



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Case 209A of 1991

PHILOMENA INGOSI LUMULAPLAINTIFF

V E R S U S

JACKTON MWANZIDEFENDANT

R U L I N G

The defendant, *JACKTON MWANZI*, made an application to this court on 1-9-2006 seeking leave to amend his defence out of time. His application was by chamber summons dated 31.8.06 supported by his own affidavit sworn on 31.8.06. The application was opposed by the plaintiff, *PHILOMENA INGOSI LUMULA*, who on 18-09-06 filed a replying affidavit sworn on 15.9.06.

The grounds on which the application was made which were set out on the face of the application were:-

- (a) *That the initial defence was filed by a defunct Insurance which did not dispute the claim and therefore made some admission which are far from the truth and which might prejudice the defendant in person after trial hereof.*
- (b) *That the amendment sought will not prejudice the Plaintiff/Respondent case in any manner whatsoever as the Plaintiff has not closed the hearing on her part.*
- (c) *That the delay is not inordinate as some of the documents sought are still not yet traced but the application was to be formally made.*

The application was made after the hearing of the case had commenced and was argued after the plaintiff had closed his case.

The gravamen of the applicant's application is that the defendant who had in his paragraph 3 of his defence admitted that he was on 5.12.1988 the registered proprietor and driver of the motor vehicle registration No. KSC 990, a Peugeot No.404 matatu in which the plaintiff was injured while traveling as a fare paying passenger when it was involved in an accident, now wanted to amend the defence so as to deny this allegation. In his affidavit in support of the application the defendant averred that the defence was filed "*by advocates for the insured upon instructions from Kenya National Assurance Company Ltd., now defunct,*" and that the existence of the matter came to his notice when he was served with a hearing notice marked "JNM". But the record shows that it was a copy of the defence sought to be amended that was annexed. In paragraphs 3, 4, 5 and 6 of his affidavit, the defendant stated-

3. That the defence filed made admissions which are factual and are likely to prejudice as a defendant in

person as the insurance company is no longer in existence.

4. That I and my advocates now on record did inadvertently not realize the prejudicial admissions contained in the defence filed by the advocate of the said insurance company until the same was pointed out during trial as the plaintiff was giving evidence.

5. That I have subsequently made efforts to piece up pieces of evidence that clearly shows that I am not culpable and that I have been wrongly sued in the proceedings. annexed hereto and marked "JMN2" is a copy of the Official Search for the Registered owner of the motor vehicle as at the time of the accident.

6. That I have also obtained a fresh abstract which clearly shows that I was not the known owner of the accident causing motor vehicle neither was I the driver as at the time of the accident. Also noting that my attempts to obtain copies of proceedings in the public inquest case No.7 of 1990 from the Public Archives at Kakamega and Court Registry has proved fruitless hence the delay in bringing this application. Annexed hereto and marked "JMN3" is a copy of the Police Abstract.

Mr. Nyanga, learned counsel for the defendant, urged me to grant the application contending that an amendment can be allowed at any time and that he did not realize the admission in the defence in good time.

The application was opposed by the plaintiff who filed a replying affidavit sworn on 15-9-2006 and filed in court on 18-9-06.

In the replying affidavit, the plaintiff averred, in paragraphs 8, 9, 11, and 14 the following –

(8) That it is within my knowledge that in an application to set aside the ex parte judgment which had been obtained against the defendant, the defendant's then counsel MR. JOSEPH KIMANI of AGN KAMAU ADVOCATES filed a Replying Affidavit sworn on 25.10.1993 in which he deposed in paragraph 2 thereof that he had been instructed by the defendant herein to enter appearance and file a defence on his behalf.

(9) That the said lawyer averred in paragraph 3 of the said affidavit that he filed a statement of defence on 5.8.1993 pursuant to the instructions received from the defendant on 5.7.1993.

(11) That I have been informed by my lawyers on record and which information I verily believe to be true that the defendant's new Counsel on record M/S B. A. Nyanga & Co. Advocates came on record on 20.9.2000 which is nearly six years ago and had all the time before the hearing of the case commenced to apply to amend the defence which they did not.

(12) That in my honest opinion it is too late in the day to seek to amend the defence especially given that I have already testified and nearly closed my case as the only evidence remaining is that of the police officer who investigated the accident that gave rise to my claim herein.

(14) That it is more than 13 years ago when the defendant filed his defence and to come to court now to seek to amend it is to say the least to abuse the process of the court.

Mr. Shitsama, learned counsel for the plaintiff urged the court to dismiss the application because the plaintiff would suffer prejudice if the application was allowed. He pointed out that the suit is 15 years old and the advocate for the defendant has been on record since 20/9/00. He submitted that when the demand letter of 15.6.89 ("PIL1") was sent to the defendant, no denial was made to the effect that the latter was not the owner of the motor vehicle in question and at no stage was this denied. He contended that it was not open to the defendant to seek to amend the defence and at the same time seek to disown it. Mr. Shitsama referred to the police abstract dated 5.4.89 (annexture "PIL2") and pointed out that the defendant was therein described as the owner of the said motor vehicle. The defendant's annexture JMN 3, which was also a police abstract dated 19/9/00 reflected one Davyson Mwanzi Odera as the owner of the said motor vehicle.

In the light of all these matters, should the court allow the amendment sought? What principles apply in this matter?

Rule 3(1) of Order VIA of the Civil Procedure Rules gives the court unfettered discretion to allow amendment of pleadings at any stage of the proceedings on such terms as to costs or otherwise as may be just and in such manner as it may direct. Under Rule 5(1) of Order VIA, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs (and on such terms as to costs or otherwise as are just) for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings. In *Eastern Bakery v. Castelino* (1958) EA 461, the former Court of Appeal for East Africa held that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side. This court did also hold in 1968 that amendments may be allowed at a very late stage where it is necessitated solely by a drafting error and where there is no element of surprise, see *General Manager E.A.R & H.A. versus Thierstein* [1968] EA 354. It is important to point out that amendments timeously made before the hearing of a suit should be readily allowed if no prejudice is caused to the other party and if they are designed to help place before the court all the relevant matters for determination of the real issue in dispute between the parties. *Bullen and Leake & Jacob's Precedents of Pleadings, 12th Edition* shows that the power of the court in allowing amendments is intended to help in determination of the true, substantive merits of the case. It also shows that amendments should be timeously applied for. The power of the court to grant amendment can be exercised at any stage of the proceedings including the appeal stage.

It is salient from authorities including *Beoco Ltd. v. Alfa Laval Co. Ltd.* [1994] 4 ALL ER 464 that in considering leave to amend pleadings, the guiding principle is that all amendments should be freely allowed at any stage of the proceedings provided that the amendment will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs. In volume 2, 6th Edition of the AIR commentaries on the Indian Civil Procedure Code by Chittaley and Rao at page 2245 the rule with regard to amendment of pleadings has been stated thus, "that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been 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 prejudice to the other side."

Applying these principles to the instant case, can it be said that the intended amendment was sought timeously or without undue delay or that it will not prejudice the plaintiff? The plaintiff has closed his case on the basis of the existing pleadings. If the defendant were allowed to change his defence by denying that which he had admitted and which was the basis on which the plaintiff led its evidence, the effect would be to re-open the case all over again with the result that the plaintiff would have to go back on the drawing board, as it were. Where a party who has had ample time to amend his pleadings negligently fails to take steps to amend and wakes up from his slumber after the close of the plaintiff's case, should such party be granted leave to amend if the effect of such amendment is to do injustice to the other side? I do not think so. The defendant in this case had the present advocate as his counsel from 20-9-2000 when the latter went on record by filing his Notice of Appointment of Advocates. The case was fixed for hearing on 22-11-2001 and on 12-6-2003, and the defendant's advocate on record attended court on these occasions but the hearing collapsed on each occasion. On 30.11.04, the hearing proceeded and the plaintiff testified and was cross-examined by the defendant's advocate. It was adjourned and further hearing resumed on 27-6-06 when the plaintiff's witness (PW2) testified and was cross-examined by the advocate for defendant. The case was adjourned for further hearing on 19.9.06 when the plaintiff's counsel closed the plaintiff's case.

The application to amend the defence was dated 31.8.06 and was filed in court on 1st September, 2006, that is to say, it was filed after the adjournment on 27.6.06 and before the resumed hearing on 19.09.06. What explanation did the defendant give for failing to apply for leave to amend from the time his advocate went on record on 20-9-00? In paragraph 4 of his affidavit in support of the application for leave to amend the defence, the defendant averred:-

4. “that I and my advocate on record did inadvertently not realize the prejudicial admissions contained in the defence filed by the advocate of the said insurance company until the same was pointed out during the trial as the plaintiff was giving evidence.”

This averment does not reflect seriousness. The issue was central to the case and although to error is human, any counsel getting up on the matter would be bound to spot it. The case had come up for hearing on three occasions as aforesaid and it was not until eighteen days before the third hearing that the defendant filed the application. I think the defendant was indolent and the amendment he seeks cannot be allowed without injustice to the plaintiff. For these reasons, I decline to allow the amendment and accordingly dismiss with costs to the plaintiff the defendant’s Chamber Summons application dated 31.8.06 filed in court on 1.9.06. It is so ordered.

Delivered, dated and signed at Kakamega this 19th day of October, 2006.

G. B. M. KARIUKI

J U D G E