**Simwa v Jiangix Zhongmei Engineering Construction (K) Ltd (Civil Appeal E065 of 2021) [2023] KEHC 18050 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18050 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**CIVIL APPEAL E065 OF 2021**

**JRA WANANDA, J**

**MAY 26, 2023**

**BETWEEN**

**LEVI SIMWA ..... APPELLANT**

**AND**

**JIANGIX ZHONGMEI ENGINEERING CONSTRUCTION (K) LTD ..... RESPONDENT**

## JUDGMENT

1. This Appeal is against the refusal by the trial Court to allow an Application seeking leave to amend the Plaint filed in Kakamega Civil Suit No. 134 of 2018.

2. By the Plaint filed on 12/04/2018 through his Advocates, Messrs Shibanda Wilunda & Associates, the Appellant sued the Respondent seeking general, punitive and exemplary damages for defamation, costs of the suit and interest. It was alleged that the Appellant was an employee of Messrs Admiral Security Company and that he had been assigned to work at the Respondent's premises as a security guard.

3. It was further alleged that on or about 07/09/2017 the Appellant was in the course of his employment when his supervisor arrested him in the full glare of the public and took him to Malava Police Station, that the Supervisor accused him of stealing and the Appellant was then detained at the station for 4 days, he was later released without any charges and tat in the course of the arrest and detention the supervisor continuously referred to him as a "thief". The Appellant therefore claimed that the Respondent had defamed him.

4. There being no Appearance entered for the Respondent within the stipulated time, a default Judgment was entered on 5/06/2018. However, on 14/06/2018 the firm of Kidiavai & Co. Advocates came on record for the Respondent and also applied for setting aside of the default Judgment. The Judgment was later set aside by consent and pursuant whereof a Statement of Defence was filed on behalf of the Respondent on 18/07/2018.

5. Subsequently, the Appellant changed its Advocates to Messrs V.A. Shibanda & Co. who then slightly amended the Plaint. The amendment seems to have been made to clarify that the defamation claim was one for slander rather than libel. Accordingly, reference to the phrase "publication" was deleted and substituted with the phrase "words".

6. The matter then proceeded to trial in which however there was no attendance by the Respondent. After hearing the matter in the absence of the Respondent, the trial Court, on 30/12/2019, entered Judgment in favour of the Appellant and awarded damages at Kshs 800,000/- plus interest and costs.

7. However, on 17/01/2020 the firm of Olendo Orare & Samba filed a Notice of Change of Advocates on behalf of the Respondent and also filed an Application seeking to set aside the Judgment. The fate of the Application is not clear from the record but on 31/08/2010 the trial Court directed the Respondent to deposit half of the decretal sum in a joint interest earning account. I therefore presume that the Application seeking to set aside was allowed.

8. On 12/10/2020, the matter came up for hearing but the Appellant's Counsel sought to be allowed to re-open the Plaintiff's case. The Respondent's Counsel did not object and the Appellant was allowed to re-open the Plaintiff's case. The hearing was then adjourned and fixed for 09/11/2020.

9. When the matter came up for hearing on 09/11/2020, once more it did not proceed because again the Appellant's Counsel sought an adjournment. His ground this time was that he wished to file an Application for leave to enjoin the Attorney General by further amending the Plaint. The adjournment was granted. The Appellant then filed the Application on 09/02/2021. It is however dated 28/03/2019, most likely a typographical error.

10. The Application was opposed and was then canvassed by way of written Submissions. Finally, by the Ruling delivered on 22/11/2021 the Application was dismissed.

**Grounds of Appeal**

11. The Appellant was aggrieved by the decision and filed this Appeal on 07/12/2021. He preferred the following 5 grounds: -

    i. That the learned trial Magistrate erred in law and fact by finding that the Respondent proved his case on probability.

    ii. That the learned trial Magistrate erred in law and fact by finding that the suit had already proceeded and hence could not allow the Plaintiffs pleadings to be amended, whereas the said Honourable Court had given orders that the matter do start de novo.

    iii. That the learned trial Magistrate erred in law and fact in disregarding Section 100 of the *Civil Procedure Act* and Order 8 Rules 1,2,3,4 & 5 of the *Civil Procedure Rules*

    iv. That the learned trial Magistrate erred in law and fact by finding that the Application to further amend the Plaint was not merited, whereas the Plaintiff needed to include the Attorney General in the said suit as a second defendant, since it is the police officers who arrested the Plaintiff and illegally detained him in the cells for four days.

