



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

**AT NAKURU**

**Civil Appeal 45 of 2002**

*(An appeal from the ruling of Senior Resident Magistrate, Nakuru (H. Wasilwa Mrs) in Civil Suit No. 1129 and 2001 both of 2000 – consolidated)*

**PETER OKAO OBUGA.....1<sup>ST</sup> APPELLANT**

**NEWTON KARIUKI KAHARA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JULIUS ORENGE KEROSE.....RESPONDENT**

**JUDGMENT**

On 30<sup>th</sup> March, 2001, the appellants through their advocate made an oral application for leave to amend their defence. The application was made pursuant to the provisions of Order VIA Rules 5 and 8 of the Civil Procedure Rules and Section 100 of the Civil Procedure Act. The appellants had in their statement of defence admitted that the court had jurisdiction to hear and determine the matter but their counsel indicated that he had received subsequent instructions to the effect that the accident that had given rise to the suit took place at a place called Kaisugu within Kericho District and so the appellants wanted to amend their defence and deny that the Chief Magistrate's Court at Nakuru had jurisdiction to hear and determine the suit.

The application was opposed by the plaintiff's counsel and the trial court in its short ruling stated as follows:-

*“The application sought goes to the core of this case. There are other defendants on record admitting to jurisdiction of this court. To allow application is to delay justice. Since parties are ready to proceed I will not allow amendment sought at this juncture. The court will proceed.”*

The appellants' counsel then applied for stay of proceedings but the same was rejected and the hearing ordered to proceed.

On 15<sup>th</sup> May, 2001 the appellants filed an application by way of a chamber summons under Order VIA Rules 3(1) and 8 of the Civil Procedure Rules seeking leave to amend their defence on the same reasons

that were advanced initially. The plaintiff filed a replying affidavit and a notice of preliminary objection. In the preliminary objection, counsel for the plaintiff stated that the aforesaid application was bad in law, unsustainable and an abuse of the court process as the same had previously been heard and determined by the court. The court upheld the preliminary objection and that ruling gave rise to this appeal. The appellants argued that the learned trial magistrate erred in law in upholding the preliminary objection and urged the court to reverse and set aside the said ruling.

Mr. Kagucia for the appellants submitted that in denying the appellants leave to amend their statement of defence, the learned trial magistrate exercised her discretion based on wrong principles. He therefore urged this court to interfere with the exercise of the said discretion. Counsel cited the Court of Appeal decision in **THE BRITISH INDIA GENERAL INSURANCE CO. LTD VS G. M. PARMAR & CO.** [1966] E.A. 172 where it was held that courts will ordinarily freely allow an amendment to pleadings before a hearing if it can be done without injustice to the other side.

He further cited the holding of Apaloo JA in **MWAKIO VS KENYA COMMERCIAL BANK LTD** [1987] KLR 513 that leave to amend should not normally be declined unless it would occasion injustice to the other side. It was also held that leave to amend should always be granted unless the court was convinced that the party applying is acting *mala fides* or that it will cause an injury to the opponent which could not be compensated by way of costs or otherwise.

Mrs Magana for the respondent opposed the appeal and submitted that the application for amendment had already been adjudicated upon and a ruling made on 30/3/01 and the appellants had not sought to appeal against the said ruling or appeal against the same. She said that under Order VI Rule 8 the application could be brought either orally or in writing and the same had already been made orally and rejected. She further argued that the intended amendment to the defence had no merit because the trial court in Nakuru had jurisdiction to hear the matter even if the accident that gave rise to the suit occurred at Kaisugu within Kericho District as the Resident Magistrate's Court had jurisdiction throughout Kenya as per the provisions of Section 3(2) of the Magistrate's Court Act and for that proposition she cited the decision of Ringera J (as he then was) in **MOHAMED SHABAN VS GEORGE MWANGI KAROKI** HCCC No. 13 of 2002 at Bungoma (unreported).

Counsel also submitted that the said application had been filed in bad faith, merely to delay the conclusion of the suit.

Having carefully considered the arguments that were advanced by both sides in this matter I will start by stating that under Order VIA Rule 3(1) and 8 of the Civil Procedure Rules amendments to pleadings can be done either orally or by way of chamber summons. A party who intends to amend pleadings must choose one of the above means aforesaid but cannot do it both ways. The appellants made an oral application that was rejected by the trial court. No appeal was preferred against that decision of refusal. I am of the view that the appellants, having unsuccessfully made the same application orally could not be permitted to rehash the very same application which had already been determined. The appellant was not prevented from appealing against the initial decision. The second application was therefore an abuse of the court process.

Even if I am wrong on my aforesaid holding, it is trite law that an appellate court will not interfere with the discretion of a subordinate court in allowing or disallowing an amendment to a pleading unless it appears that in reaching its decision the court proceeded upon wrong materials or wrong principle.

It was so held in **EASTERN BAKERY VS CASTELINO** [1958] E.A. 462. It was not demonstrated by the appellant that in disallowing the application for amendment the trial magistrate proceeded upon wrong materials or wrong principle. In the circumstances, I dismiss with costs the appellant's appeal herein.

DATED, SIGNED AND DELIVERED at Nakuru 9<sup>th</sup> day of December, 2005.

**D. MUSINGA**

JUDGE

**9/12/2005**

Judgment delivered in open court in the presence of Mr. Kagucia for the appellants, Mr. Okeke holding brief for M/S Gatu Magana for the first respondent.

**D. MUSINGA**

JUDGE

**9/12/2005**