

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3154 of 1988

ANGELINA CHELAGA.....PLAINTIFF

VERSUS

ELIZABETH MARY OKELLO.....RESPONDENT

RULING

This application was filed in court in 15th July 1992 and is now in the hands of the 3rd advocate since. The same was brought by way of chamber summons under Order VIA rules 3, 5 and 8 of the Civil Procedure Rules. In it the Plaintiff seeks leave to amend the Plaintiff in terms of a draft. Amended Plaintiff which despite the application stating so was not annexed to the application.

During the arguments on 18th February 2004 Counsel for the applicant relied on the affidavit of George Mwaura (then acting for the Plaintiff) in which he refers to the amended Plaintiff filed on 24th January 1989 and stated that the reason for this application is to make good that amendment, which according to him, was made without leave despite pleadings being closed at the time.

In opposition counsel for the Respondent argued that the present application ought not to be allowed as it would have the effect of substituting a party in circumstances where the suit against the substituted defendant is time barred. In the case of plaintiff proceedings herein are a clear case of too many costs spoiling the broth, wherein the advocates on both sides have now completely lost their focus.

Having combed through the record, I see no reason for this application for the following reasons:

The amendment without leave was proper under Order VIA Rule 1 which allows a party to amend pleadings once without leave of the court before pleadings are closed. As borne out by the record, and from the Respondent's pending Notice of Motion dated 4th May 1992, pleadings herein closed on 4th April 1989, presumably after the filing of the Defence to the Amended Plaintiff on 3rd April 1989. In the said Defence as well as in the grounds of opposition dated 23rd July 1992 (The copy in the court file is not stamped but bears an acknowledgment by the then advocate for the Plaintiff) the Defendant raises the issues of limitation as one of the grounds of challenging the amendment. The same line was pursued at the inter partes hearing.

According to the provisions of ORDER VIA Rule 2 A party served with a pleading amended without leave is at liberty to apply for disallowance of the amendment within 14 days of service. The Defendant did not do so but filed instead a Defence to the Amended Plaintiff. In my view she should be taken to have conceded to the amendment at that point Except to point out that the Police abstract report complained of bears the name Dr. E. Okello as the owner of the subject motor vehicle as stated by counsel, I see no reason to go into the merits of the application which as earlier stated is of no use and ought not to have been filed. The same is dismissed with costs to the Defendant.

Dated and Delivered at Nairobi this 12th day of March 2006

M.G. MUGO

JUDGE

Delivered in the presence of

No appearance for Plaintiff/Applicant

Tiego for Defendant/Respondent