12. It was then directed that this Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed his Submissions on 19/10/2022 and the Respondent filed its Submissions on 10/01/2023.

**Appellant's Submissions**

13. Counsel for the Appellant faulted the trial Magistrate for rejecting the Application on the grounds that allegedly the proposed amendment was an afterthought and that the same opened a totally new case because there had already been a Judgment in the suit. Counsel submitted that the Judgment referred to by the Magistrate had been set side and pursuant thereto the Appellant was allowed to reopen his case. He stated that the suit was directed to begin de novo (afresh) and that such de novo hearing had not yet commenced. He submitted that by Section 100 of the *Civil Procedure Act* and Order 8 Rule 3(5) of the *Civil Procedure Rules*, the Court has powers to allow a party to amend his Pleadings at any stage. He stated that the Attorney General was a necessary party to the suit and that his inclusion would assist the Court in determining the matter since the claim is for unlawful arrest and detention and it is police officers who arrested and detained the Appellant.

14. Counsel cited the decision of Mutungi J in *Hiram Kinuthia & 2 Others v Edick Omondi & 3 Others* [2014] eKLR in which an Application for amendment of a Plaint was allowed after the Court found that even if the proposed amendments were to be deemed to set up a new cause of action, the amendments arose from the same facts and circumstances that gave rise to the suit. He finalized his Submissions by arguing that the trial Magistrate simply stated that the amendments introduced new matters and a new suit but she did not demonstrate in which manner. He then submitted that no new matters outside the scope of the suit were being introduced.

**Respondent's Submissions**

15. In his Submissions, the Respondent's Counsel began by referring to various Court decisions in which the meaning of the terms "de novo" and "hearing beginning afresh" were defined. He cited *Kenya Anti-Corruption Commission vs Michael K. Gituto* [2015] eKLR, *Catherine Wanjiku Kagua vs Chinga Tea Factory & Another* [2016] eKLR, *Julius M'mario M'mauta vs Republic* [2011] eKLR, *Peter Okeyo Ogila vs Rachuonyo Farmers' Co-operative Union Ltd*, Civil Appeal No. 79 of 1992 and *David Mutune Nzongo vs. Republic* [2014] eKLR.

16. Counsel argued that in this instant case, after the matter was directed to begin de novo, the Respondent filed his Witness Statement and documents and the parties then fixed the matter for defence hearing on 12/10/2020, that up to that point the Appellant was not interested in re-opening his case and was ready to proceed with the defence hearing, that however when the case came up for hearing on 12/10/2020 the Appellant requested for leave to re-open his case and respond to some matters raised by the Respondent, the request was allowed, adjournment granted and the matter fixed for hearing on 09/11/2020.

17. He submitted that however, when the case came up for hearing on 09/11/2020, once again the Appellant caused an adjournment by requesting for leave to file an application seeking to further amend the Plaint by joining the Attorney General into the suit. Counsel submitted that the idea of including the Attorney General in the proceedings was informed by the Respondent's Witness Statement which was to effectively rebut the Appellant's suit since in his view, the failure to join the Attorney General was fatal to the suit. He added that the Application was meant to defeat the Respondent's defence and that the proposed amendments constituted a new suit and also that there was no demonstration of discovery of any new facts that were not at the Appellant's disposal.

18. Counsel argued further that before filing the suit the Plaintiff had issued a notice of intention to sue the Attorney General so it cannot be said that the Appellant had only recently learnt of the need to sue the Attorney General and only after the Respondent had raised that issue in the defence. He accused the Appellant of indolence and stated that equity cannot come to his aid. He submitted further that the

trial Court was justified in declining the amendments since they did not accord with the original Plaint, that in directing that the matter starts de novo the Court did not in any way mean that the parties were at liberty to bring in new issues and/or parties, that the amendments would have caused great prejudice to the Respondent. He then cited the holding in Kassam vs Bank of Baroda [2002] eKLR, and argued that allowing the amendment would be akin to shifting goal posts when the Respondent is almost scoring. In conclusion, Counsel submitted that the consequence of allowing such amendments would be to open a very dangerous avenue for Plaintiffs to always move Courts with amendments anytime the defence raises issues that may injure their cases and that this will lead to absurdity.

