



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 566 OF 2019

DHIRENDRA DAYALJI DEVANIAPPELLANT

VERSUS

HOUSEHOLD DT MICROFINANCE.....RESPONDENT

(Being an appeal from the Ruling of Hon. G. A. MASI Senior Principal Magistrate in Milimani Commercial Court, Nairobi CMCC 4910 of 2014 delivered on the 18th September 2019)

JUDGMENT

1. Dhirendra Dayalji Devani referred to as “the appellant” was the defendant while Household DT Microfinance referred to as “the respondent” was the plaintiff in the lower court.
2. The appellant filed a notice of motion dated 23rd May 2019 before the trial court. The same was dismissed on the ground that there had been inordinate delay in bringing it for the amendment sought and that it would prejudice the plaintiff by delaying the suit.
3. Being aggrieved the appellant filed this appeal raising the following grounds:
 - a) *That the learned magistrate erred and/or misdirected herself in law and in fact by misinterpreting and or failing to comply with the principals for allowing /disallowing amendment of pleadings.*
 - b) *That the learned magistrate failed to allow the amendment for the purposes of determining the issues in controversy between the parties.*
 - c) *That the learned magistrate erred in law and in fact in refusing to grant the order for amendment thus denying the appellant the right to fully articulate his case.*
 - d) *That the learned magistrate erred in law and in fact in failing to hold that amendments are granted so as to obviate injustice by shutting out a party.*
 - e) *That the learned magistrate erred in law and in fact in failing to find that the scales of justice tilted in favour of allowing the appellant to amend his defence.*
 - f) *That the learned magistrate erred in law and in fact in failing to consider the inconvenience caused to the respondent would be compensated by an award of costs.*
 - g) *That the learned magistrate erred in law and in fact in finding that the amendments to the statements of defence sought would prejudice the respondent and cause further delay of the suit.*
 - h) *That the learned magistrate erred in law and in fact in finding that there has been inordinate delay in seeking to amend the statement of defence and that the same is an afterthought.*
4. The appeal was canvassed by written submissions.
5. The firm of Sichale & Company advocates for the appellant submitted that the legal principles that guide the exercise of discretion in amendment of pleadings as set out in the case of **Central Kenya Ltd vs Trust Bank Ltd & 5 Others (2000) eKLR** are as follows: -

- a) The court needs to be satisfied that the application is made in good faith
- b) Whether the amendment is material for a proper determination of the issues before the court.
- c) Whether the amendment, if allowed, will be prejudicial to the respondent or can they be compensated by way of costs
- d) The overriding consideration be whether the amendments are necessary for the just and final determination between the parties.

6. Learned counsel submitted that the first principle for consideration was whether the amendments if allowed would be prejudicial to the respondent or can they be compensated by way of costs. She relied again on the case of **Central (K) Limited vs Trust Bank of Kenya Ltd**

“Mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs”

7. She submitted that the appellant explained the delay and it would not be fair to deny him to do the amendments because of tardiness on the part of the former advocate.

8. On the second principle counsel submitted that the learned magistrate did not consider that the amendment was material for proper determination of the issues before the court. The amendment the applicant wished to include in its defence are that the respondent’s company is non-existent and the defendant was not in Kenya on the material date of the alleged accident. Further that the motor vehicle that was alleged to have caused the accident does not belong to the respondent’s company.

9. She relied on the case of **Institute for Social Accountability & Another vs Parliament of Kenya and 3 Others (2014) KLR**

“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 false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather, on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend 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 and proceedings”

10. Counsel submitted that the learned magistrate failed to consider that the appellant’s application was in good faith and supported by case law to wit; **Daniel Ngetich & Another vs KRep Bank Limited (2013) eKLR**, where Justice J.B Havelock stated that:

“Normally the court should be liberal in granting leave to amend pleadings. But it must never grant leave if the Court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a devise to abuse the process of the Court”

11. She therefore prays that the order issued on 18th September 2019 be vacated and the same be replaced with order allowing the notice of motion dated 23rd May 2019 as prayed with costs.

12. In opposing the appeal the respondent through the firm of Muchui and advocates submits that in the ruling it was stated that “the courts have frequently stated that amendments to pleadings ought to be freely allowed if they are made without injustice to the opposite side”. The trial court further cited the case of **Central (K) Limited vs Trust Bank of Kenya Ltd and 5 Others (2000) eKLR** where it was held:

“Mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation.”

The trial court noted that there was inordinate delay in bringing the application for amendments without a satisfactory explanation and it went ahead and dismissed the appellant’s application.

13. On ground 1 to 4, counsel relied on Order 8 rules 3 and 5(1) of the Civil Procedure Rules which state as follows:

“3(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

“3(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

“5(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.”

14. He further relied on the case of **St. Patrick’s Hill School Ltd v Bank of Africa Kenya Ltd (2018) eKLR** the Court of Appeal set out

the principles governing the amendments of pleadings as follows: -

- a) *The power of the court to allow amendments is intended to determine the true substantive merits of the case.*
- b) *The amendments should be timeously applied for;*
- c) *Power to amend can be exercised by the court at any stage of the proceedings.*
- d) *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.*
- e) *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 limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.*

15. Learned counsel submitted that the said application was filed five years after inception of the suit and after all the respondent witnesses had testified. He further submitted that the appellant had ample time to introduce any amendments earlier and that the intended amendments will not help the court in determining the real questions in controversy.

16. Counsel also relied on the case of **Kyalo v Bayusuf Brothers Limited (1983) KLR**, where the Court of Appeal that-;

Ø Applications for amendments of pleadings should only be allowed if they are brought within reasonable time because to allow a late amendment would amount to an abuse of the court process.

