



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 96 OF 2019.

ERIC KENNEDY OKUMU OGOLA.....PLAINTIFF/APPLICANT

VERSUS

NATION MEDIA GROUP.....1ST DEFENDANT/RESPONDENT

PHILIP MUYANGA.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff filed a Notice of Motion dated 30th September, 2020 brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 8 Rules 3(1), 5(1), 7 and 8 of the Civil Procedure Rules 2010, and all other enabling provisions of the Law. He seeks the following orders-

(i) That the plaintiff be allowed to amend his plaint dated 17th December, 2019 and filed in this Honorable Court on the same date as per the draft annexed hereto;

(ii) That the amended plaint be deemed duly filed upon payment of the requisite court fees and thereafter be served upon the defendant; and

(iii) That the costs of this application be in the cause.

2. The application is brought on the grounds on the face of it and is supported by an affidavit sworn on 30th September, 2020 by Jane. M. Adogo, the plaintiff's Advocate. On 1st March, 2021, the defendants filed grounds of opposition dated 27th February, 2021.

3. The application was canvassed by way of written submissions. The plaintiff's submissions were filed on 26th February, 2021 by the law firm of J.M Adogo Advocates while the defendants' submissions were filed on 27th April, 2021 by the firm of Archer & Wilcock Advocates.

4. Mrs. Adogo, learned Counsel for the plaintiff submitted that the defendants failed to file a replying affidavit despite being granted leave to do so and as a result, the plaintiff's application stood unopposed and should be allowed as prayed. She relied on the case of **Zulfikar Ali Hassanally & Rustam Hira (Suing as the Legal Representatives of the late Abdul Karim Hassanally) Nyota Service Station Limited v Westco Kenya Limited & 3 others** [2016] eKLR, where the Court held that the plaintiffs had not filed a replying affidavit to verify the grounds of opposition, thus the failure to file a replying affidavit in contention of facts amounts to an admission of facts.

5. She relied on the provisions of Order 8 Rule 3(1) of the Civil Procedure Rules, 2010 which provides for amendment of pleadings by any party at any stage of the proceedings on such terms as may be just. She submitted that in the case of **Central Kenya Ltd vs Trust Bank Ltd & 5 Others** [2000] eKLR which was cited in **Ocean Foods Limited vs Osotspa Company Limited & 2 Others** [2020] eKLR, the Court reiterated the guiding principles in applications for amendment of pleadings and stated that the overriding consideration in such an application is whether the amendments are necessary for the just determination of the dispute between the parties and whether by allowing the amendment, the opposite party will be prejudiced or suffer injustice that cannot be compensated by way of costs.

6. Mrs. Adogo submitted that amendments sought before the hearing of the case should be freely allowed as was adopted by the Court in the case of **Eastern Bakery vs Castelino** [1958] EA 461 which was cited in **Ocean Foods Limited vs Osotspa Company Limited & 2 others** [2020] eKLR, where the Court of Appeal held that amendments to pleadings sought before the hearing should be freely allowed if the other party will not suffer an injustice and can be compensated by costs.

7. The plaintiff's Counsel indicated that the proposed amendments were necessitated by the discovery of new information that the plaintiff was not aware of at the time of drawing and filing the plaint dated 17th December, 2019. She urged that the proposed amendments were intended to bring before this Court the real matters in controversy between the parties herein, so that they can be determined on their true and

substantive merits. Mrs. Adogo was of the view that the defendants would not be prejudiced in any way in the event that the present application was allowed.

8. Ms. Kemunto, learned Counsel for the defendants in opposing the application for amendment submitted that the general power to amend pleadings is donated by Section 100 of the Civil Procedure Act being the substantive law and its handmaiden under Order 8 Rule 5 of the Civil Procedure Rules. She submitted that Courts have the discretion to allow amendments of pleadings at any stage of the suit but such discretion ought to be exercised judiciously and not whimsically.

