



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 45 of 1997

ELIZAPHAN N. NYAMU PLAINTIFF

- V E R S U S -

NDAIKWA MWAGORO

S. M. SUMRA TRANSPORTER DEFENDANTS

RULING

The plaintiff's Chamber Summons dated 2nd April 2007 seeks leave of this court to amend the plaint. It is based on the grounds that as a result of the accident injuries the plaintiff suffered he lost his job with Kenya/Nordic Co-operative Development Programme, and has had to employ a house help. He also requires to travel to Germany for treatment and fitting of a prosthesis. The amendment is therefore intended to include a claim for loss of earning and/or future earning capacity, the house helps salary and the costs of air travel medication and accommodation in Germany.

Counsel for the plaintiff argued that the medical bill as of 1997 when this suit was filed was Sh. 988,012/- but it has since gone up. Though the suit is partly heard he said that the intended amendment will not cause the defendants any prejudice as they can always call evidence in rebuttal.

The defendants are not amused by the application. They argued through their counsel that this application being brought after inordinate delay of ten years is therefore an abuse of the process of court.

Order 6 Rule 5 of the Civil Procedure Rules empowers the court to allow amendments to the pleadings at

any stage of the proceedings as long as the amendments satisfy the two conditions of (a) not working injustice to the other side and (b) being necessary for determining the real question in controversy between the parties.

In the words of the Court of Appeal:

“The guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot be properly compensated for in costs. (See *Bedco Ltd –Vs- Alfa Laval Co. Ltd [1994] 4 ALLER 464*” – (Central Bank of Kenya Ltd –Vs- Trust Bank Ltd & Others.

In Civil Appeal No. 222 of 1998 (C.A.) the Court of Appeal stated:

“... likewise mere delay is not a ground for declining to grant leave. It must be such delay that is likely to prejudice the opposite party beyond monetary compensation in costs.”

Even if these conditions are satisfied amendments which are made *mala fides* or are intended to introduce an inconsistent cause of action will be rejected.

In this case I do not agree with counsel for the defendants that the proposed amendments are made in bad faith or after inordinate delay. What I understand the plaintiff to claim is that as a sequel of the injuries suffered he now requires some specialized treatment and a prosthesis, he has had to employ a helper and has suffered loss of earning or earning capacity. Whether or not he will prove all those claims is another matter.

In the circumstances I allow this application and order the plaintiff to file and serve his amended plaint within fifteen days. The defendants have corresponding leave to amend their defence if they so wish within fifteen days of service of the amended plaint. The defendants shall have the costs of this application in any event.

DATED and delivered this 18th day of December 2007.

D.K. MARAGA

JUDGE