



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

AT NAIROBI

CIVIL CASE 604 OF 1998

JOSEPH GITAU WAWERU.....PLAINTIFF

VERSUS

FRANCIS MUCHAI KARERA.....DEFENDANT

RULING

This suit arises out of a road accident involving the defendant's motor vehicle Reg. NO.KAA 445V and the plaintiff who was riding a motor cycle. The plaintiff brought this claim against the defendant for damages. He filed a suit and served the defendant. The summons served upon the defendant were hearing **HCCC NO.604 OF 1997** while the plaint was bearing **HCCC NO. 564 OF 1998**. The Advocates on record then for the defendant proceeded and entered appearance and filed a defence in **HCCC NO.564 OF 1998**. But at some stage the **NO.564 of 1997** was cancelled by drawing a line across and above it inserting **NO.604 OF 1998**.

Because of this confusion the plaintiff proceeded under the altered number 604 of 1998, and applied for interlocutory judgment for failure to enter appearance and file a defence and subsequently the suit proceeded by way of formal proof and judgment was entered by Mulwa J on 23rd January 2001.

The defendant filed this Chamber Summons under Order IXA Rule 10, Order L Rule 12 Civil Procedure Rules and Section 3A Civil Procedure Act seeking orders to set aside that judgment and be granted leave to enter appearance and file defence.

Counsel for the applicant submitted that the said service was wrong and he was misled to enter appearance and file a defence in **HCCC NO.564 OF 1997** while the defendant proceeded under **HCCC NO.604 OF 1998** which proceeded by way of formal proof for lack of appearance and defence.

While counsel from the plaintiff opposes the application and submitted the error quoted by the defendant was noticed and corrected by amendment. As I have stated earlier the amendment was effected by crossing **NO.564 OF 1997** and inserting **NO.604 OF 1998** on top. This violated the provisions of Order VIA which provides:

“O.VIA (5)(1)

For the purpose of determining the real question of controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on application of any party order any document to be amended in such a manner as it directs and on such terms as to costs or otherwise as are just.”

And Order VIA 7(1) provides for the mode of amendment. It reads:

“Every pleading and any document amended under this order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or if no order has been made, the number of the rule in pursuant of which the amendment was made.

In the instant suit, no leave to amend was granted and the mode of amendment violated the provisions of Order 7(2) which provides:

“(2) All amendments shall be shown by striking out in red ink all deleted words, but in such manner as to leave them legible and by underlining in red ink all added words.”

Applications under this order shall be made by summons but the court may nevertheless hear and determine any oral application made in court.

Although the counsel for the plaintiff contends that the error was noticed and corrected by amendment, it is clear from the record that the amendment was made too late and was irregular and contrary to the Civil Procedure Rules.

It follows therefore that the judgment entered herein was irregular and she ought to be set aside.

In the result the defendants’ application is allowed in terms of prayer (c) of the Chamber Summons dated 1st November 2001. Costs to the applicant.

Dated this 20th day of June 2005.

J.L.A. OSIEMO

JUDGE