



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL NO. 85 OF 2018.

EZEKIEL KIMANI.....1ST APPELLANT/APPLICANT

MASIBO BONIFACE.....1ST DEFENDANT/RESPONDENT

MARTIN NABWORA. 3RD DEFENDANT/ RESPONDENT

VERSUS.

PIUS OYOMNO GWARA.....PLAINTIFF/RESPONDENT

(An appeal from ruling and order delivered on 29th November, 2018 in original Bungoma CMCC 2125/2010 by G.P Omondi Senior Resident Magistrate.)

J U D G M E N T

PIUS OYOMNO GWARA the Respondent (Plaintiff in lower court) sued the Appellants (Defendants in Lower court) seeking general damages for pain and suffering from injuries sustained in a road traffic accident involving motor Tractor KAR 402P Tractor owned by the Appellant and motor vehicle Registration No. KAQ 462K Toyota Matatu owned by 2nd defendant. The Plaintiff filed his plaint dated 17.2.2018. The Plaintiff filed an amended plaint amended on 7.5.2010. The 1st and 3rd Defendant/Appellant filed statement of defence dated 14.6.2010 denying the claim. The 2nd defendant Ezekiel Kimani filed statement of Amended defence on 6.4.2011. From the documents filed it appears that arising from the same accident, **CMCC 126/2010 Evans Ouma Ogada -vs- Masibo Boniface (1st defendant) Ezekiel Kimani (2nd defendant) and Martin Nabwire (3rd defendant)** was adopted as a test suit in liability. Judgment on liability in the test suit was delivered on 15.6.2017 opportunity liability at 50% against the 1st and 3rd defendant jointly and 50% against the 2nd defendant.

The appellant who were defendants in the lower court then filed an application dated 7.9.2018 seeking leave for the defendant to amend their defence filed on 28.4.2010 on the grounds that further investigations into the circumstances of the accident had revealed crucial information that is necessary for the just determination of the issue. The issue they wanted to plead was fraud on the part of the plaintiff that he was treated for dog bite vide treatment notes NO. 24521/09 and not Road Traffic Accident. The application was canvassed before the trial court, and the trial magistrate stated: -

“The records shows that the 2nd defendant/applicant filed an amended defence on 6.4.2011. The applicant was aware of the letter marked KN2 by the year 2013. No application for amendment of the defence was made. Judgement on the test suit was delivered on 1st June 2017. Again no application for amendment was NOT made until fifteen months later. No explanation as given for the delay in making the application. I find that the delay to make the present application is not explained and is not excusable. Seeking an amendment after such inordinate and inexcusable delay would not facilitate the just, expeditious and proportionate resolution of the dispute herein. I, therefore, find that the application dated 7th September, 2018 has no merit and is dismissed with costs to the respondent.”

The Appellant is support of the appeal submitted that a party to a such has a right to amend his pleadings at any stage of the proceedings save that the applications should be done in good faith and should not prejudice the other party in the proceedings. He submits that the request for leave should be freely be granted and that delay in making the application is not a ground for rejection of the application if the object of the leave is to bring the issues in dispute for determination by court.

Mr. Ocharo for the Respondents submits that the application was properly rejected because it was made so late in the day when judgment on liability in the test case had been determined and that no explanation was offered for the delay of 5 years since they received the alleged document from the hospital.

The appellants application in the trial court was brought under Order 2 rule 4, Order 8 rule 3 (1), 5, 7 Order 51 rule 1 Civil Procedure rules.

The court of law is approached by litigants to resolve disputes between the parties. As such court should aim to determine all the issues in controversy. Consequently parties should not be denied opportunity of bringing all the issues that touch on the matter for determination.

When an application for leave to amend pleadings with the aim of putting before court all materials to enable a just determination of the controversy between the parties, then unless shown to be prejudicial to the other party should freely be allowed. This is even more crucial where an allegation of fraud is made. Where as in this case the issue sought to be brought to court is that there was fraud on the part of the Plaintiff, it is an issue which a court should allow to be brought for determination. If the same is not canvassed and determined the court may in advertently be used to perpetuate a fraud or same be used to sanitize a fraudulent transaction.

I therefore set aside the ruling of dismissal of application dated 7.9.2018. The applicant is hereby granted leave to file amended defence and serve within 14 days from date of this ruling.

Noting that this suit has been in court for almost 10 years I direct that the suit be heard on priority and be finalized within 60 days. As the only issue in this suit will be in respect of the Petitioners involvement in the accident, the issue of liability in the test said in CC 126/2010 as between **Masibo Boniface (1st defendant)**, **Ezekiel Kimani (2nd defendant)** and Martini Nabwara on liability for the accident in respect of motor vehicle KAR 402P/2B and KAQ 462K is not affected by this appeal.

Dated, signed and delivered at **BUNGOMA** this 5th day of June 2020.

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S.N.RIECHI

JUDGE