



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 518 OF 2012

JULIUS NZIOKI WAMBUA.....APPELLANT

VERSUS

MOHAMED SALIM KHAMIS.....1ST RESPONDENT

SILVER STAR AUTOMOBILES LTD.....2ND RESPONDENT

(Being an appeal from the Ruling and Order made on 28th September 2012

by the Hon. Mr. P. W. Wasike, Resident Magistrate, in Nairobi

Chief Magistrate's Court Civil Case No. 2586 of 2010)

JUDGEMENT

1. This is an appeal against the trial court's ruling disallowing an oral application for leave to amend the plaint. The record shows that in the course of proceedings before the court and after cross examination of the appellant, the appellant's counsel made an oral application under **Order 8 Rule 8** of the **Civil Procedure Rules**, to further amend paragraph 4 of the plaint to indicate that the plaintiff was cycling to the road as opposed to standing on the pedestrian pavement alongside the road when the cause of action arose.

2. The trial court found that though the amendment was meant to enable the court determine the real issues in controversy, it was meant to cure the defects of the case exposed in cross- examination and thus unmerited. Being dissatisfied with that decision, the appellant filed this appeal which proceeded by way of written submissions.

3. In canvassing the appeal, the appellant's counsel in his written submissions argued that the amendment of pleadings is a statutory right provided as follows under **section 100** of the **Civil Procedure Act**;

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 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.

4. He argues that the court has unfettered jurisdiction to allow amendment of pleadings the only rider being that the court may allow the application on such orders as to costs or otherwise as may be just. Counsel contends that the trial court erred in finding that the error came up during cross examination yet in his evidence in chief, the appellant had testified that he was riding a bicycle at the material time. He submits that the question of whether the appellant was standing off the road or cycling became a real issue for determination and the trial court erred in finding that it was not.

5. It was submitted that the defendants neither demonstrated the prejudice they would have suffered if the application was allowed nor did they make a request to recall the plaintiff or adduce further evidence. It was also submitted that the trial court erred by concerning itself with the manner in which the error was detected while statute and case law provided that any defect or error in any proceeding could be amended at any time and at any stage of the proceedings. That the court's discretion was wide enough to allow amendments even in appeals as held in the case of **Jupiter General Insurance Co. Ltd v Rajabali Hashman & Sons (1960) E.A. 592**.

6. Relying on the cases of **Kenya Cold Storage (1964) Ltd v Overseas Food Services (Africa) Ltd (1982) KLR 453**, **Cooper v Smith**

Bugerere Tea Estates Ltd (1971) EA 188 and **General Manager, E.A.R& H.A V Thierstein (1968)EA 354** counsel for the appellant argued that it was only in cases where costs were inadequate that an amendment would be declined. A genuine mistake, even a careless one, could be remedied by amendment subject to costs which in most instances cured the defect.

7. Counsel argued that the need to freely allow amendment of pleadings was essential to the core mandate of the courts to do substantive justice and in this case, the trial court had erred in declining to grant leave to amend especially given that the amendment would not change the cause of action and did not require further evidence or rehearing of the matter.

8. On his part, counsel for the respondent argued that the application to amend the plaintiff had been made in bad faith with a view to defeat the defendant's case after it had poked holes into the entire claim. He submitted that allowing the amendment after cross-examination would re-open the appellant's case and render the entire process pointless. He cited the cases of **James Nandasab vs Willis Wachilonga [2005]eKLR** and **John Mulwa Kang'aatu vs Pan African Insurance Co. Ltd [2015]eKLR** in support of his case and urged the court to dismiss the appeal.

9. The sole issue arising from the memorandum of appeal, the record of appeal and the parties' submissions is whether the trial court properly exercised its discretion in declining to grant leave to amend the plaintiff. In determining this issue, I am mindful that an appellate court may only interfere with the exercise of judicial discretion if satisfied that the court misdirected itself on law; misapprehended the facts; took account of considerations of which it should not have taken an account, failed to take account of consideration of which it should have taken account, or that the decision, albeit discretionary, was plainly wrong. (See **Mrao Ltd v First American Bank of Kenya Ltd & 2 others Civil Appeal No 39 of 2002 [2003] eKLR**)

10. In the case of **Easter Bakery v Castelino (1958) EA 461**, cited with approval by the Court of Appeal in **John Mulwa Kang'aatu (supra)** the court held;

"Generally speaking this Court will not interfere with the discretion of a Judge in disallowing or allowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded on wrong materials or a wrong principle."

11. The appellant filed a plaintiff dated 23rd March 2010 against the respondent for damages following a road accident that he claimed occurred along Enterprise Road. The respondent denied the claim in its statement of defence and put the appellant to strict proof of the averments made in his plaintiff.

12. Before the hearing could take off, the appellant's counsel made an application to amend the date of the accident to 28th September 2009 at paragraph 4 which read as follows;

4. On or about 30/09/2009, the plaintiff was standing on the pedestrian pavement alongside Enterprise Road Nairobi when the 1st defendant acting as the servant or agent of the 2nd defendant jointly for their gain so negligently drove, managed or controlled the aforesaid vehicle that it collided with the plaintiff who sustained serious injuries and has suffered loss and damage.