9. The defendants' Counsel relied on the case of **Institute for Social Accountability & Another v Parliament of Kenya & 3 Others** [2014] eKLR, where the Court of Appeal held that 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.

10. She also relied on the case of **Central Kenya Limited v Trust Bank Limited & 5 Others** (supra), where the Court of Appeal enumerated the prerequisites that ought to be fulfilled before a Court can exercise its discretion with regard to applications for amendments. These are that there has been no undue delay, that no new or inconsistent cause of action is introduced and that the amendment can be allowed without injustice to the other side. Ms. Kemunto submitted that the proposed amendment by the plaintiff seeks to introduce a new cause of action being the public reactions from social media after the impugned publication was published.

11. She posited that the orders which were being sought by the defendant are statute barred under the Limitation of Actions Act and the Defamation Act and they should not be granted by this Court. She relied on the case of **Fredrick M. Waweru & Another v Peter Nguni Kimingi** [2007] eKLR, where the appellant had sought to introduce a new defendant after the limitation period by way of an amendment but the Court declined to allow the said application on the ground that what the appellants were seeking went beyond a simple amendment of the plaint since they sought to introduce a new defendant who clearly had the defence of limitation available to him in the event a whole new suit had been filed against him, but instead the appellants sought to sneak him in through an application for amendment.

12. It was submitted by Ms. Kemunto that should the proposed amendment be allowed, the same would be in contravention of the Defamation Act and the Limitation of Actions Act and it would serve as a great injustice to the proposed defendant who will be introduced to a cause of action that accrued almost two years from the date of publication. She stated that the plaintiff had sufficient time to amend his pleadings after the cause of action arose but no explanation had been given for the failure to amend the plaint before the time lapsed.

13. The defendants' Counsel contended that the defendants would be highly prejudiced in the event that the proposed amendment was allowed and that the said prejudice was incapable of being compensated by an award of costs. She stated that in the event that the proposed amendment was allowed, it would defeat the whole purpose the Limitation of Actions Act is meant to cure and that would not be in the interest of justice.

ANALYSIS AND DETERMINATION.

14. This Court has considered the issues raised in the application herein, the affidavit in support thereof, the defendants' grounds of opposition and the written submissions by Counsel for the parties. The issue that arises for determination is **whether the application dated 30th September, 2020 is merited.**

15. In the affidavit filed by the plaintiff's Advocate, she deposed that on 1st February, 2019, the 2nd defendant authored an article on page 8 of the Daily Nation entitled, "**Court lets trader sell 10m kilos of kebs-barred rice**", which article was published by the 1st defendant.

16. She averred that the said article elicited reaction from social media including a viral video/photo/film/picture of the plaintiff and that the said information was neither within the plaintiff's knowledge nor hers, at the time of drawing and filing the plaint herein. She further averred that the reaction on social media was as a result of the publication by the defendants.

17. Mrs Adogo also deposed that in the judgments in Constitutional Petition No. 205 of 2018 and Civil Appeal No. 63 of 2019, the issue that was before the Court was the size and grading of the rice and not the issue of the rice being poisonous. She deposed that it was in the interest of justice for the plaint to be amended so that the suit will not be tried on a false hypothesis of facts. The plaintiff's Counsel also deposed that the intended amendments would not prejudice the cause of action in way.

18. In the grounds of opposition dated 27th February, 2021 filed by defendants, they opposed the plaintiff's application on the grounds that the amendment sought was time barred, it was fatally defective, it was misconceived, misplaced and an abuse of the Court process and that the plaintiff herein was seeking an equitable remedy and yet they were guilty of laches. The defendants urged this Court to dismiss and/or strike out the application dated 30th September, 2020 and the entire suit.

Whether the application dated 30th September, 2020 is merited.

19. As correctly submitted by both parties, it is trite that when it comes to amendments of pleadings, they should be allowed freely as long as they can be made without prejudice to the other party and/or if any prejudice is occasioned to the said party, the same can be compensated by way of costs. These principles were laid down by the Court in the decision in *Eastern Bakery vs Castelino*, [1958] EA at p. 461 where it was held as hereunder-

"It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings 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." (emphasis added).

