



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 121 OF 2001

AGNES M. MBOLONZI ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

JACKSON MUTUNGA & ANOTHER: ::::::::::::::: DEFENDANT

RULING

Pleadings herein were closed. The case proceeded to trial and the trial was concluded both for the plaintiff and the defence. A date was set for submissions and submissions from both the plaintiff, defendant and 3rd party were filed. The matter was then set down for the writing of the judgement. The plaintiff's counsel submissions were filed on 13.6.2002 those of the 3rd party filed on 19.6.2002, while those of the defendant were also filed on 19.6.2002 on 10.7.2002 counsel for the plaintiff put in an application for leave to amend the plaint. He was faced with a technicality as the proceedings had been concluded. That application was withdrawn and another one filed on 20.8.2002 seeking leave to have the case reopened for hearing, leave to amend the plaint in order to reflect the deceased's monthly earning in terms of the amended copy of the plaint, annexed, that the amended plaint be deemed as being duly filed and served and that costs be in the cause. The application is brought under order 1 rule 10 of the Civil Procedure Rules, section 3A and 100 of the Civil Procedure Act and order 6A rule 3 of Civil Procedure Rules Cap 21 Laws of Kenya.

The grounds in support are in the body of the application supporting affidavit in which the counsel wholly relied during the hearing of the application. The major ones are that failure to indicate the monthly earnings of the deceased was due to a bonafide mistake on the part of the advocate and the typist and not the plaintiff and so the plaintiff should not be punished in any way, that the mistake relates on to failure to indicate the deceased's earnings in the plaint on which evidence has already been adduced, that the court has power to amend before judgement is pronounced, that the error was discovered late hence this application, that ends of justice demand that the matter be reopened to allow the amendment to be done, that the case was done in a hurry as the suit is a test suit and it is holding up many other suits which are waiting for its outcome, that counsel was under extreme pressure to finalize the case as it is holding up many other suits; that the court has power to amend the plaint before formal judgement is given.

Counsel for the 3rd party filed no papers in opposition but stated that the suit is holding many others. It is a test suit.

Counsel holding brief for counsel for the defendant relied on the grounds of opposition filed which are to the effect that the applicant is guilty of undue delay, that the case is concluded and submissions done and if the amendment is allowed it will irregularly reopen the case, that if the amendment is allowed the pleadings of the plaintiff will go in unchallenged which is prejudicial to the defendant.

On the court's assessment of the facts herein it is clear that there is no dispute that the case is

concluded. The plaintiffs counsel wants to reopen the matter because due to inadvertence he forgot to plead the income of the deceased and that is likely to prejudice the case of the plaintiff who has children who are of school going age.

The only point in issue here is whether this court has jurisdiction to do so. The applicant has cited provisions of the law which he says empower the court to do so.

I have perused the same. Order 1 rule 10 of the Civil Procedure Rules deals with additions and substitution of the parties. I have had occasion to look at the intended amended plaint and I find that there is no move to order or substitute any party and so there is no power flowing from order 1 rule 10 of the Civil Procedure Rules empowering this court to amend at the close of the proceedings.

Section 3A of the Civil Procedure Act empowers the court to do all that is necessary for ends of justice to be met and to prevent abuse of the due process of the court. This section is usually invoked where the kind of situation being dealt with is not provided for under the rules. It is the finding of this court that that does not assist the applicant as the civil procedure rules makes provision for the procedure to be followed when a party wants to amend a pleading.

Section 100 of the Civil Procedure Act deals with amendment of proceedings and not pleadings.

Order 6A rule 3 gives the power to amend at any stage of the proceedings either upon application or on the court's own motion before the end of the proceedings.

The person who wants to amend is the plaintiff. She closed her pleadings and case. The defendants then presented their case and closed their case. The proceedings are therefore closed both for the plaintiff and the defence. There are no proceedings still pending. What is pending is the writing of the judgement. There is no rule which allows the court to jump over the defence, proceedings by the plaintiff and have his/her case reopened.

The defence have closed their case. They are not seeking to reopen their case without the defence reopening their case first there is no way the plaintiff can be allowed to reopen the case for herself, for further proceedings.

It is appreciated that failure to plead the income of the deceased is an error on the part of the counsel. It is appreciated that it is settled that mistakes of counsel should not be visited on the party. That notwithstanding it has to be appreciated that this is a court of law and not sympathies. It has to operate within the provisions of the law governing its procedure. There was power to allow the plaintiff to amend before she closed her proceedings and before the defence closed their proceedings. After the defence closed the proceedings and without them reopening their proceedings there is no way the court can amend her plaint. The application is refused with costs to the defendant who had opposed it.

Dated, read and delivered at Machakos this 29th day of July, 2002.

R. NAMBUYE

JUDGE