk

.....

EDWARD M. MURIITHI

JUDGE