



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

**Civil Suit 126 of 2004**

**GEORGE KEBASO MABEYA .....**  
**PLAINTIFF**

- Versus -

**CROWN INDUSTRIES LIMITED .....**  
**DEFENDANT**

**Coram: Before Hon. Mr. Justice L. Njagi**

**Mr. Gichana for Plaintiff/Applicant**

**Mr. Otieno for Defendant/Respondent**

**Court clerk – Kinyua**

**R U L I N G**

By this application, the plaintiff/applicant seeks the court's leave to amend his plaint. The application is dated 19<sup>th</sup> September, 2005 and is brought by way of a chamber summons taken out under Order VIA rules 3 and 5 of the Civil Procedure Rules; sections 3A, 63(e) and 100 of the Civil Procedure Act; and all other enabling provisions of the law. The application also seeks an order that costs be in the cause.

The application is supported by the annexed affidavit of GEORGE KEBASO MABEYA, the plaintiff herein, sworn on 19<sup>th</sup> September 2005, and a supplementary affidavit sworn by the same deponent on 4<sup>th</sup> May, 2006. It is based on the grounds that the plaintiff's/applicant's counsel inadvertently omitted to use the right medical term of the injuries sustained by the plaintiff as described by the doctor; that the amendment is minor and not prejudicial to the defendant's cause; and it is fair, just and equitable in the circumstances of this case.

In opposition to the application, the defendant/respondent filed six grounds of opposition dated 22<sup>nd</sup> January, 2006. These are:

- (a) that the application is made in bad faith and is an abuse of the process of the court;
- (b) the plaintiff's assertion that he inadvertently omitted to use the right medical term of the injuries sustained by the plaintiff as prescribed (sic) by the doctor is an afterthought and therefore his application

is only meant to introduce new matters and/or raise a new cause of action;

- (c) the plaintiff was aware of the injuries sustained by him and the introduction of a medical report is meant to exaggerate the injuries sustained by the plaintiff;
- (d) the plaintiff cannot take advantage of their deliberate and intentional failure to plead the actual injuries sustained by him;
- (e) the plaintiff has not come to court with clean hands; and
- (f) the application is superfluous and should be dismissed with costs.

At the hearing of the application, Mr. Gichana appeared for the applicant while Mr. Otieno appeared for the respondent. Mr. Gichana relied on the applicant's supporting affidavit sworn on 19<sup>th</sup> September, 2005, and the supplementary affidavit sworn on 4<sup>th</sup> May, 2006. He also referred to paragraph 7 of the original plaint in which the word "cut" was used. He argued that in his report, the doctor had used the words "cut" and amputated interchangeably, and submitted that the word used in paragraph 7 of the plaint should have read amputated. He asked for the orders as prayed.

Opposing the application, Mr. Otieno adopted the grounds of opposition and submitted that the application was an afterthought and that it was intended to change the cause of action in this suit. The plaintiff was in possession of the medical report all along, and when he filed the verifying affidavit he swore to the correctness of the plaint. Mr. Otieno further contended that paragraph 5 of the intended amended plaint seeks to change the date of the accident from 12<sup>th</sup> to 21<sup>st</sup> January, 2005, and yet the supporting and supplementary affidavits do not explain the change of date. He submitted that the change of date of the accident could prejudice the defendant as the injuries could have been sustained after the plaintiff had left the defendant's employment. Lastly, even though the supporting affidavit says that the omission in the use of the proper medical term was the mistake of counsel, there is no affidavit from counsel to explain. Mr. Otieno asked that the application be dismissed with costs.

In his reply, Mr. Gichana submitted that the objection taken by the respondent was of a technical nature which is prohibited by Order VI rule 12 of the Civil Procedure Rules. He further submitted that the date of the accident is a matter of fact to be proved at the trial, and that if the application is allowed, the defendant will have an opportunity to amend the defence.

After considering the pleadings, the application, the grounds of opposition and the submissions of counsel, I wish to point out that the respondent has not shown how the application is made in bad faith, or how it is an abuse of the court process as alleged in paragraph 1 of the grounds of opposition. The allegation in paragraph 2 of those grounds that the intention to use the terminology used by the doctor is an afterthought and therefore the application is only meant to introduce new matters and/or raise a new cause of action cannot be sustained. In the first instance, the conclusion drawn by the respondent does not logically flow from the premise and even if it did, the respondent should have demonstrated what new matters are introduced or what new cause of action is raised. This has not been done. With regard to paragraph 3 of those grounds, if there is any exaggeration of the injuries sustained, that is matter for the trial court to decide. At this stage, it would be unfair to deny the plaintiff/applicant a chance to amend his pleadings merely on the ground of an apprehension that this will exaggerate the injuries. For the same reason, the point taken in paragraph 4 of the grounds of opposition cannot stand. Finally, the respondent has not shown in what manner the plaintiff's hands are unclean. But if the application is rendered superfluous by the use of the word "amputated" in place of the word "cut", I don't think that this prejudices the defendant in any way.

In respect of the change of date from 12<sup>th</sup> to 21<sup>st</sup> January, 2002, Mr. Otieno argued that this is likely to prejudice the defendant. He did not, however, elaborate as to how such prejudice would arise. In my view, such prejudice would have arisen if the defendant had pleaded limitation and the plaintiff sought to bring forward the date of the accident. But that is not shown to be the case here. And even if it had been shown to be the case, the date of the accident is a matter of fact to be proved at the trial. Once proved, it

will clearly demonstrate whether the accident occurred during the subsistence of employer/employee relationship between the parties, and whether the action was commenced within the period provided for under the Limitation of Actions Act. For these reasons, I don't see any merit in any of the grounds advanced in opposition to the application for amendment of the plaint.

On the other hand, it seems to me that the law governing the amendment of pleadings is in favour of the applicant in this matter. In the case of **EASTERN BAKERY v. CASTELINO** [1958] E.A. 461, Sir Kenneth O'Conner, President of the then Court of Appeal for Eastern Africa, said at p. 462 –

**“It will be sufficient ... to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs.”**

He concluded by observing, on the same page, that –

**“The main principle is that an amendment should not be allowed if it causes injustice to the other side.”**

In the instant matter, the respondent has not demonstrated what injustice, if any, it will suffer if the applicant is granted leave to amend. On the contrary, if such leave is granted, not only will the respondent be granted leave to amend its defence, if it so wishes, but it will also be entitled to costs. That being so, I grant leave to the plaintiff to amend the plaint as prayed. The draft amended plaint attached to the application shall be deemed as duly filed and served upon payment of the requisite court fees. The plaintiff will meet the costs of this application in any event. It is so ordered.

Dated and delivered at Mombasa this 21<sup>st</sup> day of September, 2006.

L. NJAGI

JUDGE