**Analysis & Determination**

19. This being the first appellate Court, I am required to re-evaluate the evidence adduced before the trial court and arrive at an independent determination. This position has been set out in a long line of cases including *Selle & Another vs Associated Motor Boat Co. Ltd & Others* (1968) E.A 123 where the Court stated as follows:

> "...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ....."

20. In my view, the issue that arises for determination in this appeal is only the following;

    i. Whether the trial Court erred in declining the Appellant's Application seeking to amend the Plaint.

21. I now proceed to analyse and answer the issue.

22. On the issue of amendment of pleadings, Order 8 Rule 5(1) of the *Civil Procedure Rules* provides as follows:

> "(1) 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 of its own motion or on the 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.

23. The classic authority on amendment of pleadings in Kenya is *Eastern Bakery vs Castelino* (1958) EA 461 where Sir O'Connor P. stated the following:

> "It will be sufficient for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: *Tildesley v. Harper* (10 (1878), 10 Ch. D. 393; *Clarapede v. Commercial Union Association (2)* (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: *Budding v. Murdoch (3)* (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya vs. Maung Po Hnaung (4)* (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen*

(5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v. Neal* (6) (1887), 19 Q.B.D. 394; *Hilton v. Sutton Steam Laundry* (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side".

24. The law on amendment of pleadings was further explained by the Court of Appeal in *Joseph Ochieng & 2 others vs First National Bank of Chicago*, Civil Appeal No. 149 of 1991 in which the Court referred to Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition in the following terms:

> " 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."

25. The power of the Court to allow or refuse a party to amend pleadings is discretionary as was held by Gikonyo J in the case of *Andrew Wabuyele Biketi vs. Chinese Centre for The Promotion of Investment Development & Trade in Kenya Limited & 2 Others* [2015] eKLR, where the Judge 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 fide, and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs".

26. However, the discretionary power of the Court in granting or refusing an application for amendment of pleadings should be exercised judicially and in consideration of the facts of the case in particular. This is what Aburili J in *Bosire Ogero v Royal Media Services* [2015] eKLR, held in the following terms:

> " In Bullen Leak and Jacobs Precedents of Pleadings, 12th Edition page 127 titled "amendment with leave - time to amend "it is stated that the power to grant or refuse leave to amend a pleading is discretionary and it to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise"

27. It is therefore clear from the foregoing that ordinarily, Courts should be liberal in granting leave to amend pleadings. However, leave should not be granted if the amendment will cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the Court. The power to allow amendments is intended to do justice and should therefore be granted if it does not cause injustice.

It should be granted where the purpose is to determine the real question in controversy between the parties.

28. In this case, the Judgment referred to by the Magistrate had been set side and the suit was directed to begin de novo (afresh). Pursuant thereto, the Appellant was allowed to reopen his case. At the time that the Application to amend was made, such de novo hearing had not yet commenced. Amendments should only be refused where the opposing party cannot be placed in the same position as if the pleading had been originally correct and where the amendment will cause him an injury which cannot not be compensated in costs. The court must aim at ensuring that a multiplicity of suits is avoided, the real matters in controversy between the parties are clearly brought out, the opposing party is not prejudiced, the character of the suit or defence is not altered and the object of the amendment is not to abuse the process of the Court or to unnecessarily delay justice or work a clear injustice.

29. It is not in dispute that the power to amend can be exercised by the Court at any stage of the proceedings and also that as a general rule, however late, amendment should be allowed if made in good faith provided costs can compensate the other side. These parameters are not exhaustive as far as the grant of leave to amend plaints is concerned. It is apparent from the principles laid down in the cases that amendment of pleadings in general should be allowed before the final judgement is delivered. What this means is that the Court has a very wide discretion in granting or refusing leave to amend.