20. In the decision in the case of *Abdul Karim Khan v Mohamed Roshan* [1965] EA at P. 289, which was cited by Nyakundi J, in *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR, it was held that Courts will not permit an amendment that is inconsistent with the original pleading and which entirely alters the nature of the defence or plaint.

21. The defendants were of the view that the orders sought by the plaintiff were statute barred under the Limitation of Actions Act and the Defamation Act. As such, in the event the proposed amendment was allowed, it would be in contravention of the said statutes and would serve as a great injustice to the proposed defendant who would be introduced to a cause of action that accrued almost two years from the date of the publication.

22. In *Weldon v Neal* [1887] 19 Q.B. D, 394 it was held that the Court would ordinarily refuse to grant leave where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, for instance by depriving him of a defence of limitation accrued since the issue of the writ.

23. However, in the case of *Kenneth Kariuki Githii v Royal Media Services Ltd* [2009] eKLR, Maraga J (as he then was) stated as follows-

“Referring to the new English Rule Lord Denning said in *Sterman vs E.W. & W.J. Moore* [1970] 1 Q.B. 596 at p. 604: -

“Since the new rule, I think we should discard the strict rule of practice in *Weldon V. Neal (1887), 19 Q.B.D. 394. The courts should give O. 20, r. 5(1) its full width. They should allow an amendment whenever it is just so to do, even though it may deprive the defendant of a defence under the Statute of Limitations.”*

The new English rule referred to above is similar to our Order 6A Rule 3(2) and (5) of the Civil Procedure Rules which provide:

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“3(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such a leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(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 amendments.”

It is clear from this provision that the law allows amendments which introduce a new cause of action even when the limitation period has expired. Interpreting this provision in *James Ochieng’ Oduol vs Richard Kuloba, C.A. No. 2 of 2002, the Court of Appeal, however, stated that amendments under this provision are allowed only in peculiar circumstances.....*” (emphasis added).

24. Looking at the draft amended plaint, the plaintiff seeks to introduce and rely on a viral video/photo/film/picture of the plaintiff where social media players after reading the false publication of the defendants, dramatized the defamation on a film which was not available to him at the time of filing the plaint herein. They also seek to rely on the judgment of the High Court in Constitutional Petition No. 205 of 2018 and the judgment of the Court of Appeal in Mombasa Civil Appeal No. 63 of 2019.

25. It is evident that the plaintiff does not seek to introduce and/or enjoin a new defendant as alleged by the defendants in their submissions, thus the issue of the Limitations of Actions Act does not arise. In determining the issue at hand, this Court has to consider whether the information the plaintiff seeks to introduce was available to him at the time he filed the plaint and that the amendment shall not occasion any prejudice to the defendants that cannot be compensated by way of costs.

26. The defendants contended that the application herein is time barred, fatally defective, misconceived, misplaced and an abuse of the Court process, while the plaintiff averred that the proposed amendment should be allowed so as to bring before this Court, the real matters in controversy between the plaintiff and the defendants herein, so that they are determined on their true and substantive merits. The plaintiff’s deponent averred that the information giving rise to the proposed amendment was not available to the plaintiff at the time of drawing and filing the plaint dated 17th December, 2019 and that no prejudice would be occasioned to the defendants as the law allows corresponding leave for such amendment.

27. *The law with regard to amendment of pleadings is provided under Order 8 Rule 5(1) of Civil Procedure Rules, 2010 which states as follows: -*

“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.”

28. This Court after a careful reading of the plaint dated 17th December, 2019, alongside the draft amended plaint, finds that the proposed amendment does not in any way alter the cause of action of the suit and/or introduce a new cause of action. The case by the plaintiff and reliefs sought against the defendants are expressly pleaded in the plaint. Whether a reaction from the social media which included a viral video/photo/film/picture of the plaintiff dramatizing the defamation on a film was as a result of social media players reading the alleged false publication by the defendants, can only be decided at the hearing of the main suit or the plaintiff will forever lose the opportunity to address the said issue before the Trial Court.

