**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 17 OF 2020**

**MARTIN WERU GICHURU.....1ST APPELLANT**

**JAMES MURURA.....2ND APPELLANT**

**VERSUS**

**BEATRICE WAMBUI MWAURA**

**(suing as next of kin and personal representative of the Estate of**

**MICHAEL KINYUA THOMAS (DECEASED).....RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. The appellants herein lodged an appeal before this court challenging the ruling of the trial Court (Hon. H. Nyakwemba- PM) delivered on 5.05.2020 in Embu Chief Magistrate Civil Suit No. 69 of 2018 and wherein the Learned Magistrate dismissed the Appellants' Application seeking to amend their defence.

2. The appellants postulated six (6) grounds of appeal in the said memorandum of appeal and which grounds can be summarized as follows: -

*1) That the learned trial magistrate erred in law and misdirected himself in failing to consider the appellants' submissions on both points of law and facts and ignoring the case laws in appellants' submissions.*

*2) That the learned trial Magistrate's ruling was unjust, against the weight of evidence and was based on misguided points of facts and wrong principles of law thus occasioning miscarriage of justice.*

*3) That the Learned Magistrate erred in fact and in Law in holding that the Appellant's supporting affidavit was not dated whereas it was dated and its execution was not an issue as neither party raised such an issue.*

*4) That the Learned Magistrate erred in fact and law in disallowing the Appellant's application dated 24th January 2020 in Civil Case No. 69 of 2018 thereby leading to miscarriage of justice.*

3. The appellant thus prayed that the appeal be allowed with costs, and the ruling and orders of the Honourable H. Nyakweba PM subject of the appeal be set aside and the appellant be allowed to amend their defence.

4. The appeal was canvassed by way of written submissions.

**B. Submission by the parties**

5. The Appellant submitted to the effect that the application to amend the defence was merited as the court is bestowed with discretion as far as amendment of pleadings is concerned and reliance placed on Order 8 Rule 5(1) of the Civil Procedure Rules 2010. Further that the court can on its own motion or upon application of any party order amendment of a document in such a manner as it directs. Reliance was made on **Bosire Ongero –vs- Royal Media Services (2015) eKLR**. The Appellant further submitted to the effect that the amendment would not cause injustice/ or prejudice to the Respondent as she would have the chance to respond to the Amended Defence and that the amendment

was in tandem with the right to a fair hearing as envisaged under article 50 of the Constitution. Reliance was made on **J.C Patel –vs- Joshi 1952 19 EACA 12** and **Institute for Social Accountability & Another –vs- Parliament of Kenya & 3 Others (2014) eKLR.** It was further submitted that the application was made at the pre-trial stage and thus timely and reliance made on **Elijah Kipngeno Arap Bii –vs- Kenya Commercial Bank Ltd (2013) eKLR.**

6. On her part the Respondent submitted to the effect that the appeal herein is not merited as Appellants sought to amend the defence to introduce new issues that were never pleaded and/or referred and which issues were introduced without following the due procedure. This was because, it was submitted, the issues introduced were in the nature of a counterclaim and was in contravention of the procedure of pleading a counterclaim under Order 7 Rule 8 of the Civil Procedure Rules 2010. Reliance was made on **Moses Mwicigi and 14 others –vs- IEBC and 5 others (2016) eKLR** as to the importance of following the procedures. It was further submitted that the issues raised in the amended defense were derived from Runyenjes SPMCC 101 of 2015 and which matter was heard and determined and the Respondent herein was not a party thereto. As such this was completely a new claim with a complete departure from the previous statement of defence which the Appellants sought to amend and in contravention of Order 2 Rule 6 of the Civil Procedure Rules 2010. The Respondent further submitted to the effect that the Appellant was strictly confined to the contents of the Defense and could not introduce new issues which had not been pleaded in the defence and which was filed with leave of the court and that the trial court made a conscious decision and was not bound to use the case law filed by the parties before him. As such it was submitted that the appeal ought to be dismissed with costs.

**C. Issues for determination**

7. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga& Another (1988) KLR 348).**

8. However, in the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and that what matters in the analysis is the substance and not its length. (See Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR).**

9. I have certainly perused and understood the contents of the pleadings, proceedings, ruling, grounds of appeal, submissions and the decisions referred to by the parties herein. It is my opinion that this appeal therefore revolves around the exercise of the discretionary power of the trial court in allowing an amendment of a pleading. As such the main issues for determination in my view are whether the learned Magistrate exercised his discretion properly in rejecting the appellants' application and whether the appeal ought to succeed.

