

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 140 OF 2023

**BUENA MOTORS GARAGE
LIMITED.....APPELLANT**

VERSUS

**CIC INSURANCE GROUP LIMITED.....
RESPONDENT**

*(Being an appeal from the ruling and order of Hon. E. S. Soita
(SRM) in Nakuru CM's Civil Suit No. E133 of 2020, delivered on
27th June 2023)*

JUDGMENT

1. This appeal arises from the ruling and order entered by the lower court on 27th June 2023. In the said suit, the appellant who was the plaintiff vide the plaint dated 29th July, 2020 sued the respondent who was the defendant for the sum of kshs. 932,060/=, additional accumulated storage charges from the date of institution of the suit till the date of determination of the suit and costs of the suit plus interest.
2. Thereafter the appellant filed an application dated 30th March 2023 seeking to further amend its plaint and the trial court delivered a ruling on the same dismissing the said application with costs.
3. Being aggrieved with the ruling the appellant lodged the appeal dated 27th June, 2023 on the following grounds:

- i. That the learned trial magistrate court erred in law and in fact in failing to note that there was a proper explanation proffered by the plaintiff as to why the plaint needed to be amended.***
- ii. That the learned trial magistrate erred in law and in fact in failing to note that the provisions of Order 1 Rules 3, 7 and 9 and Order 8 Rule 3 and section 100 granted a right to the plaintiff to make amendments to the plaint in so far as the same will enable the court to deliver justice to the suit before it.***
- iii. That the learned trial magistrate erred in law and in fact in holding that the application to amend was brought late without considering the fact that the plaintiff was not in possession of the documents and or evidence and that the explanation had been proffered which explanation was not discounted in any material particular by the defendant/respondent.***
- iv. That the learned trial Magistrate erred in law and in fact in failing to note that the defendant /respondent was rather in possession of the evidence that it failed to disclose to the trial court but had disclosed the same to a different Court whereby the said respondent had opted that the issues before the trial court be determined by that other court.***

- v. ***That the learned trial magistrate erred in law and in fact in failing to note that it was rather the defendant/respondent who had hidden material particulars.***
- vi. ***That the learned trial magistrate erred in law and in fact in failing to note that the plaintiff's amendment was availing new parties to the suit and not the new cause of action. The decision regarding the suit was first and foremost determination of ownership of the motor vehicle in which the proposed 2nd and 3rd defendants are cited as the owners and the 1st defendant as the person who had authorized the storage of the motor vehicle in question.***
- vii. ***That learned trial magistrate erred in law and in fact in failing to note that the nature of the claim herein was liquidated claim and accumulated storage charges whose issues of determination entailed the determination on ownership of the motor vehicle in question being motor vehicle registration number KBZ 037C and secondly the person who authorized the storage of the said motor vehicle.***
- viii. ***That the learned trial magistrate erred in law and in fact in failing to note that it will amount to miscarriage of justice for the suit to proceed excluding the proposed defendants (who also knew that there was a suit involving them save***

that the plaintiff was not) yet the defendant/respondent (who had not all along prepared not to pay the said proposed defendants' dues emanating from the subject motor vehicle citing the suit as the cause) had strenuously denied ownership and authorization of storage.

- ix. That the learned trial magistrate erred in law and in fact in failing to note that it will have amounted to miscarriage of justice since the plaintiff after due diligence, managed to make discovery of evidence and obtained the appropriate parties and evidence to the suit for the court to shun it out and allow the suit and to proceed the way it was.**
- x. That the learned trial magistrate erred in law and in fact in failing to note that the defendant and the proposed interested parties will have had the opportunity to defend the amendment.**
- xi. That the trial magistrate erred in law and in fact in failing to note that the defendant/respondent never intimated to court any offending averments to the amendment and or how it was prejudiced with the amendment, now that the persons who were the owners of the subject motor vehicle had been added to the suit.**

xii. That the learned trial magistrate erred in law and in fact in failing to note and acknowledge that it had the option of addressing on issues of costs if at all the defendant was affected by the amendments.

4. The appellant prayed that the appeal be allowed and the trial's court ruling be set aside in its entirety. Further, that the respondent be condemned to pay costs of the appeal.
5. The Appeal was canvassed through written submissions.

