



REPUBLIC OF KENYA



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**Bikeri v Kipkurui (Civil Appeal E070 of 2021)
[2023] KEHC 22902 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E070 OF 2021
WA OKWANY, J
SEPTEMBER 28, 2023**

BETWEEN

DUKE MOSIOMA BIKERI APPELLANT

AND

ELIJAH KIPKURUI RESPONDENT

(Being an Appeal against the Ruling of Hon. W. C. Waswa – RM Nyamira dated and delivered on the 2nd day of September 2021 in the original Nyamira CMCC No. E15 of 2020)

JUDGMENT

Introduction

1. The Appellant herein, who was the Defendant before the Lower Court, filed an application dated 30th July 2021 before the said court seeking, inter alia, orders for leave to amend the Defence and file a supplementary list of documents and witnesses.
2. The Lower Court dismissed the said application through a Ruling delivered on 2nd September 2021 thus triggering the filing of this appeal.

Appeal

3. The Appellant listed the following grounds of appeal in the Memorandum of Appeal: -
 1. The Learned Magistrate erred in fact and in law by dismissing the Appellant’s Application without considering the harm that would befall the Appellant.
 2. The Learned Magistrate erred in law by finding that the delay in making the application to amend the defence was inadequately explained.



3. The Learned Magistrate erred in law by finding that the delay in seeking to amend the defence was inexcusable.
 4. The Learned Magistrate erred in law and fact when he pronounced himself that the application has no merit.
 5. The Learned Magistrate erred in law and fact when he pronounced himself that the issue in contention was whether the applicant should be allowed to file supplementary list of documents and/or witnesses yet the application before the court was one seeking leave to amend defence.
4. The appeal was canvassed by way of written submissions which I have considered.
 5. The Appellant cited the provisions of Order 8 Rule 3 of the Civil Procedure Rules (CPR) which stipulate that the court may, at any stage of the proceedings allow an amendment on such terms as to costs as may be just. He added that Order 8 Rule 5 of the CPR states that the court may on its own motion allow amendments for the purposes of determining the real issues in controversy between the parties. He referred to the decision in Institute for Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR where the object of amendment of pleadings was discussed.
 6. It was submitted that the Lower Court should have allowed the amendment application as it was made barely two months after the suit had first been listed for hearing.
 7. It was the Appellant's case that the documents that he sought to introduce through the supplementary list of documents were not in his advocate's custody at the time the pleadings were filed and that the said documents indicated that parties had agreed to settle the suit out of court.
 8. The Appellant further relied on the provisions of Article 50 of the Constitution on the right to be heard and the overriding objective of law in civil cases as stated under Sections 1A and 1B of the Civil Procedure Act.
 9. The Respondent had not filed his submissions as at the time this court reserved a judgment date for this appeal and even as at the time that I was writing the judgment.
 10. I have considered the record of appeal and the Appellant's submissions. I find that the main issue for determination is whether the trial court made the correct finding in dismissing the Appellant's application to amend the defence and file supplementary list of documents.
 11. The trial court rendered itself as follows when dismissing the Appellant's said application for amendment: -

“This court has carefully perused the court record and notes that the defendant filed his statement of defence on 18th May, 2021 together with a list of documents and a list of witnesses. However, no documents were attached to the said list of documents and neither were statements attached to the said list of witnesses.

On 10th May, 2021, during the pretrial stage, this court granted leave to the defendant to file all his supporting documents and the matter was fixed for hearing on 31st May, 2021. To date, the defendant has not complied with the said orders. He has failed to file his supporting documents. That is why he has now moved this court seeking leave to file a supplementary list of documents and witnesses.

This court has carefully read the contents of the defendant's application together with the supporting affidavit and further affidavit. The defendant has not explained as to why he



failed to comply with Order 7 Rule 5 of the Civil Procedure Rules. Further, he has not explained as to why he failed to comply with the orders of this court issued on 10th May, 2021, in his favour.

This court has looked at the proposed document that the defendant seeks leave to file. The same is dated 17th July, 2020 and it is purportedly executed by the defendant and the plaintiff. The said document was therefore in possession of the defendant since 17th July, 2020. The question that the defendant has failed to answer is why it is being brought to the attention of this court at this stage of the trial.

The plaintiff adduced evidence and closed his case. This matter is now at the defence hearing stage. If indeed the defendant was acting in good faith, he ought to have filed the said document at the onset of the trial. If for some reasons he could not do so, he ought to have explained his difficulties for this court to appreciate the same.

