



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 2711 OF 1998**

**BEATRICE WANGUI MWANGI ..... PLAINTIFF/APPLICANT**

**VERSUS**

**PETER KIMEMIA MWANGI .....1ST DEFENDANT/RESPONDENT**

**KENYA BUS SERVICES**

**LIMITED (STAGECOACH).....2ND DEFENDANT/RESPONDENT**

**RULING**

The plaintiff's application by Chamber Summons dated and filed on 29th June, 2004 was brought under Order VIA rules 3,5, and 8 of the Civil Procedure Rules and Section 3A and 18 of the Civil Procedure Act (Cap. 21). The prayers were, firstly, that the Court be pleased to grant the plaintiff leave to amend plaint; secondly, that the annexed amended plaint be deemed to be duly filed upon payment of the requisite fees; thirdly, that the Court do transfer the instant suit to the Senior Principal Magistrate's Court at the Milimani Commercial Courts for hearing and determination; and lastly, that costs be in the cause.

The supporting grounds are, firstly, that the plaintiff wishes to amend the plaint to include averments attributing vicarious liability to the second defendant; secondly, that the proposed amendment is not prejudicial to the defendants but would assist the Court to determine the issues in controversy; thirdly, that the Senior Principal Magistrate does have the necessary pecuniary jurisdiction to hear and determine the matter; fourthly, that the intended amendment to the plaint is only a matter of form rather than of substance; and lastly, that this Court has the discretion to grant the orders sought.

In further support of the application is the affidavit of *Jane Nyamuringa Ruigu*, the advocate with the conduct of the instant matter on behalf of the plaintiff. She deposes that her firm, M/s Mbigi Njuguna & Co. Advocates, had instructions to take over representation of the plaintiff from other advocates, and in that behalf duly filed notice of change of advocates on 15th June, 2004. Her firm then realized that the former advocates on record had not included the averment that the second defendant is vicariously liable for the torts or negligence of the first defendant as pleaded. The deponent prays that the plaintiff be not prejudiced by the inadvertent omission. She deposes that the pecuniary jurisdiction of the Senior Principal Magistrate at the Milimani Chief Magistrate's Court has now been enhanced and is well likely to cover such claims as the plaintiff will make in the instant suit. The deponent avers that the defendants will not be exposed to any prejudice if the orders sought herein are granted.

To this application the defendants, on 9th August, 2004 filed their grounds of opposition dated 5th August, 2004. The matter came up for hearing before me on 5th October,2004 when *Ms Machio*

represented the plaintiff while **Mr. Kinyanjui** represented the defendants.

Mr. Kinyanjui made his submissions on the basis of the grounds of opposition. He contended that the proposed amendment to the plaint had the effect of introducing new averments, and this would not be in compliance with Order VII rule 1(2), since the proposed addition to the plaint was not confirmed as true by a verifying affidavit. He urged that by virtue of Order VII rule 1 (3), the Court should strike out the plaint. The original plaint is dated 3rd December, 1998 and was filed on 4th December, 1998. It was only some two – three years later that, by Legal Notice No. 128 of 2001 a new Order VII, rule 2 was inserted which reads:

**“(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint”.**

That new requirement is protected by rule 2(3), which stipulates that:

**“The Court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with subrule (2) of this rule”.**

The tenor and effect of **Mr. Kinyanjui’s** submission is that the Court’s powers under rule 2(3) be exercised to strike out the proposed amendment to the plaint, because it is not accompanied by a verifying affidavit. I do not think, with due respect, that such a proposition is tenable, since the change to the plaint is only a proposal, which is subject to being granted or refused – but not struck out. Yet counsel has continued to canvass his point by stating: “It will be an act of futility allowing a document that deserves to be *struck out*”.

The response of counsel for the plaintiff on the question is that the requirement of a verifying affidavit must be referring to the original plaint, rather than the amended plaint. Her own position may well be, with much respect, only one of conjecture, as she has cited no authority to support her submission. There may well be no authority yet. But if it is assumed, as it must be, that there was good cause for the amendment which introduced rule 2(3), then, logically, a quite substantially *amended plaintiff* could well require a verifying affidavit, whereas a minor or purely formal amendment might not require such an affidavit. Would it serve any purpose for a most limited and purely formal amendment to the plaint, for instance, one involving only the spelling of a word, or rectifying some two or three descriptive labels, to be accompanied by a verifying affidavit? If that were the case it would simply proliferate paper-work and add to the copious materials which the judge has to read; and that could very well cause delays in the disposal of cases. I think the Court must have a discretion as to what extent of proposed amendment to the plaint would call for the filing of a verifying affidavit.