Ø Amendments that contain allegations completely inconsistent with previous pleadings in the same suit cannot be allowed especially if they are late, as they would delay fair and prejudice the other party.

17. On grounds 5 and 6 counsel submitted that the trial magistrate considered all the facts of the case, analysed the evidence that was adduced and in the end arrived at a decision that was based on a clear consideration of the evidence, the law and circumstances of the case.

18. On ground 7 and 8, he submitted that the ruling by the trial magistrate is well reasoned and fair as they explained that there was inordinate delay in bringing the application for amendments. Further it would prejudice the respondent as it would cause delay to the suit.

Analysis and Determination

19. This being a first appeal this court has a duty to re-examine and reconsider the evidence on record and arrive at its own conclusion. **See the case of:**

(i) Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. advocates [2013] eKLR

(ii) Gitobu Imanyara & 2 others v A. G. [2016] eKLR.

20. I have carefully considered the grounds of appeal, evidence on record, both submissions and the authorities cited. I find one issue to be falling for determination. The issue is whether the application dated 23rd May 2019 was filed after inordinate delay which would cause prejudice to the respondent.

21. The statutory provisions dealing with the power to amend is section 100 of the Civil Procedure Act which states as follows:

General power to amend

“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 proceeding 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 the proceeding.”

I also refer to the provisions of Order 8 Rules 3 and 5 of the Civil Procedure Rules which have already been cited at paragraph 13 of this Judgement.

22. It is not in dispute that the appellant had a right to amend his pleadings. The question is whether such amendment would have caused prejudice to the respondent. Further whether the application was filed without undue delay. The suit in question was filed over five years ago and has had several applications by the appellant trying to explain to the court that indeed he was not the one who caused the accident and that the respondent is not a registered company as they have alleged.

23. I have perused the ruling in question where the appellant’s application for amendments was dismissed on grounds that there had been inordinate delay in bringing it and no satisfactory explanation had been given by the appellant for the delay. Secondly that the amendment would be prejudicial to the respondent.

24. In the case of **Joseph Ochieng & 2 Others vs First National Bank of Chicago, Civil Appeal No. 149 of 1991** the court of Appeal stated thus: -

“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 respondent has submitted that the trial magistrate analyzed the evidence before the court and arrived at a decision that was based on clear consideration of the law and the circumstances. The respondent believes that the application is an abuse of the court process, lacks merit and is couched to delay the trial.

26. In assessing any prejudice caused to the respondent by the delay, the court should also assess the likely prejudice that would result if the amendments if not done, would cause the appellant. See **Allen vs Alfred Mcalphire & sons [1968] 1ALL E.R. 543, Agip Kenya Ltd vs Highlands Tyres Ltd [2001] KLR 630 & Birket vs James [1978] A.C 297**. It follows that the prejudice to the plaintiff/respondent may only be ascertained by looking at the following among others: the nature of the case e.g. public litigation or representative suit; importance of the claim or subject matter, legal capacity of parties, rights of the parties in the suit etc.

27. On whether there was inordinate delay on the part of the appellant, the record speaks for itself. The appellant had on several occasions filed other applications addressing the issues that have been brought before this court which were never properly addressed by the trial court, due to non-attendance by the appellant’s advocate.

28. The appellant has given the reasons for the delay being the tardiness on the part of his former advocate and the fact that he was out of the country during the accident at the same time he has been sickly.

29. **Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36 (1) at paragraph 76**, states the following about amendments of pleadings:-

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

30. In the case of **Utalii Transport Company Limited & 3 Others vs NIC Bank & Another [2014] eKLR** the court stated that: -

“... whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case ... caution is advised for courts not to take the word inordinate in its ordinary meaning ...”

31. The trial court erred in dismissing the application for amendments since it is the responsibility of each party to ensure that its pleadings reflect the correct position. The pleadings must as much as possible be accurate because courts and advocates change over the years. A lot of confusion would definitely ensue if subsequent advocates or subsequent courts that do not have historical background of a matter were to take up the same. In that case the learned magistrate should have allowed the amendments so that the appellant’s pleadings reflect the position they consider to be correct.

32. A perusal of the notice of motion dated 23rd May 2019 plus the supporting grounds and affidavit, and the ruling delivered on 18th September 2019 reveals that the learned trial Magistrate only confined herself to the issue of delay and prejudice to the respondent. She did not consider the prejudice (if any) to the appellant and the issue of the amendment itself.

33. What was the intended amendment and what would be its effect on the suit? This was the gist of the amendment. The whole idea is to place before the court material that would assist it arrive at a just decision. This is a crucial element that was overlooked by the learned trial Magistrate.

34. The respondent’s counsel in the lower court had in his submissions dated 22nd July 2019 opposed the application or amendment. However, in a rider he stated thus:

“In the unlikely event that the court opts to exercise discretion in the defendant’s favour it should be conditional upon the plaintiff paying the plaintiff’s costs and throw away costs assessed at 50,000/= considering how far the trial has gone and expenses incurred.”

To my mind this is the option the trial court ought to have taken.

35. From the above analysis I am of the view that had the learned trial Magistrate taken time to look at the issues the appellant had raised in his application she would have found them to be within the cause of action. Further they were in the interest of justice going to assist in the

fair determination of the case.

36. My final finding is that the appeal has merit and I allow it. The order issued by the learned trial Magistrate vide her ruling delivered on 18th September 2019 is set aside. It is substituted with an order allowing prayer no. 2 of the notice of motion dated 23rd May 2019. The amended defence to be filed and served within 10 (ten) days from today's date. The respondent is granted leave to file a reply to the amended defence within 7 (seven) days upon service by the appellant.

37. Costs to the appellant.

Orders accordingly.

Delivered online, signed and dated this 27th day of July, 2021 at Nairobi.

H. I. ONG'UDI

JUDGE