



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

**CIVIL APPEAL NO. 560 OF 2012**

**MARGARET KAREO GITONGA .....APPELLANT**

**VERSUS**

**GILLIAN WAMBUI KARANJA .....RESPONDENT**

*(Being an appeal against the judgment of the Hon. CC Kipkorir delivered on 27<sup>th</sup> September, 2012 in Milimani Commercial Courts Civil Case No. 4934 of 2008)-*

**JUDGMENT**

The appellant herein was the plaintiff in the lower court while the respondent was the 2<sup>nd</sup> defendant in the original plaint. The plaint was filed on 14<sup>th</sup> August, 2008 and the statement of defence filed on 26<sup>th</sup> September, 2008. The cause of action according to the plaint arose from an accident that inflicted injuries upon the plaintiff when she was knocked by a motor vehicle while waiting to cross the road. She blamed the accident on the 2<sup>nd</sup> defendant.

The record shows that on 1<sup>st</sup> August, 2012 which was about four years from the date of filing of the original plaint, the plaint was amended followed by an amended statement of defence which I believe was prompted by service upon the defendant of the said amended plaint.

In the amended plaint the name and any reference to the 1<sup>st</sup> defendant was struck out. There was also an amendment of the registration Number of the motor vehicle to read KAT 146Z from KAT 148Z, which was in possession and control of the defendant. The case was heard and judgment rendered on 27<sup>th</sup> September, 2012 wherein the appellant's suit was dismissed with costs.

A reading of the judgment shows that the case was dismissed for two main reasons; that the plaint was amended without leave of the court and therefore filed out of time despite the mandatory terms of the Civil Procedure Rules in such cases. The second reason is that since the amended plaint was now non-existent the motor vehicle pleaded in the original plaint did not belong to the defendant and therefore since it goes to the root of the cause of action, ownership of the motor vehicle was crucial and therefore the suit was dismissed.

In this appeal the appellant has raised the ground that the learned trial magistrate failed to find or hold that the appellant had proved her case against the respondent. The lower court was also faulted for holding that the amended plaint filed on 1<sup>st</sup> August, 2012 was irregularly before the court as no leave had been granted by the court to effect the amendment.

The court was also faulted for not finding that, as the respondent had failed to offer any evidence at the trial, the weight of evidence was in favour of the appellant. Finally that the court was wrong to rely on

procedural technicality to dismiss the appellant's case.

It is true that the rules require leave to be obtained before the plaint is amended. The relevant order is Order 8 of the Civil Procedure Rules. The pleadings in this case had long been closed when the amended plaint was lodged in court.

From the amended plaint on record, the effect was to delete the name of the 1<sup>st</sup> defendant and correct the registration number of the motor vehicle. At no point in the proceedings did the respondent question the appellant on those two amendments. In fact the appellant referred to motor vehicle registration No. KAT 146Z in her evidence in chief. This was also to be found in the abstract from the Police relating to that accident. It was not therefore a controversial issue and could easily be addressed under Order 8 Rule 5 of the Civil Procedure Rules. In any case no prejudice has been alleged to have been suffered by the respondent in this case.

The counsel for the defendant did not raise this in the submissions. It is the court that addressed the matter in the judgment. Sections 1 A and 1B of the Civil Procedure Act provide that the overriding objective of the Act and the Rules is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. It is the duty of the court to give effect to that overriding objective.

The courts have also addressed the relevance of the rules in the administration of justice. Section 3 (2) of the Judicature Act provides that courts shall decide all cases according to substantial justice without undue regard to technicalities of procedure and without undue delay. This is also repeated in Article 159 (2) (d) of the Constitution. In the case of Microsoft Corporation Ltd & Another Vs Mitsumi Computer Garage Limited and Mitsuminete (K) Limited, Milimani [2001] KLR 470 the court repeated the often stated statement that.

**“Rules of procedure are the hand maiden and not mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner not to fetter or choke it”**

With profound respect, the trial court over emphasised the requirement of leave before pleadings are amended leading to injustice on the part of the appellant.

I allow this appeal by setting aside the judgment of the lower court and ordering that the amended plaint is properly on record and that there should be a retrial before another magistrate of competent jurisdiction. This being an old case the retrial should be initiated as soon as it is practical to do so. Each party shall bear their own costs.

*Dated, signed and delivered at Nairobi this 7<sup>th</sup> Day of December, 2016.*

**A. MBOGHOLI MSAGHA**

**JUDGE**