



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII**

Civil Appeal 3 of 2007

JOEL OKWA NYAMBUORO APPELLANT

VERSUS

1. JOHNSON OBEWA 1ST RESPONDENT

2. B. MAGAK 2ND RESPONDENT

**(Appeal from the ruling of the learned Senior Resident Hon. Mrs. Ngetich delivered on
30th November 2006 in Oyugis SRMCC NO.5 of 2006)**

JUDGMENT

On 26th July 2006 the respondents filed an application by way of notice of motion brought under Order XLIX rule 5 and Order VIA rule 3 of the Civil Procedure Rules. They sought leave to file a reply to a statement of defence and an amended plaint out of time. The said pleadings had already been filed on 20th April, 2006 and they wanted the same to be deemed as having been filed in time. The application was made on grounds that the defence had been sent by post from Kisumu to Homa Bay and the same was received late. Thereafter the plaintiff's advocate was unable to get in touch with his client in good time to enable him get further instructions.

The application was opposed by the defendant, who stated, inter alia, that there had been inordinate delay in filing the said application. The court heard the application and in a considered ruling, the learned trial magistrate disallowed the prayer for leave to file a reply to the statement of defence but allowed the prayer for leave to file an amended plaint. The learned magistrate held that Order VI rule 5(1) of the Civil Procedure Rules gives general power to a court to allow such amendments for purposes of determining the real questions in controversy.

The defendant filed an appeal against the said ruling. He contended that the application was unmeritorious and was incurably defective.

On the other hand, Mr. Okoth for the respondent submitted that the trial court exercised its discretion in allowing the said application and there was no basis of interfering with such exercise of discretion.

With respect, I agree with Mr. Okoth. It is trite law that an appellate court will not interfere with the discretion of a trial court unless it is satisfied that the court misdirected itself in some matter and as a result arrived at a wrong decision or unless it is manifest that the trial magistrate was clearly wrong in the exercise of his or her discretion and as a result there arose a miscarriage of justice. That was not demonstrated by the appellant. See CHEMWOLO & ANOTHER VS KUBENDE [1986] KLR 492.

I find no merit in this appeal and dismiss it with costs.

DATED, SIGNED and DELIVERED at KISII this 27th day of June, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Ochwangi HB for Mr. Kinanga for the appellant

N/A for the Respondents

D. MUSINGA

JUDGE