



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 107 OF 2005

BEENA K KHAMBHATIA.....PLAINTIFF

VERSUS

1. TAL VINDER SAGOO

2. BAL WANT SAGOO.....DEFENDANTS

RULING

1. The Plaintiff's claim is in negligence. The 2nd Defendant subsequently died and there was no substitution; the Plaintiff wished to proceed against the 1st Defendant only.
2. The Plaintiff obtained interlocutory judgment against the 1st Defendant. An application to set aside that interlocutory judgment was dismissed by a ruling delivered on 17th December 2012 (Odunga, J).
3. Hearing of the Plaintiff's case for assessment of damages commenced on 22nd January 2014 when two doctors testified. The Plaintiff subsequently applied by **notice of motion dated 31st January 2014** for leave to amend his plaint yet again. A draft of the 3rd further amended plaint is annexed to the application. It shows that the intended amendments are to figures in the particulars of special damages claimed. The Plaintiff has explained in the supporting affidavit that after filing suit and even after interlocutory judgment was obtained he continued in treatment and that the figures for special damages, including the claim for future medical expenses, kept rising, hence the need to amend.
4. The 1st Defendant has opposed the application by **replying affidavit filed on 10th March 2014** which is sworn by his advocate, **E N Mussilli**. The main grounds for objection are –
 - (i) That the application has not been made in good faith but is intended to frustrate the 1st Defendant.
 - (ii) That the application has been brought after unreasonable delay.
 - (iii) That interlocutory judgment having been entered, the amendments sought will amount to a new claim which the 1st Defendant will not have an opportunity to confront. Therefore if the plaint is to be amended the interlocutory judgment ought first to be set aside in the interests of justice.
5. I have considered the oral submissions of the learned counsel for the Plaintiff and the written

submissions of the learned counsel for the 1st Defendant, including the cases cited.

6. **Order 8, rule 3(1)** provides for amendments of pleadings with leave of court in the following terms –

“3. (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, 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 his pleadings.”

7. And **rule 5(1)** of the same Order makes provision for a general power to amend in the following terms –

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

8. The emerging principles from these two rules are -

- (i) **That amendments can be made at any stage of the proceedings.**
- (ii) **That leave to amend would be on such terms as to costs or otherwise as may be just.**
- (iii) **That amendments would be in such manner as the court may direct.**
- (iv) **That amendments will normally be permitted in order to enable determination of the real question in controversy between the parties, or to correct any defect or error in any proceedings.**
- (v) **That even the court in its own motion can direct amendment as may be required by dictates of justice.**

9. It is trite law that amendment of pleadings will be liberally allowed. In the present case the amendments sought have been necessitated by the Plaintiff's continued state of health and the treatment that he had been undergoing. No new cause of action is being pleaded.

10. It is also to be noted that the amendments are in respect to special damages which will be subject to strict proof as required by law. The 1st Defendant will have an opportunity to challenge the new figures at the hearing for assessment of damages.

11. I therefore find that no prejudice can possibly be occasioned to the 1st Defendant by the amendments sought. I will allow the application as prayed in prayer (2). The Plaintiff shall file and serve his 3rd further amended plaint within 10 days of delivery of this ruling. On his part the 1st Defendant shall have leave, if need be, to file and serve an amended defence within 10 days of service upon him of the 3rd amended plaint.

12. As for prayer (3) of the application which seeks review of the interlocutory judgment already entered against the 1st Defendant in order to bring it in tandem with the intended amendments, this is not necessary for the simple reason that only such special damages as may be strictly proved at the trial would be awarded, notwithstanding any figures appearing in the interlocutory judgment.

13. Costs of the application will be in the cause.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF OCTOBER 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2014