It is important to note that the defendant has not deposed an affidavit in support of his application and therefore this court cannot speculate as why the defendant slept on his rights up to and until now.

The essence of Order 3 Rule 2, Order 7 Rule 5 and Order 11 of the Civil Procedure Rules is to avoid trial by ambush by having all parties reveal their evidence before the commencement of a trial. This is meant to safeguard a fair, expeditious and just trial.

In Margaret Muthoni Wanyee vs Mukenia Co-operative Society Limited [2017] eKLR the court held: -

“ 13. I am of the view that the court should be extremely slow and cautious before admitting evidence that was not earlier disclosed as provided for by the rules. In fact, my own take is that the court should incline towards denying such application since it is an ambush on the other party.”

12. A perusal of the application wherein the Appellant sought leave to amend the defence reveals that he listed the following grounds in the application: -
- i. That the Plaintiff and Defendant herein entered into an agreement to settle the matter out of court, which information has recently come to the attention of the Defendant's Advocates through his instructing client M/s Directline Assurance Limited.
 - ii. That the additional information obtained by the Applicant/Defendant necessitates amendment of the Defendant's defence.
 - iii. That the defendant/applicant now seeks leave of this honourable court to amend his defence thereof so as to plead accord and satisfaction.
 - iv. That the proposed amendments are necessary for the purposes of determining the real questions in dispute herein.
 - v. That the proposed amendments are necessary for purposes of the fair and just determination of the real questions or issues in dispute in this matter.
 - vi. That the proposed amendments will not occasion any prejudice to the plaintiff/respondent.
 - vii. That it is therefore in the interests of justice that this Honourable court grants the defendant leave to amend his defence in terms of the draft amended defence filed herewith.



- viii. That this application is made in utmost good faith.
13. The Appellant's case was that he did not act in person before the trial court as he was represented by an Advocate appointed for him by his insurers. I note that it is the said Advocates, who swore the affidavit in support of the application before the trial court, were seemingly unaware of the agreement that the Defendant/Appellant entered into with the Respondent regarding the out of court settlement. It is clear that the Appellant's said Advocates were not instructed by the Appellant directly, but by his insurers Ms. Directline Assurance Limited. The said insurers were obviously not privy to the alleged out of court settlement between the parties herein.
14. My finding is that considering the nature of the amendments proposed by the Appellant and the explanation advanced for the delay in making the application for amendment, the trial court should have allowed the said amendment so as to determine the real dispute between the parties, the delay notwithstanding. Indeed, courts have held that amendments can be allowed at any stage during the proceedings and even on appeal. In *Hamisi Omar vs EA Cargo Handling Services Ltd* [1985] eKLR it was held: -
- “I am only too well aware that amendments may be allowed at any time up to delivery of judgment and that applications for amendment of pleadings should generally be viewed sympathetically provided that any damage which may arise as a result of the amendment can be cured by way of costs.”
15. In *Institute For Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the court held:-
- “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.
- Rule 18 of the *Rules* clearly stipulates that the court may permit an amendment at any stage of the proceedings. The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”
16. The Court of Appeal outlined the principles of amendment of pleadings in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR as follows: -
- “The law on amendment of pleadings in terms of section 100 of the *Civil Procedure Act* and Order Via rule 3 of the repealed *Civil Procedure Rules* under which the application was brought 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.”

17. The legal parameters governing the amendment of pleadings that arise from the above cited decisions are that; the amendment should be made timeously without undue delay; should not introduce a new or inconsistency cause of action or issues; the application should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.
18. In the present case, I have already noted that the proposed amendment was to introduce a document/ agreement that the parties allegedly signed prior to the filing of the suit. My finding is that the introduction of such a document, if indeed the same exists, will have a bearing to the just and fair determination of the case. My take is that the production of such a document cannot in any way be held to be prejudicial to the Respondent who, will in any event, be granted an opportunity to respond to its production.
19. For the above reasons, I find merit in the appeal and I allow it in the following terms: -
 - a. The Appellant is granted leave to amend his defence dated 12th May 2021 in accordance with the draft amended defence.
 - b. The Appellant is granted leave to file his supplementary list of documents and witness statements.
 - c. The draft amended defence be deemed as duly filed and served upon payment of the requisite court fees.
 - d. The Respondent is at liberty to file and serve an amended plaint, should he deem it necessary, within 21 days from the date of service with the amended defence.
 - e. Costs of the appeal shall abide the outcome of the Lower Court case.
20. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 28TH DAY OF SEPTEMBER 2023.

W. A. OKWANY

JUDGE

