



Al Siddique Motors Limited v Mukilo & another (Both Suing on Behalf of the Estate of Newton Mwakina Kibirisho - Deceased) (Civil Appeal E038 of 2023) [2024] KEHC 9011 (KLR) (2 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E038 OF 2023
GMA DULU, J
JULY 2, 2024**

BETWEEN

AL SIDDIQUE MOTORS LIMITED APPELLANT

AND

ERICK MUKILO 1ST RESPONDENT

MESALIMU MWAMABO 2ND RESPONDENT

**BOTH SUING ON BEHALF OF THE ESTATE OF NEWTON MWAKINA
KIBIRISHO - DECEASED**

(From the ruling in Civil Case No. E044 of 2021 delivered on 4th August 2023 by Hon. C. K. Kithinji (PM) at Voi Law Courts)

JUDGMENT

1. In a ruling delivered by the learned Magistrate on 4th August 2023 in Voi Magistrate’s Civil Suit No. E044 of 2021 the court allowed an application by the plaintiffs (now respondents) for stay of proceedings, arrest of judgment and leave to amend and file further list of documents, in the following terms:-

“14. Therefore, the application is allowed. Costs in this instance will be to the defendant. The parties to take directions on how to proceed as the orders automatically reopen the case for purposes of production of documents. Orders accordingly.”

2. Dissatisfied with the above ruling of the trial court, the appellant, who is the defendant in the trial court has come to this court on appeal through counsel Jengo & Associates Advocates, on the following grounds:-



1. There is no provision in law that allows a party to amend a pleading to introduce new evidence that was not availed at the time of the hearing.
 2. The learned trial Magistrate erred in law in mixing up the issue of amendment of pleadings to introduce new allegation and an application to merely re-open a case and call new evidence.
 3. That the learned Magistrate erred in law and in fact in holding that there was evidence on record to show that the plaintiff had made attempts to obtain the alleged new evidence at the time of hearing when no such evidence was tendered.
 4. That the learned trial Magistrate erred in law and in fact took into account the wrong principles and failed to apply the correct principles in making her decision hence exercised her discretion wrongly and arrived at a decision that is on the face of it not balanced, unfair, unjust and gives one party an unfair advantage.
 5. The learned trial Magistrate disregarded the defendants submissions so as not to answer the issues that were raised and ventilated.
 6. That this is a ruling where the trial court failed to consider constitutional principles set out in Article 47, 50 and 159 of the Constitution of Kenya.
 7. That the learned trial Magistrate in allowing the application as prayed in essence set aside all her proceedings and ordered a trial denovo to simply enable the plaintiff to call new evidence and fill the gaps in its case.
 8. That the learned trial Magistrate erred in law and in fact and overlooked Article 159 of the Constitution in holding that the appellant had not shown any prejudice it would suffer when the delay itself and the stage at which the amendment was sought defeats the principles of Article 159 of the Constitution on delayed justice.
 9. The impugned ruling amounts to wanton and flagrant abuse, misuse, arbitrary and oppressive abuse of the discretionary powers occasioning an injustice.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Jengo Associates Advocates for the appellant, as well as the submissions filed by Njoroge Mwangi & Company Advocates for the respondents. I have to acknowledge here that both sides relied upon decided court cases.
 4. I note that the prayers in the application filed by Erick Mkilo and Mesalimu Mwamabo as plaintiff dated 27th March 2023 to which the subject ruling appealed from relates, were as follows:-
 1. (Spent).
 2. That the court be pleased to set aside the proceedings in this suit including suspending the delivery of judgment scheduled for 12.4.2023 pending the hearing and determination of the instant application.
 3. That the plaintiffs be granted leave to further amend their plaint.
 4. That the plaintiff be granted leave to file and serve a further list of documents.
 5. That the costs of the application be in the cause.
 5. In the supporting affidavit to the application, the proposed further amended plaint was annexed, and seeks to amend the number of the Certificate of Insurance issued by Kenya Orient Insurance Co. Ltd,



and the subject motor vehicle chassis number. I see no mention of the motor vehicle number plate, though the description of the incident giving rise to the case relates to an allegation that the deceased was a passenger in the said motor vehicle in the Mombasa – Nairobi road when he died in a traffic accident, which is no doubt a public road or highway.

6. In arguing this appeal, the appellant’s counsel has listed two main issues for determination which are firstly, whether the Magistrate failed to grasp and address whether the filing of the application was very late in the day, and secondly, the relevance of the intended new evidence in determining the issue at hand.
7. The respondent’s counsel, on the other hand, has argued that the proposed amendment did not seek to introduce any new cause of action, and that the trial court had discretion to amend, and that the amendments were very crucial in this case, and that the appellant will in any case have a chance to respond to same.
8. I have considered the grounds of appeal and the submissions on both sides. The power of a trial court to amend pleadings is a discretionary power which may be exercised at any stage of proceedings. This means that before the final decision is made, amendment of pleadings may be allowed by the trial court and the main purpose is for the court do justice to all parties involved in the particular circumstances of the case. That discretion is anchored under Order 8 rule 3 and 5 of the Civil Procedure as follows:-

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- (1) Subject to Order 1 rules 9 and 10, order 24 rules 3, 4, 5 and 6...the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend pleadings.....

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- (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in the proceedings, the court may either of its own motion or on the application of any party order documents to be amended in such a manner as it directs and, on such terms, as to costs or otherwise as are just.”

9. The scope of the exercise of discretionary powers by courts have been considered severally, including the case of *Mbogo & Another = Versus= Shah* (1968) EA 93 relied upon by counsel for the appellant, wherein it was stated by the East African Court of Appeal that the crucial consideration is to do justice to all parties involved.
10. I have perused and considered the ruling of the trial court, the application and affidavits filed as well as the submissions on both sides.
11. It is true that the application was filed after evidence had been tendered, case closed and only the judgment was pending and judgment date had already been fixed. Thus though the proceedings were still alive, the application was made at the tail end of the trial court proceedings.
12. What are the circumstances of the application? This is a matter where a motor vehicle which was driven on the public highway Mombasa – Nairobi road, was so driven without displaying number plates, which appears to be contrary to the Traffic Act, and made it impossible for road users including the deceased, to get the identity or description of the vehicle except from the owner or the police. If one of the two is cunning, then it is difficult if not impossible to get the actual information on the identity of the motor vehicle, from anybody else or any institution.



13. The same problem would arise in getting the identity of the insurer of the motor vehicle. It might not even be easy to know whether the vehicle was insured or whom the insurer is.
14. In those circumstances, even outside the apparent criminality under the *Traffic Act*, the fault if any falls squarely on the owners of the vehicle and the police for allowing it to happen that a vehicle did not have identifying marks on the road, as against third parties who claim to have been affected adversely by the said motor vehicle. It was for the owner and the police to provide the correct hidden identification marks of the motor vehicle, and cannot be a fault to be passed on to others.
15. In those circumstances, though the application was made late in the day, in my view, the trial court was correct and exercised its discretion properly and judiciously in allowing the application. The trial court's ruling was quite clear that the effect of the ruling meant re-opening the case, so that is not an issue to be clarified by this court.
16. I thus find no merits in the appeal. I dismiss the appeal. The costs of appeal will follow the substantive decision in the pending case before the trial court.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF JULY 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

No appearance for appellant

Mr. Kazungu for respondent

