



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 20 of 1996

UGMA ENGINEERING CORP. LTD.....PLAINTIFF

VERSUS

TRANSAMI (Uganda) Ltd.1st DEFENDANT

TRANSAMI (Kenya) ltd2ND DEFENDANT

RULING

This suit is part heard. However in the course of hearing the Plaintiff seeks leave to amend the plaint in respect of the lorry in which the goods were carried. The application is opposed by Defendants who say the application is to substitute new cause of action. Plaint will be at variance with parties pleading and after issues already framed.

The desired amendment is to replace the quoted number of motor vehicle with another. The defendants denied the ownership of the vehicle. The defendant will be prejudiced by the amendment. There is an element of surprise. The court should consider the effect of the amendment.

Negligence is tied to the carrier. Proof of the owner of vehicle is important. Submit that the vehicle is of a different carrier not ours.

The defendant should get leave to controvert the evidence.

In the case of the British India General Insurance Co. Ltd. Vs. G.M. Parmer & Co, it was held that the general principle in amendments is that the courts will freely allow an amendment to pleadings before the hearing if it can be done without injustice to the other party where the application was made bona fide and could cause no injustice to the other side. There is no good reason to refuse amendment.

The effect of allowing the amendment here would be to open up the case. Dependants would have to offer evidence to rebut the amendment. Mr. Wameyo also opposed the application to amend saying that proposed amendment would change the character of the suit as relates the second defendant who had denied ever owning the motor vehicle. The plaintiff knew in advance that the ownership of the vehicle was disputed. Cross-examination was tailored to disproving that the defendant was owner of that vehicle.

He submitted that to amend the plaint at this stage would prejudice this defendant. The evidence in

plaintiff's document asserted "Motor vehicle in respect of report KAC 232z a".

The correct Number of vehicle is not the same as in Police Abstract (KAC 236 A/ZA 948Z. This is the number mentioned in the letter of demand dated 11.8.95 by the plaintiff. In the Toplies & Harding report, note container Number is give as UFCU 300360/8 and the transport from Mombasa to Kampala was to be by road.

The goods were carried on Truck No. KAC 236 a Trailer ZA 9482. This was the number state in Police Abstract and is the same number appearing on the plaint paragraph 6.

It is quite clear the error occurred in following the Police Abstract which gave the Truck Number. A party is entitled to rely on information given by a statutory body empowered to have such information.

On authorities Mr. Inamdar has cited the Supreme Court Practice 1957 at page 359 per. 20/5/8/6 where Jenkins LJ stated; "It is a well established principle that the object of the court is to decide the rights of parties and not to punish them for mistakes they make in conduct of their cases..."

In this case the plaintiff failed to notice that the 2nd defendant in the defence had denied the ownership of the Truck identified by the plaintiff in the plaint as Number KAC 236 and trailer 2A 9482.

However in the cause of trial the matter was again denied by defendant witness and therefore it became necessary for the plaint to be amended by inserting correct number of the Truck. The suit is not yet determined.

In the British India Insurance Co. vs. Parmer mentioned above Law J.A. said at page 177 letter F "Surely the court cannot allow an amendment which creates inconstancy in the pleading".

In the present case the plaintiff does not wish to add an inconsistency in pleading but wishes to clarify his case by giving correct information – the number of the vehicle. Also the case of Central Bank of Kenya Ltd. Vs. Trust Bank. Court of Appeal decision it was held "The amendments of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action".

"Accordingly all amendments should be freely allowed at any stage of the proceedings" provided the other party is not prejudiced.

In this case the defendant has already given evidence that the vehicles are not his.

If the amendment is carried out no prejudice will be occasioned to the said defendant.

In the case cited by Wameyo for the defendant, it was held that in special circumstances may exist to enable the court to allow the amendment to the plaint.

In that case Barclays Bank vs. Shamsudin [1973] EA at 451.

The court allowed the amendment even if that effect was to defeat a defence of limitation. In the present case special circumstances exist the error sought to be corrected was made bona fide – by taking the police abstract as correct. The defendant has had full opportunity to give evidence to the contrary. The plaintiff does not seek to add new cause of action which the defendants do not know upon considering everything. I am of the view that the leave to amend sought should be granted.

I allow application. The plaintiff shall amend its plaint within the next 7 days. Defendants may file defence to the amendment within 7 days of service.

All thrown away costs to the Respondents/Dependants.

Delivered and dated at Mombasa this 29th day of September 2005.

J. KHAMINWA

J U D G E

29/9/05:

Khaminwa, J

Jason – court clerk

Ms. Anita shah

Mr. Wameyo also h/b for Kinyanjui

KHAMINWA, J

Mr. Wameyo

Ms. Anita Shah

We have agreed for a mention dated.

Court:

Mention on 7/10/05.

KHAMINWA, J