



REPUBLIC OF KENYA



**Levis v City Shuttle Limited & another (Civil Appeal 108 of 2020)
[2022] KEHC 14287 (KLR) (Civ) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 108 OF 2020

DAS MAJANJA, J

OCTOBER 21, 2022

BETWEEN

ARON LEVIS APPELLANT

AND

CITY SHUTTLE LIMITED 1ST RESPONDENT

PAUL WAWERU NJOROGE 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. S. G. Gitonga, RM dated 4th February 2020 at the Nairobi Magistrates Court, Milimani in Civil Case No. 1463 of 2018)

JUDGMENT

1. This is an appeal from a ruling and order of the Subordinate Court dismissing the Appellant's application seeking leave under sections 99 and 100 of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) to amend the 1st Respondent's name in the pleading and decree by inserting the word "STAR" in between the word "City" and "Shuttle".
2. The facts leading to this appeal are not in dispute and are as follows. The Appellant filed suit by way of a Plaint dated February 28, 2018 seeking special damages of Kshs. 195,623.00 as repair costs against the 1st Respondent named as City Shuttle Limited and its driver, the 2nd Respondent following a road accident that took place on December 28, 2015 between the Appellant's motor vehicle registration number KCB XXXH and the 1st Respondent motor vehicle registration number KBT XXXH
3. According to the Appellant, the Summons to Enter Appearance ("the Summons") and the Plaint were served on the firm of K. M. Mburu and Company Associates Advocates who accepted service on behalf of the Respondents by endorsing on the Summons that they were received on behalf of, "C.S.S.L".



Based on the service, the court entered interlocutory judgment against the Respondents on September 26, 2018.

4. In due course, the Appellants conducted a search of the 1st Respondent on the Business Registration System at the Companies Registry which showed that, “City Shuttle Limited” was a non-existent entity. On the basis of the mistake, the Appellant moved the court by the application dated June 7, 2019 contending that the failure to sue “City Star Shuttle Limited” was a clerical mistake and that he should be allowed to amend the pleading and decree to reflect the correct name and that the Respondents would not suffer any prejudice.
5. The Respondents opposed the application on the ground that section 99 and 100 of the Civil Procedure Act did not apply to the circumstances at hand as the power of amendment only applied to judgments, decrees or orders or errors therein arising from accidental slip or omission and or proceedings not pleadings. They asserted that the court could not allow any amendment as the matter had been concluded by a judgment and decree issued hence there was nothing further to decide and the court was *functus officio*.
6. The trial magistrate agreed with the Respondents that sections 99 and 100 of the Civil Procedure Act were no applicable to circumstances of the case. That the failure to sue the proper party was as a result of the Appellant’s lack of due diligence and that the error ought to have been corrected before the case was concluded. Finally, the court concluded that allowing the amendment would amount to varying the entire judgment and would amount to condemning City Star Shuttle Limited unheard owing to the fact that it was not party to the proceedings.
7. It is the ruling that has precipitated this appeal. The substance of the appeal is set out in the Memorandum of Appeal dated March 2, 2020. The appeal was argued by way or written submissions. The issue in this appeal is whether the court has jurisdiction to amend the pleading and decree in the circumstances and if so, whether the court exercised its discretion in a judicial manner. In considering this matter, the court is guided by the following words of Newbold P., in *Mbogo v Shab* [1968] EA 93;

A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

8. Both parties have cited various decisions that delineate the jurisdiction of the court under sections 99 and 100 of the Civil Procedure Act. These provisions state as follows:
 99. Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.
 100. The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.
9. Both provisions have been subject to the interpretation and application by our courts. As regards section 99 of the Civil Procedure Act, the Court of Appeal in Republic v Attorney General and 15 Others



ex-parte Kenya Seed Company Limited and 5 Others NRB CA Civil Appeal No. 137 of 2005 [2010] eKLR recalled as follows:

[27]..... It is a codification of the common law doctrine dubbed “the Slip Rule”, the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become *functus officio* upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.

[28] Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will of course depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.