Appellant's submissions

6. These were filed by Maragia Ogaro & Company advocates and are dated 16th November 2023. Counsel gave a brief background on the case and identified three issues for determination.
7. The first issue is whether the appellant proffered a plausible explanation for amending the plaint and whether the trial court considered the same. Counsel submitted that the appellant in seeking to make further amendment to the plaint had explained that he was adding the proposed defendants in terms of Order 1 Rule 3 and 7 of the Civil Procedure Rules. Further, that the reason for the said amendments was that the proposed defendants were the beneficial owners of the subject motor vehicle herein KBZ 037C and that either they or the then 1st defendant or all, sought for storage services for the said vehicle. Thus, the trial court erred indicating that the appellant was introducing a new cause.

8. The second issue is whether there existed a provision of law in place that supported the nature of the amendment sought and the necessity portrayed for amendments. On this counsel submitted that the law permits for amendments of pleadings before final determination of the suit. He placed reliance on Order 1 rule 3 and 7, Order 8 rule 3(1) of the Civil Procedure Rules and section 100 of the Civil Procedure Act.
9. On whether the appellant will suffer any prejudice, counsel submitted that in the event the suit went on without the proposed amendment, the court would have difficulty to apportion blame to the respondent yet it was liable. He placed reliance on the decision in **Central Bank of Kenya Limited v Trust Bank Limited [2000] EALR 365** where the court held as follows;
- “The amendment of pleadings (is) aimed at allowing a litigant to plead the whole of the Claim he is entitled to make such amendments of pleadings as (are) necessary for determining the real issue in controversy or avoiding a multiplicity of suits, provided (i) there has been no undue delay, (ii) no new and inconsistent cause of action is introduced, (iii) no vested or accrued legal right is affected and (iv) the amendment can be allowed without injustice on the other side.”***
10. See also; **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR** and **Institution of Social Accountability & Another v**

**Parliament of Kenya & 4 Others Nakuru High Court
Petition No. 10 of 2013.**

11. In conclusion, he urged the court to allow the appeal with costs.
12. The appellant further filed supplementary submissions dated 11th December 2023 where counsel identified four (4) issues for determination.
13. The first issue is whether courts have discretion to allow or disallow amendment of pleadings is (sic) superior to the right of a party to amend its pleading. Reference on this was made to the decision in **Andrew Wabuvele Biketi v Chinese Centre for Promotion of Investment Development and Trade in Kenya Limited & 2 Others [2015] eKLR** in which it underlined in its submissions thus:

“Your lordship, we humbly submit that the power of the court to allow or refuse a party to amend pleadings is discretionary as was held in the case of Andrew.....”

14. Counsel submitted that the appellant was opposed to the contention that the right to amend rests only on the discretion of the court. Reference was made to Order 8 rule 5(1) which provides as follows;

“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 on its own motion or on any 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.”

15. Counsel further submitted that the circumstances of the appellant’s suit required amendment and the court, if it had to exercise its discretion, then the same could not be anything less than allowing the appellant to amend its plaint

16. On the second issue on whether the trial court properly exercised its discretion, counsel submitted that the said court improperly exercised its discretion and had it been guided by **Lewar Ventures Limited v Equity Bank (Kenya) Limited [2022] eKLR** it would not have disallowed the application to amend.

17. On the third issue, counsel submitted that the respondent did not serve it with the authorities it cited in its submissions. Further, that besides the portion highlighted by the respondent its reference was meant to mislead the court on the actual holding of the court in those cases and their applicability to the appeal herein.

18. Lastly, on whether the respondent raised any tangible or foreseeable prejudice in the event the amendment was to be allowed, counsel submitted that at no time during trial and even in the instant appeal had the respondent shown with satisfaction the prejudice it would suffer if the amendment is allowed.

Respondent’s submissions

19. These were filed by Sheth & Wathigo advocates and are dated 21st November 2023. Counsel gave a brief

background on the case and identified one issue for determination which is whether or not the appeal herein is merited.

