

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CIVIL SUIT NO. E001 OF 2023

ELIJAH MAROKO OMUNDI (suing as the legal
Representative of the estate of **SAMUEL ORORI ELIJAH,**
Deceased)..

.....**PLAINTIFF**

VERSUS

BELLE HOLDINGS LIMITED.....1ST
DEFENDANT

WIRELESS CELL CONNECT LIMITED.....2ND
DEFENDANT

RULING

[1] This ruling is in respect of the Notice of Motion dated 7th November 2024. It was filed pursuant **Order 1 Rule 10(2) and 15** and **Order 7 Rules 5 and Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders, *inter alia*, that the defendants be granted leave to amend their pleading in terms of the annexed draft Amended Defence; and that costs of the application be in the cause. The intention is to bring on board **Bramwel Mogire Kenaly**, who testified as one of the plaintiff’s witnesses as PW2.

[2] In his evidence, PW2 stated that he was driving the subject motor vehicle, Registration No. KCT 461D at the time of the

accident. It was therefore on that account that the defendants seek to have him enjoined as one of the defendants. In the alternative, the defendants prayed that they be allowed to take out Third Party Notice against **Bramwel Mogire Kenaly**. The applicants contended that the said **Bramwel Mogire Kenaly** is a necessary party to these proceedings and that upon such joinder as sought by them, the real issues can be brought to the fore and resolved with finality.

[3] The plaintiff opposed the application and contended, in his Replying Affidavit sworn on 17th January 2025, that the defendants had sufficient opportunities to amend their Defence and did not have to wait till the end of the matter to come up with the instant application after the parties had been asked to file their final submissions. At paragraph 14 of the Replying Affidavit, the respondent pointed out that this matter was mentioned five times to confirm compliance with **Order 11** of the Civil Procedure Rules; and therefore the defendants had all the time to present their application for amendment of their Defence. He accordingly urged for the dismissal of the application, contending that it is an afterthought intended to unduly delay the finalization of this suit.

[4] The application was canvassed by way of written submissions pursuant to the directions given herein on 4th February 2025. In the defendants' written submissions dated 14th February 2025, they conceded that the matter has been heard to conclusion and final submissions filed. They further conceded that the matter was for mention to confirm the filing of written submissions with a view of taking a date for judgment when the instant application was filed. They nevertheless submitted that the Court's jurisdiction to grant leave to amend pleadings is unfettered; and that such leave can be granted at any stage of the proceedings. They anchored their application on **Order 1 Rule 10(2)** of the Civil Procedure Rules.

[5] The defendants also relied on **Order 1 Rule 1**, Civil Procedure Rules, **Sarkar's Code of Civil Procedure** (11th Ed. Reprint, 2011, Vol. 1 P.887) and the case of **Central Kenya Ltd v Trust Bank & 4 others**, Civil Appeal No. 222 of 1998 among other authorities to buttress their arguments. In particular, the defendant's submitted that the proposed 3rd defendant is a necessary party that ought to have been joined at the very beginning to enable the Court decide on the key issue of liability.

They defendants also posited that no prejudice will be suffered by either the plaintiff or the proposed third party that cannot be compensated by way of costs, considering that the proposed third party admitted that he was driving Motor Vehicle Registration No. KCT 461 at the time of the accident.

[6] There is no indication that the plaintiff filed any submissions. I have nevertheless taken into consideration the averments set out in the parties' respective affidavits. I have likewise paid attention to the written submissions filed on behalf of the defendants and all the authorities relied on by counsel. In terms of joinder of parties, **Order 1 Rule 10(2)** of the **Civil Procedure Rules** provides that:

"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."

[7] The discretion of the Court to grant leave to amend pleadings is therefore unfettered and can be exercised at any stage of the proceedings. However, the discretion is not to be exercised whimsically or capriciously. The Court must be

convinced that the party whose joinder is sought is a necessary party to the proceedings; and that the proposed joinder is necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit.

[8] Accordingly, in **Nyamodi Ochieng Nyamogo v Kenya Posts and Telecommunication Corporation** [2007] eKLR, it was held that:

"The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of the facts already claimed but rather on the basis of the true state of facts or relief or remedy which the parties really and finally intend to rely on or to claim."

[9] Likewise, in **Institute for Social Accountability & Another v Parliament of Kenya & 3 Others** [2014] eKLR it was observed that:

"The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings."

[10] The principles that guide the exercise of discretion in an application of this nature were restated in **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited** [2013] KECA 345 (KLR) by the Court of Appeal thus:

“The law on amendment of pleading ... was summarized by this Court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.” (see also Central Kenya Ltd vs. Trust Bank Ltd & 5 Others [2000] eKLR)

[11] There is no gainsaying that the application for amendment has been brought belatedly and at the tail end of the proceedings just before a judgment date could be taken. It is however trite that such an application can still be allowed and leave to amend granted, the delay notwithstanding, if to do so would meet the ends of justice. Hence, from the averments in the affidavits filed in respect of the instant application as well as the written submissions filed herein, only one issue presents itself for determination, namely: whether the proposed amendment is necessary for the just and effectual resolution of this dispute.

[12] Bramwel Mogire Kanaly, who is sought to be enjoined as the 3rd defendant, was a witness for the plaintiff in this matter. It

is on record that he was driving Motor Vehicle Registration No. KCT 461D in which the deceased was travelling; and that the motor vehicle collided with the 2nd defendant's tractor on the fateful night. It cannot therefore be said that the application is frivolous as questions may linger as to whether or not he is to blame for the collision.

[13] In the premises, the application dated is hereby allowed and orders granted as follows:

[a] That leave be and is hereby granted to the defendants to amend their Defence terms of the draft Amended Defence annexed to the application. The Amended Defence be filed and served on the proposed 3rd defendant and the Plaintiff within 7 days from the date hereof.

[b] That corresponding leave be and is hereby granted to the plaintiff to file a Reply to the Amended Defence within 14 days from the date of service of the Amended Defence.

[c] That the costs of the application be borne by the defendants.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY
THIS 22ND DAY OF JANUARY 2026**

OLGA SEWE

JUDGE

ORIGINAL