13. The amendment was allowed by consent and the trial court proceeded to take the appellant's evidence. The defence had indicated that it would not be calling any witnesses. After cross examination and reexamination of the appellant, the appellant's counsel made the contested application to further amend the plaintiff to indicate that the plaintiff was cycling to the road rather than standing on the pedestrian pavement alongside the road.

14. The application was based on **Order 8 Rule 8** of the **Civil Procedure Rules** which provides that a court may hear and determine an oral application for amendment of pleadings. **Order 8 Rule 3 (1)** provides that "... 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."

15. **Order 8 Rule 3** gives wide discretion to the court to allow amendments even where *such an application is made after the expiry of a period of limitation upon which the other party might be entitled to rely, or substitute a party, or alter the capacity in which a party sues or even add or substitute a new cause of action.* (See **Kenya Cold Storage (1964) Ltd v Overseas Food Services (Africa) Ltd (supra)**)

16. Such discretion must however be exercised within established principles. These principles were enunciated by the Court of Appeal in the case of **Central Kenya Ltd v Trust Bank Ltd & 5 others CIVIL APPEAL NO.222 OF 1998 [2000]eKLR** thus

... the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, Beoco Ltd v. Alfa Laval Co. Ltd [1994]4 ALL ER. 464).

17. In the present case, the trial court denied to grant leave to amend the plaintiff in the following terms;

"It is my finding that the intended amendment is not meant to enable the court determine the real issues in controversy but is meant to cure the defects of the case as exposed in cross examination by the defendant. If this was the object for amendment of pleadings, then either party will seek to amend and perhaps re-amend their pleadings, each time a weakness is established on cross examination to panel beat their case. This is not fair to the other party against whom such an amendment is made."

18. As rightly pointed out by the appellant's counsel the appellant had testified in his evidence in chief that he was riding a bicycle when the accident occurred. It would perhaps have been more prudent of the appellant's counsel to apply for amendment at this point. That being said and with due respect, the issue of whether the appellant was standing on the pavement alongside the road or cycling was not exposed during cross examination as held by the trial court but first arose during evidence in chief.

19. If an amendment is sought for the purpose of bringing to the fore real questions or issues for determination, the court will allow the application however negligent or careless. In this case the defence did not demonstrate the prejudice it would suffer that would not be compensated by costs. To disallow the application for amendment would mean that the matter would proceed and be decided on a false hypothesis.

20. I agree with the observation of the court in the case of **Institute For Social Accountability & Another v Parliament of Kenya & 3 others NAKURU PETITION NO. 16 OF 2013 [2014]eKLR** 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. 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.”

21. In the case of **John Mulwa (supra)** which was relied upon by the respondent, the court warned that in as much as amendments should be allowed freely, the courts must be wary of parties who seek to delay the legal process. In that case, the applicant had applied for amendments on several occasions and in a span of 13 years without making an effort to fix his matter for hearing. The applicant sought to further amend his Further Amended Complaint, due to a typographical error in the date. Upon perusal of the proposed amendments, it emerged that in addition to rectifying the error in the date, there were other amendments which would introduce new facts completely altering the cause of action. The court allowed the amendment of the date but declined leave for all other amendments.

22. I also find useful guidance in the case of **Printing Industries Limited & another v Bank of Baroda Civil Appeal No. 277 of 2014 [2017] eKLR** where the Court of appeal in upholding the trial court’s decision to allow amendment in the course of trial held;

“In allowing the amendments in question, the learned Judge relied on an extract from the judgment of this Court in Joseph Ochieng(supra) [Joseph Ochieng T/A Aquiline Agencies versus First National Bank of Chicago Civil Appeal No. 149 of 1991], which we think summarises and represents the law on amendment of pleadings. Writing for the Court and quoting extensively a passage from Bullen and Leake & Jacob’s Precedents of Pleading 12th Edition, Shah, JA, said;

“The ratio that emerges out of what was gleaned from the said book is that the 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 allow amendments can be exercised by the court at any stage of 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 ...” [Emphasis added]

23. In **Eastern Bakery –Vs- Castelino(1958) EA 462** the court held;

“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 defence of limitation accrued since the issue of the unit.”

24. The overriding consideration in an application for leave for amendment is whether the amendment sought is necessary for determining the real question in controversy and whether any delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.

25. From the foregoing, the principle of law running through is that the court has wide discretion to allow any party to amend its pleadings 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 under **Order 8 Rule 3** of the **Civil procedure Rules**.

26. In light of the foregoing, I find that the trial court misdirected itself on the law in declining the application for amendment. I hereby allow the appeal and set aside the order of the trial court made on 28th September 2012. The appellant is hereby granted leave to amend the plaint in the terms sought. He shall however bear the costs of this appeal.

27. Having considered the Law as enunciated in Statute and in Case Law and the facts of this case, I am persuaded that the trial court misdirected itself on the Law in declining the application for amendment. I hereby allow the appeal and set aside the order of the trial court made on the 28/9/2012. The appellant is hereby granted leave to amend the plaint in terms sought. He shall, however, bear the costs of this appeal.

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

A. K. NDUNG’U

JUDGE