In the present instance I am of the opinion that the proposed amendments to the plaint are purely formal and there is no need for a verifying affidavit. In such cases the position may be taken that *de minimis non curat lex*.

The next objection raised by the defendants is that the accident which is the basis of the cause of action, occurred on 4th December, 1995 – and so the presented limitation period of three years for torts has already expired. Ms. Machio has met this contention with the response that, as a matter of law, parties are allowed to amend their plaint any time before judgment is delivered. Counsel, in this regard, cites the East African Court of Appeal decision in **Eastern Bakery v. Castelino [1958]** E.A. 461. It was held in that case that “amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs” (P.461).

Another relevant decision is **Julia Akelo Kunguru v. Seth Lugonzo & Another**, Civil Suit No. 197 of 2001, in which the Honourable Mr. Justice Ringera (as he then was) held:

**“..... Order VI rule 3(2) gives the Court a discretion to allow certain types of amendment even though made outside the limitation period if the Court thinks it is just**

**so to do. The permissible amendments in that regard are only those contemplated in subrules (3), (4) and (5) which are amendments to correct the names of parties, or to alter the capacity in which a party sues, or to add or substitute a new cause of action by the party making the amendment provided the new or substituted cause of action arises from the same or substantially the same facts as the earlier cause of action by him”.**

It is similarly affirmed in **Fulkner v. Agricultural Development Corporation** [1978] KLR 49 that (p.51):

**“..... an amendment may by Order VIA, rule 3(2), be made although it is made after the period of limitation has expired, if the Court thinks just; and by rule 3(5) such an amendment may be made, even though it adds a new cause of action, if it arises out of the same or substantially the same facts”.**

From the foregoing authorities, it follows that there is nothing at all which is improper in the plaintiff, by the proposed amendment, introducing the element of vicarious liability. One point taken by *Mr. Kinyanjui* in contesting the proposed amendment to the plaint is that it is not proper to introduce vicarious liability, since the driver of the vehicle which was involved in the accident leading to the suit, was on a frolic of his own. I do not, with respect, accept this contention at this stage of pleadings; it must be kept pending until the time of adducing evidence in Court.

Counsel has also submitted that, bringing the second defendant into the suit through vicarious responsibility some nine years since the accident took place would be prejudicial to that defendant. The nature of the prejudice, however, has not been disclosed. On that account, but more particularly on account of the fact that the case authorities are in support of the plaintiff's prayer, I think a good case exists for allowing amendment to the plaint as proposed.

*Mr. Kinyanjui* also contested the application to have the present suit transferred to the Senior Principal Magistrate's Court for hearing and disposal. His argument is that there ought to be a separate application, by Notice of Motion, for such a transfer. In aid of this argument, counsel cites both Order L rule 1 and Section 18 of the Civil Procedure Act (Cap. 21).

On the advantages of the transfer of the instant suit from the High Court to the Senior Principal Magistrate's Court, I find myself more in agreement with the plaintiff than with the defendant. Indeed judicial notice may be taken of the fact that the case stands to be disposed of much more expeditiously in the Subordinate court than in the High Court, a prospect which should yield benefits for parties on both sides, as well as save on the very tight time resources of the High Court. It should be noted that Section 18 of the said Act empowers this Court to act suo motu in transferring a case, where necessary, to a Subordinate Court. Hence it is not mandatory that the plaintiff should come by formal application in a prescribed form to secure the transfer of the suit to the Subordinate Court.

The foregoing review of the application, the prayers, the dispositions and the submissions of counsel leads me to make the following orders:

- 1. Leave is hereby granted to the plaintiff to amend the plaint dated 3rd December, 1998 in the manner represented by the annexed amended plaint.**
- 2. The said draft amended plaint shall, subject to payment of the requisite fees, be deemed to be duly filed.**
- 3. This suit, based on the plaint as hereby allowed to be amended, shall upon compliance with the orders herein, be transferred to the Court of the Senior Principal Magistrate at the Milimani Commercial Courts, for hearing and determination.**

**DATED and DELIVERED at NAIROBI this 21st day of January, 2005.**

**J.B. OJWANG**

**JUDGE**

**Coram : Ojwang, J**

**Court Clerk – Mwangi**

**For the Plaintiff/Applicant : Ms. Machio, instructed by**

**M/s Mbigi Njuguna & Co. Advocates**

**For Defendants/Respondents : Mr. Kinyanjui, instructed**

**by M/s Kantai & Co. Advocates**