30. In this case, in my view, it has not been demonstrated that the amendment was sought in bad faith or that the Respondent cannot be compensated by costs or that the amendment is intended to reframe the Appellant's case. There is also no allegation that it deprives the Respondent of its right to rely on the Limitations Act. In any event, the Court has powers to grant leave to amend notwithstanding the expiry of the period of limitation. I am also not persuaded by the Respondent's argument that the amendment should be declined because allegedly it will occasion injustice or it will defeat the Respondent's defence. On the contrary, I am persuaded that the amendment is intended to determine the true substantive merits of the case.

31. I therefore find that the amendment sought is not a novel issue in the suit and it does not introduce a new cause of action that is substantially different from the already existing one (see decision of Nyakundi J in *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR).

32. As was held by Okwany J in *Emerge Development Limited v Chestnut Uganda Limited & another* [2020] eKLR, I find that "the proposed amendments do not introduce a new cause of action or change the character of the case, but arise from the same set of facts and are necessary so as to provide clarity of issues that will enable the court to conclusively determine all the issues between the parties to the suit."

33. I am not persuaded that the cause of action and the character thereof will change with the proposed amendment. I therefore do not also foresee any prospects of there being a prejudice upon the Respondent. In any event, under Order 8 Rule 5, *Civil Procedure Rules* the Court still has powers, where appropriate, to grant leave to amend even where introduction of a new cause of action will be the consequence of the amendment. For an amendment to be refused, it must be one that substantially changes the character of the suit.

34. I also take guidance from the decision of the Court of Appeal in *Eastern Bakery v Castelino* [1958] EA 461 where it was held that:

> " The court will not refuse to allow an amendment simply because it introduces a new case ... The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character ..., or where the amendment would prejudice the

rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defense of limitation accrued since the issue of the writ"

35. In my considered opinion, the proposed amendment does not depart from the original claim nor change the character of the suit. Instead, they are issues that crystalize the Plaintiff's case and will aid the Court in determining the case. Further, no substantial injustice will be suffered by the Respondent since the de novo hearing is yet to commence. It is true that there is evidence that the Appellant's legal team all along appreciated the need to join the Attorney General into the case but for some reason never sued or joined him. This is proven by the pre-suit notice served. It is also true that the Appellant's legal team had a long opportunity to amend the Plaint but inexplicably never took advantage of that opportunity until the folly of not including the Attorney General in the suit was brought up in the Respondent's Statement of Defence after the ex parte Judgment had been set aside.

36. Perhaps this was because the Appellant's team went into a slumber erroneously believing that since initially the Respondent did not defend the suit, the failure to join the Attorney General would not be raised. This indecisiveness and indolence of the Appellant's legal term is inexcusable. However, it will not be fair to punish the Appellant for the mistakes or indecisiveness of his legal team. Indeed, in the Court of Appeal case of *Phillip Chemwolo & Another v Augustine Kubende* [1986] eKLR, Apaloo J.A. in recognizing that mistakes will always arise, stated the following:

> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline".

37. For the foregoing reasons and since there is no evidence that the intended amendments are aimed at delaying the cause of justice, I allow the Appeal. The Respondent will have the opportunity to respond to the amendments and to rebut the claim during trial. The application should in my view be allowed and the Respondent granted corresponding leave to amend its defence if need be.

**Final Orders**

38. The upshot is that I find the Appellant's Notice of Motion dated 28/03/2019 filed before the trial Court meritorious. I accordingly set aside the order made by the trial Court on 22/11/2021 declining to leave to further amend the Appellant's Plain. I substitute the said order with the following:

    i. The lower Court file is to be returned to the lower Court for trial of the suit.

    ii. The Appellant is granted leave to further amend his Plaint as per the draft attached thereto.

    iii. The Further Amended Plaint be filed and served within 14 days from the date that the parties will be informed by the lower Court of the receipt of the lower Court file from this Appellate Court.

    iv. The Respondent is granted corresponding leave to amend, file and serve an Amended Defence within 14 days from the date of being served with the Further Amended Plaint.

    v. To avoid the possibility of any allegations of bias, the suit shall be heard by any other Magistrate other than Hon. Dolphina Alego who was seized of the matter therebefore.

vi. Although the Appellant has succeeded, I note that it his indecisiveness and indolence that has given rise to this Appeal. The Appellant shall therefore bear the costs of this appeal.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF MAY 2023**

**.....**

**WANANDA J. R. ANURO**

**JUDGE**