10. As regards section 100 of the Civil Procedure Act, this is what Gikonyo J., had to say in Gachango Njuguna Munyambu and 2 Others v Gatundu Holdings and 4 Others ML HCCC No. 173 of 2014 [2015] eKLR:

Under section 100 of the Civil Procedure Rules the Court has unfettered discretion to allow amendment of pleadings at any stage of the proceedings on such terms as to costs or otherwise as it may deem fit and just, and in such manner, as it may direct. Order 8 of the Civil Procedure Rules provides reinforcement and mechanism of invocation of this jurisdiction of the Court on amendment. The law on amendment of pleadings is now settled and cannot be called upon to justify itself.

11. In Mwenendega Enterprises Limited v Kenya Commercial Bank Limited Meru HCCC No. 56 of 2002 [2008] eKLR, Ouko J., states as follows:

The substantive law, however, is section 100 of the Civil Procedure Act. Both the Act and the procedures cloth the court with a wide discretion to allow for amendment of the pleadings at any stage subject only to ensuring that any amendment to be made is for the purpose of determining the real question or issue raised by or depending on the proceeding. Amendment must also be made in good faith and timeously.

12. It is clear from the facts of the case that what the Appellant sought before the court is amendment not only of the pleading, that is the plaint, but also the resulting decree to correct the name of the 1st Respondent. This plea falls within the province of section 100 of the Civil Procedure Act which, as the authorities show, clothes the court with unfettered jurisdiction to allow an amendment on such terms as it deems fit and just and in such manner as the court may direct. The trial magistrate seemed to suggest that the amendment sought was in respect of pleadings and not proceedings. By excluding pleadings from the proceedings, the trial magistrate took an unduly narrow view of the court’s general power to amend from which the provisions of the Civil Procedure Rules regarding amendment draw authority. In short, the reference to proceedings in section 100 includes the power to amend pleadings, orders and decrees whether before and after judgment.
13. I therefore find and hold that the court has jurisdiction under section 100 of the Civil Procedure Act to permit amendment of proceedings including pleadings, orders and decrees before and after judgment. The question then is whether in the circumstances of the case, the court ought to have allowed the proposed amendment.



14. It is not in dispute that City Shuttle Limited as a company is a non-existent entity which the Appellant realised upon conducting a search. However, the Summons were served on City Star Shuttle Limited at its office and whose officers directed the process server to effect service on their nominated advocates hence the endorsement of the Summons by the Advocate. The Appellant was alerted to the error when the Respondents' Advocate endorsed on the Summons the correct name of the 1st Respondent and informed the Appellant's advocate by a letter dated March 6, 2019, that although the motor vehicle was owned by City Star Shuttle Limited, it had sued the wrong party.
15. Absent the judgment, the court would have allowed the proposed amendment because the suing of a non-existent was clearly a mistake. Having considered the facts of the case, I hold that this is case where the trial magistrate ought to have exercised discretion in the Appellant's favour but in view of the existing judgment, imposed such terms and conditions as would do justice to the parties.
16. In this regard, an amendment of the decree would deny the proper party an opportunity to defend itself in the matter. On the other hand, the proper party who was duly served is available. It accepted service and admits that the motor vehicle alleged to have caused the accident belongs to it. Justice of the matter demands that the case be heard on its merit. The court has power to allow the amendment and in order to achieve the ends of justice, the judgment has to be set aside and the case remanded for trial afresh on terms that I will set out hereunder. The Respondents will be compensated by an award of costs.
17. I therefore allow the appeal on the following terms and substitute the order of the Subordinate Court with the following order:
 - a. The judgment entered against the Respondents be and is hereby set aside.
 - b. Leave is granted to the Appellant to amend the Plaintiff by substituting the 1st Defendant name with City Star Shuttle Limited and the amended Plaintiff shall be filed and served within 14 days from the date hereof.
 - c. The Appellant shall bear the costs of the application before the trial court and of this court which I assess at Kshs. 30,000.00 only.
 - d. The suit be and is hereby transferred to the Small Claims Court, Nairobi for hearing and disposal.

CONCLUSIONS

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER 2022.

J. SERGON (DR)

JUDGE

.....instructed by Hamilton, Harrison and Mathews Advocates for the Appellant.

.....instructed by K. M. Mburu Associates Advocates for the Respondent.