20. Counsel submitted that the appeal was unmerited and the same ought to be dismissed with costs since the trial magistrate exercised his discretion judiciously. He made reference to the decision in **Andrew Wabuyele Biketi vs. Chinese Centre for The Promotion of Investment Development & Trade in Kenya Limited & 2 Others (2015) eKLR**, where the court in disallowing an application for amendment stated as follows:

“...the court has discretion to order amendment at any stage before Judgment. And amendment should be freely allowed provided it is not done mala fides, and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs”

21. See also; **Inter Tropical Timber Trading Limited v Kenya Power Lighting Company Ltd [2021] Eklr, Bosire Ogero v Royal Media Services [2015] eKLR** and **Republic v Public Administrative Review Board & Another [2019] eKLR.**

22. Counsel further submitted that the appellant’s application for leave to amend its pleadings was inordinately delayed thus prejudicial to the respondent. He placed reliance on the decision in **Kyalo v Bayusuf Brothers Limited [1983] eKLR** where the Court of Appeal held as follows;

“Applications for amendments of pleadings should only be allowed if they are brought within reasonable time because to allow a late amendment would amount to an abuse of the court process. Amendments that contain allegations completely inconsistent with previous pleadings in the same suit cannot be allowed especially if they are late as they would delay fair (sic) and prejudice the other party.”

23. He further submitted that the intended amendment introduced a new cause of action and new parties and as such the trial magistrate rightfully dismissed the appellant’s application. He placed reliance on the decision in **Central Kenya Limited v Trust Bank Limited (2000)2 EA 365** where the court held as follows;

“.....party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

24. See also; **Kassam v Bank of Baroda [2002] eKLR, Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR** and **Lewar Ventures Limited v Equity Bank (Kenya) Limited [2022] eKLR.**

25. Counsel concluded by submitting that the trial magistrate was right in dismissing the appellant's application for amendment. Thus, the appeal lacked merit and the same ought to be dismissed with costs.

Analysis and Determination

26. This being a first appeal, this court is called upon to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. See:

(i) Selle & another V Associated Motors Boat & Others 1968 E.A 123.

(ii) Peters V Sunday Post Limited [1958] E.A 424.

27. I have carefully perused and considered the grounds of appeal, evidence on record, cited authorities and the law. I have identified one issue for determination which is whether there was any merit in the application dated 30th March 2023 seeking to further amend the appellant's plaint dated 29th July, 2020.

28. The learned trial magistrate in his ruling noted that the appellant in its application for amendment sought to introduce new defendants, new cause of action and issues at paragraph 4A and 4B. He further noted that the amendment had been brought after a two (2) year period from the date of filing of the suit.

29. I have carefully perused the appellant's application dated 30th March 2023 which was the subject of the ruling dated 27th June 2023 which the appellant has appealed. From the said application the amendments are clear and the respondent has sought to add necessary parties to the

suit. The legal provision governing amendment of pleadings is Section 100 of the Civil Procedure Act which provides as follows;

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.

30. Further, Order 8 Rule 1 (1) of the Civil Procedure Rules stipulates that;

“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.”

31. The Court of Appeal in **Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR** observed as follows;

“That the amendment is necessary for determining the real questions in controversy.

To avoid multiplicity of suits provided there has been no undue delay.

Only where no new or inconsistent cause of action is introduced “ie” if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.

That no vested interest or accrued legal rights are affected.

So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.”

32. On the other hand, joinder of parties is governed by Order 1 Rule 10 (2) of the Civil Procedure Rules which provides: -

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

33. In **Werrot & Company Ltd & Others V Andrew Douglas Gregory & Others, [1998] eKLR** the court stated as follows:

“For determining the question of who is a necessary party there are two tests;

- i. there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and***
- ii. it should not be possible to pass an effective decree in the absence of such a party.”***

34. In view of the above, it is my considered opinion that amendments are for clarifying existing issues between the current parties while joinder is the procedural route for bringing in entirely new individuals or entities to an ongoing litigation. Thus, the appellant cannot use an amendment to a plaint to add new parties in his case instead, he must file a separate joinder application to formally request the court's permission to include those new parties.

35. Accordingly, I find no reason to interfere with the decision of the trial magistrate.

36. The upshot is the appeal lacks merit and the same is dismissed with costs to the respondent.

37. Orders accordingly.

Delivered, virtually, dated and signed this 30th day of September, 2025 in open court at Nakuru.

**H. I. ONG'UDI
JUDGE**