Case Number:	civ app 118 of 99
Date Delivered:	23 Dec 1999
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Amrittal Bhagwanji Shah, Philip Kiptoo Tunoi, Samuel Elikana Ondari Bosire
Citation:	MUNGAI vs TEXCAL HOUSE SERVICE STATION[1999] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	1111 OF 1996
Case Outcome:	Appeal Allowed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA
IN THE COURT APPEAL
AT NAIROBI
CORAM: TUNOI, SHAH & BOSIRE JJ.A
CIVIL APPEAL NO. 118 OF 1999

BETWEEN

JANE MUTHONI MUNGAI &

SARAH NJERI MUNGAI (suing through) JANE MUTHONI

MUNGAI.....APPELLANTS

AND

TEXCAL HOUSE SERVICE STATION.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Lady Justice Mary Ang'awa) dated 7th October, 1998 in H.C.C.C. NO. 1111 OF 1996)
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JUDGMENT OF THE COURT

The appellants, the plaintiffs in the suit, filed a suit in the superior court on 7th May, 1996. The first appellant was suing on behalf of herself as the administratrix of the estate of Stanley Ndungu Mungai who died as a result of an accident which occurred on 14th day of May, 1993 along Peponi Road, in Nairobi. The first appellant, the deceased (Stanley) and the second appellant were at the material time passengers in a motor vehicle registration number KQE 149. The accident in question involved this vehicle as well as another one registration number KAA 215 Y. The respondent was at all material times the owner of motor vehicle KAA 215 Y.

The hearing of the suit in the superior court proceeded in a peculiar manner. The original plaint did not contain particulars of injuries suffered by the first plaintiff. The second plaintiff's injuries were set out under the heading "particulars of 2nd Defendant's injuries". There was obviously an erroneous reference to the second defendant. It should have referred to the second plaintiff. It was an error of no consequence which could have been corrected by amendment allowable under order VI A rule 5 of the Civil Procedure Rules.

As no particulars of injuries suffered by the first plaintiff were pleaded the plaintiffs' counsel applied for amendment to the plaint to include such injuries. At the same time he sought the amendment of paragraph 6 of the plaint so that the word Defendant's should read as "plaintiff's" in the title "particulars of 2nd Defendant's injuries".

The superior court (Ang'awa, J) did not allow the oral application for amendment sought on 6th October, 1998 and ruled that the plaintiff ought to make a "substantive" application which would obviously mean an application under Order VIA rule 3 of the Civil Procedure Rules. At the same time she ruled that the hearing of the suit do proceed on the same day (6th October, 1998) at 3.00 pm.

In this state of affairs the plaintiffs' counsel filed an amended plaint before the hearing time. In all probability the plaintiff's counsel must have misunderstood the learned Judge's order. The learned Judge appreciated that the filing of the amended plaint "may have been due to misunderstanding of what procedure was required."

When the suit came up for hearing (we presume at 3.00 p.m. on 6th October, 1998) Mr. Mbugua for the defendant raised preliminary objections to the suit. These objections so far as we can make out from the notes made by the learned judge are as follows:

1. As no particul ars of injuries suffered were given no cause of action was disclosed in the 'main' plaint against the second defendant.

2. No quantum of damages can be assessed since injuries were not pleaded and as medical evidence was not admitted.

3. The conse nt of the next friend was not annexed to the plaint as required by order 31 rules 1(1) and 1(2) of the Civil Procedure Rules.

4. The claim of the minor plaintiff was severable (or not).

The last objection, as recorded, is not understood by us.

Mr. Ouma, then counsel for the plaintiff, responded to the preliminary objections.

The notes of his responses as made by the learned judge are confusing. But he did attempt to reply to Mr. Mbugua's objections and with some difficulty we can make out his response as follows:

1. The claim was under both the Fatal Accidents Act and the Law Reform Act, for death of Stanley.

2. The claim for injuries suffered by the minor plaintiff can be brought in the same suit.

3. The plaint ought not to be struck out.

4. The injuries were pleaded.

5. The error was excusable.

The learned judge struck out the plaint on the grounds, as we understand the same, that as the injuries were not pleaded there was no cause of action shown; that the amendments were not properly applied for; that there ought to have been two separate suits and that the plaintiffs' case as presented

was incurably defective.

with respect, the learned judge erred all the way. She could not have ordered filing of a "substantive" application for amendments and then fixed the hearing for the same day. She erred in saying that when particulars of injuries are not pleaded there is no cause of action shown. She also erred in saying that the two plaintiffs could not claim by one plaint. Further, her conclusion that the plaint was incurably defective is erroneous.

The learned judge, it appears to us, had no idea how to proceed with the hearing of the case. She had no inkling of the age old principle that amendments are generally freely allowed even on oral applications when there is no prejudice to the other side. She overlooked the established principle that striking out is a drastic remedy and that it can only be allowed when the pleading is incontestably bad and that when a pleading could be easily amended, such course should be preferred as opposed to striking out the pleading. Besides, we think that it was quite irregular to strike out the plaint on the basis of an oral application as Order 6 rule 16, of the Civil Procedure Rules prescribe the procedure viz by summons.

In all, the trial in the superior court was defective. We have no choice but to set aside the orders of the learned judge, allow this appeal with costs with a further order that the proceedings be remitted to the superior court for hearing de novo, before another judge. The appellant shall have the costs of the *appeal.*

Dated and delivered at Nairobi this 23rd day of December, 1999.

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR