

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO 784 OF 1976

HAMISI OMARPLAINTIFF

VERSUS

EA CARGO HANDLING SERVICES LTD.....DEFENDANT

RULING

November 15, 1985, **Aragon J** delivered the following Ruling.

This application for amendment of the plaint has been very strongly resisted by the defendant on the ground that the defendant would be seriously prejudiced in the conduct of the defence if the amendment were allowed in view of the inordinate lapse of time which has occurred in this case.

In the suit the plaintiff claims damages for negligence allegedly on the part of a clinical officer or doctor employed by the defendant, in giving the plaintiff an injection which caused permanent damage to the sciatic nerve. The act said to have been negligently performed was allegedly done in December 1971. Accordingly the suit would have become timebarred in December 1974. Nevertheless the plaintiff got special leave under the provisions of the Limitation Act (cap 22) to file this suit two years out of time viz on December 16, 1976.

The hearing of the suit began on December 19, 1977 before the then resident judge in Mombasa Sir Dermot Sheridan, and was adjourned parheard to a date to be fixed in due course. Various dates were fixed but the hearing did not continue on those dates and eventually in July 1984 the plaintiff withdrew his instructions from the first firm of advocates who had prepared and filed the plaint and briefed instead Messrs Mburu, Serenje and Co. It is the latter who, presumably in an effort to remedy the defects which became apparent in the plaint during the course of the hearing, filed the present application for leave to amend.

The two important amendments which are sought to be made are following, viz:

i) In paragraph 5 of the plaint it is alleged that the plaintiff received treatment in the said clinic after he fell ill at work, which treatment was given by a person in attendance at the clinic and the servant or agent of the defendant. The amendment sought there is to introduce the words "with malaria" after the word "ill" in that paragraph.

ii) Paragraph 6 of the plaint as originally filed reads as follows:

"The said person was negligent in giving the said treatment. Particulars Giving the plaintiff an injection in the right gluteal region which caused permanent damage to the nerve which supplies the muscles necessary for the movement of dorsiflexion at the ankle joint."

It is now sought to delete those particulars and substitute them by five sets of other particulars raising a large number of issues of fact upon which the defendant would naturally need medical advice and evidence in order to raise, if possible, a defence thereto.

In other words 15 years after the date of the allegedly wrong injection, the plaintiff is seeking to raise all sorts of new issues of fact. The defendant's company secretary in her affidavit in opposition to the application for amendment depones in paragraph 7 that the doctor who treated the plaintiff in 1971 and on

numerous dates thereafter ie Dr. Owino, has since passed away and since the defendant will not have the benefit of any comments on the matters being alleged for the first time in paragraph 6 of the amended plaint, the defendant will be seriously prejudiced in its defence.

I am only too well aware that amendments may be allowed at any time up to delivery of judgment and that applications for amendment of pleadings should generally be viewed sympathetically provided that any damage which may arise as a result of the amendment can be cured by way of costs. In this case however no amount of costs can compensate the defendant of the obvious handicap to which it would be put were the amendment to be allowed. 15 years is a very long period of time. With each year that passes memories grow dimmer and in particular the fact that one of the witnesses upon which the defendant relies has died, might put, in my view, the defendant in a most invidious position were the plaintiff to be allowed to change the direction of his thrust against the defendant. The latter would be completely bereft of any opportunity of putting forward any defence. The main witness upon which it relied is now dead with the result that it could not obtain any assistance were the amendment to be allowed.

In my view, after such a lapse of time, it would be unjust to allow the amendment. The application is therefore refused with costs.

Dated and delivered at Mombasa this 15th day of November, 1985.

E.F ARAGON

JUDGE