29. In this Court's considered view, the proposed amendment is meant to assist this Court in making a determination on the issues raised in the suit herein on merit as the defendants can be granted leave to amend their statement of defence in response to the new claims and/or allegations by the plaintiff and set the record straight through cross-examining the plaintiff and his witnesses, if any, and also by the defendants calling their own witnesses to rebut the plaintiff's claims. As such, no prejudice shall be occasioned against them. This Court therefore fails to see how the defendants herein will be prejudiced if the amendment is allowed and how the same may defeat their defence.

30. It is this Court's finding that under Article 50 of the Constitution of Kenya, 2010, the right to a fair trial cannot be derogated from, as it is accorded to every litigant equally. In **J.C. Patel v D. Joshi 1952 19 EACA 12**, the Court when dealing with a similar application stated thus-

“The rule of conduct of the court in such a case is that however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side.”

31. Similarly, in **St. Patrick's Hill School Limited v Bank of Africa Kenya Limited** (supra), the Court in allowing an application for amendment of pleadings held that: -

“This power, envisaged in the provisions of Order 18 rule 10 of the Rules and section 146 of the Evidence Act, is intended to ensure that each party is afforded a fair trial guaranteed under Article 50 (1) of the Constitution. But a fair trial does not exist in a vacuum, it is governed by rules which by themselves ensure that each party is given the opportunity to present or defend his case fairly. That is the purpose of a trial court. It must make sure that the parties are given ample opportunity to ventilate the issues arising from their case. What the said rules must not do is to become an end in themselves and impede a fair trial and that is why Article 159(2) (b)(sic) of the Constitution provides that justice shall be administered without undue regard to technicalities. When a case is decided in accordance with substantial justice as depicted under the above mentioned article, justice will not only be seen but will be seen to have been done.”

32. The plaintiff submitted that the defendants only filed grounds of opposition to the application despite having been granted leave to file a replying affidavit. In **Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited** [2010] eKLR, the Court held as follows on the failure of a litigant to file an affidavit to rebut depositions made by the opposite party-

“Grounds of opposition address only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the plaintiff in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the defendants. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the plaintiff's supporting affidavit, means that the defendants have no claim against the plaintiff.” (emphasis added).

33. In the absence of a replying affidavit by the defendants to rebut the plaintiff's depositions, this Court finds that it is in the interest of justice to allow the proposed amendment so that the suit can be heard on merit. *The defendants have fallen short of demonstrating the manner in which they will be prejudiced if this court grants the order sought by the plaintiff. It is also noteworthy that none of the plaintiff's or the defendants' witnesses have testified. The holding in the case of Eastern Bakery v Castelino (supra) applies to the circumstances of this case.*

34. It is evident that none of the plaintiff's and defendants' witnesses have testified in this case. This court adopts the holding in the case of **Eastern Bakery v. Castelino (supra)**.

35. The upshot is that the application dated 30th September, 2020 is merited and the same is allowed in the following terms-

(i) The draft amended plaint is deemed as duly filed on condition that the plaintiff pays the requisite Court fees and the amended plaint is served upon the defendants within fourteen (14) days from today;

(ii) The defendants shall be at liberty to file an amended statement of defence within fourteen (14) days from the date of service of the amended plaint;

(iii) The plaintiff will within 14 days of service by the defendants file a reply to the amended statement of defence if he wishes to do so; and

(iv) The costs of the application herein shall abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 23RD DAY OF JULY, 2021.

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

MS BARAZA HOLDING BRIEF FOR MRS ADOGO FOR THE PLAINTIFF

MS OBUORI FOR THE DEFENDANTS

Mr. Cyrus Kagane – Court Assistant.