



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

CIVIL SUIT NO. 2449 OF 1998

JOSEPH MWONGERI.....PLAINTIFF

-VERSUSLE

CHEVALIER LIMITED.....DEFENDANT

JUDGEMENT

LIABILITY:

The Plaintiff has sued the Defendant as the owner of the vehicle registration number KRM 236 for General and Special damages due to injuries he sustained following a road accident. The Plaintiff's evidence was that on 28.1.1987 he was crossing the road at Serena Hotel on Kenyatta Avenue when the vehicle knocked him down.

According to him the vehicle got him as he was completing the crossing and the vehicle was speeding that was the reason he was unable to avoid the vehicle in time.

The Defendant had prior to the hearing filed an application dated 12th May, 2000 for striking out the further amended plaint. I ordered that the application would be heard together with the main suit. In support of this application the counsel for the defence. Mr. Aloo submits that:

1. This suit was filed in Machakos High court on 1996 against Karsandas Tulishads & Sons. Then on 4th September, 1996 the plaintiff filed an application in which he sought orders that:

(i) that leave be granted to the applicant Joseph Mwongeri to file a suit against the present defendant Chevater Ltd. out of the limitation period.

(ii) That the plaintiff be granted leave to amend his plaint and the annexed amended plaint be deemed as duly filed.

The Orders as prayed were granted on 14.2.1997 but Mr. Aloo the counsel for the defendant in the present suit further submits that the order granted on 14.2.1997 allowing the plaintiff to amend the plaint and file the suit out of time was fatally defective. To support his argument he says that first the application was not filed following the proper form of the application. In that instead of filing a Chamber Summons the applicant in essence filed an originating summons. This is against Order 36 Rule 3C (2) of the Civil Procedure Rules.

Secondly he argues that the application of 4th September, 1996 was defective because:

(1) The Court has no jurisdiction either through limitation of Actions Act or through Order 36 Rule 3C of the Civil Procedure Rules to order substitution of parties.

(2) The court has no power to amend pleadings. The power to amend the pleadings was not invoked.

(3) The court can not order a plaint to be deemed filed when it is not filed.

Because of all these defects the consent order entered into on 14.2.1997 was a nullity.

Dealing with the first issue; the complaint is about whether the application should have been in a form of a Chamber Summons or originating summons. The complaint is about the form but not the substance of the application. In that case the defect is not fatal as it is not fundamentally going to the jurisdiction of the court. See Section 72 of Cap. 2 Laws of Kenya and the Case of Machakos Ranching Co. Ltd. vs. Joseph Kyalo Mutiso Civil Application No. NAI 195 of 1997.

The defect if it is there is curable and cannot be struck out on that ground. With regard to the second ground of objection. It will be noted that the order complained of was recorded by consent and as such can only be faulted if it can be shown that it was entered into by misrepresentation or by fraud. The Learned Counsel is not attacking the order on these grounds but on the grounds that the court had no jurisdiction to make the orders it did. I do not agree with this argument. The court has jurisdiction to order amendments of the pleadings. I would have thought that this is rather elementary. See Order 6A of the Civil Procedure Rules. As to whether the right Procedure was followed to get the court to issue the order is a question of form and any such defect is curable. Consent order cannot be deemed a nullity on these grounds. I therefore find that the consent order of 14.2.1997 remains valid and therefore the suit was properly filed. In his evidence the plaintiff testified that on 28.1.1987 he was crossing the road near Serena Hotel when the defendant's motor vehicle hit and knocked him down. He said that the vehicle was speeding and that was the reason the driver was not able to avoid him. He had almost crossed the road when the vehicle hit him.

There was no evidence given for the defence instead the defendant has tried to avoid liability by resorting to technicalities based on procedure. In the absence of any evidence to contradict that of the plaintiff I hold that on a balance of probability the plaintiff has proved his case. I therefore hold that the accident was due to the negligence of the defendant's driver. The plaintiff was however under a duty to be more vigilant and careful crossing the road at that place. He did not exercise that extra care and I find that his failure to exercise that care contributed to the happening of the accident. I will therefore apportion the blame at 80% for the Defendant and 20% for the Plaintiff.

The Plaintiff sustained injuries as a result of the accident. These injuries are described in the medical report by Dr. Nyandika and which was produced. He assessed the disability at 30%. The doctor added that the plaintiff had impaired speech which was evident when he was giving evidence. In support of the claim for damages a number of cases were cited. I was able to compare the injuries in those cases and those of the plaintiff. The Plaintiff's uncle gave evidence that the plaintiff prior to the accident used to run a butchery where he was earning Shs.5,000 per month net profit. He was aged 31 years at the time of the accident. The plaintiff was not able to produce books of account to support income he was making from the butchery but he gave the explanation that his wife left him as a result of the accident and she later died. From the doctor's report it is quite clear that the plaintiff will not be in a position to do business again.

I accept the evidence that he used to earn Shs.5,000/- per month. This is a figure which I find practical for a butcher. For loss of earning capacity I will take a multiplier of 12 years although as a businessman he could have gone on with business well to 65 years old.

There will be judgement for the plaintiff for $20 \times 12 \times 5000 = \text{Shs.}1,200,000/-$ Plus Ksh.2,000 as Special damages. The total amount will be Kshs.1,202,000/-

The plaintiff shall have the cost of the suit and interest.

Dated and delivered this 5th day of October, 2000.

KASANGA MULWA

JUDGE