



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 3485 of 1992

NYAMBURA KAMUNYU
PLAINTIFF

VERSUS

DOUGLAS JOHN FRANCIS
UNITED TOURING CO. LTD
DEFENDANTS

R U L I N G

This application dated 24th and filed in court on 31st July, 2001 seeks the following orders: namely that,

1. The suit against the second defendant be struck out, and that,
2. The second defendant be granted the costs of its defence.

The application was based on the ground stated on the body thereof, namely:

1. That the suit against the second defendant is statute barred,
2. That the second defendant has been sued without leave to sue out of time, and
3. That the proceedings against the second defendant are an abuse of the court process.

The application was also supported by an affidavit which deponed that on 14th July, 1999 the plaintiff filed chamber summons seeking to join the second defendant as a party to these proceedings which the court allowed on 25th October, 2000 and the amended plaint enjoining the second defendant was filed on 6th November, 2000.

That the defendant was made a party to the suit (as a defendant) after 10 years after the accident occurred and that the suit against the said second defendant was clearly statute barred.

That no leave was obtained to sue the said second defendant out of time, hence pleading against the said second defendant are a nullity and should be struck out.

A replying affidavit filed herein on 5th November, 2001 deponed that under order VI A Rule 3 (of the Civil Procedure Rules) an amendment can be allowed even outside the limitation period and that the court which allowed the amendment must have considered the question of limitation before doing so.

Counsel for both parties appeared before the court on 19th November, 2001 to present or oppose the application and based their presentation either on the supporting or replying affidavits.

The application for leave to amend plaint was presented before a Mr. Bhatt, Principal Deputy Registrar, on 25th October, 2000 and was granted *exparte*.

There is a provision under the Civil Procedure Rules which allows a party to amend his pleadings once without leave and if this provision is applied then the other party need not be served.

But if such application is filed in court, I do not think there is any provision under the rules allowing it to proceed *exparte*, unless the other party is served therewith but fails to turn up on the hearing date.

There is no evidence on this file that counsel for the applicant herein was served with the application but that he failed to appear on 25th October, 2000 for the hearing thereof.

Either way, the law presumes that he/she who comes to the law knows it and that he/she follows all the provisions of that law to present his/her application in court.

In the case subject to this application, the accident occurred on 14th June, 1990 and the plaintiff filed a suit in respect thereof against the first defendant on 28th June, 1992. This was within the requisite time.

However, the application for amendment to enjoin the second defendant was filed in court on 14th June, 1999; however no order was made thereon until 25th October, 2000.

Thus the application to enjoin the 2nd defendant to this suit was filed in court 9 years after the accident subject to the orders and the order of court made over 10 years after the cause of action.

But Section 4 of the Limitation of Actions Act provides for 3 years as the period within which tort cases must be filed in court after the cause of action and that any such case being filed outside this period must be with leave of the court – (see Section 27 and 28 of the Limitation of Actions Act Cap. 22 Laws of Kenya).

No leave was sought in respect to the case subject to this application in which case the amended plaint is of no legal effect.

Section VI A Rule 3 of the Civil Procedure Rules presupposes that a party who seeks leave to amend the plaint outside the limitation period has complied with Sections 27 and 28 of the Limitation of Actions Act.

This was not the position in the case subject to this applications and that this court has the power to intervene and to correct the situation.

I am quite sure if the application dated 21st April, 1999 had been served upon counsel for the applicant herein, he might as well have raised the point being raised in this application and that we would be

dealing with other issues now.

Even if he never raised it, being an important legal point this court would still come in to state the correct position of law as already stated herein before.

I allow this application and strike out the amended plaint filed in court on 6th November, 2000. I shall make no order for costs in the circumstances prevailing herein.

Delivered and dated this 29th November, 2001.

D.K.S AGANYANYA

JUDGE