**D. Determination of the issue**

**I. Whether the learned Magistrate exercised his discretion properly in rejecting the appellants' application?**

10. It is now trite that before an appellate court can interfere with exercise of discretion of a trial court, it must be satisfied that the trial court misdirected itself in some matter and as a result arrived at a wrong decision or that he misapprehended the law or failed to take into account some relevant matter. **Madan, JA** (as he then was) captured the principle more succinctly in **United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd (1985) EA 898** as follows: -

> *"**The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account of; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong."*** *(emphasis mine)*

11. **So did the trial court** misdirect itself in law, misapprehend the facts; thirdly, took account of considerations of which he should not have taken account of; failed to take account of considerations of which he should have taken account or was his decision, albeit a discretionary one, plainly wrong?

12. It is trite law that amendments to pleadings can be freely allowed at any time before delivery of a judgment. According to Mulla, The Code of Civil Procedure, 17th Edition Volume 2, at pages 333, 334 and 335; as a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order. Further, leave to amend must always be granted unless the party applying was acting mala fide and where it is not necessary for determining the real question in controversy between the parties. I am also of the opinion that an application to amend must be made bona fide and made in good faith. In **Odgers on Pleadings and Practice 20th Edition** at page 170 the learned authors also state that where the amendment is necessary to enable justice to be done between the parties, it will be allowed on terms even at a late stage. However, if the application be made mala fide, or if the proposed amendment will cause undue delay, or will in any way unfairly prejudice the other party, or is irrelevant or useless, or would raise merely a technical point, leave to amend will be refused. **(**See **Beatrice Gikunda v CFC Life Assurance Limited [2020] eKLR).**

13. The Court of Appeal in **Elijah Kipngeno Arap Bii** (supra) restated the law applicable to amendment of pleadings as stated in **Bullen and Leake & Jacob's Precedents of Pleadings – 12th Edition** and captured in the Court of Appeal decision in **Joseph Ochieng & 2 others v First National Bank of Chicago, Civil Appeal No. 149 of 1991**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."***

14. It is thus clear 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. The overriding consideration in an application for leave for amendment is whether the amendments sought are 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.

15. **I have perused the draft amended defence in question and the ruling of the trial court. In his ruling the Learned Magistrate observed the following: -**

***a) The affidavit in support of the application for amendment was not dated and thus contravened the legal requirements for making an affidavit and thus rendered the Notice of Motion it sought to support incompetent.***

***b) The Appellants herein raised the issue as to jurisdiction of the trial court and that the Appellants herein could not raise the issue of lack of jurisdiction of the trial court and yet remain in the same court for the hearing of the application. Further that no material were placed before the trial court in support of the application to enable the court decide as to whether it ought to down its tools and thus the averments as to lack of jurisdiction were mischievous and vitiated the whole application.***

***c) The trial court observed and appreciated the legal requirements in allowing amendments but observed that the issue which was the purpose of the amendment was fraud and the appellants had not disclosed when the information that precipitated the intention to amend came into the knowledge of the Appellants and which failure demonstrated lack of good faith on the part of the appellant.***

16. **It is my opinion from the analysis of the above ruling that the trial court misdirected itself** in law and in fact. I have perused the draft amended defence and the trial court's record and I note that the Appellants filed list of documents and which includes Plaint in **Civil Suit No. 101 of 2015- Thomas Kinyaki Johana (suing as the Legal representative of the Estate of Michael Kinyua Thomas (deceased) –vs- Martin Weru** and which suit is based on negligence. There is also a copy of the agreement between Beatrice Wambui Mwaura and Thomas Kinyaki Mwaura dated 16/01/2015 wherein the said parties "agreed to begin and proceed with succession of the late Michael Kinyua Thomas in unison for the benefit of Kelvin Wawira Kinyua son of Kinyua (deceased)". The person who sued in the Runyenjes matter on behalf of the estate of the deceased is different from the one who sued in the case before the trial court. However, the two persons are parties to the said agreement dated 16/01/2015. They are both suing on behalf of the same estate. The Defendant in the Runyenjes matter is the 1st Defendant in the suit before the trial court. In the proposed amendment, the Appellant intended to raise the issue of there being another suit and thus the trial court not having jurisdiction and thus the suit by the Respondent herein was a fraud. In my opinion, the Defendant was right in bringing out the issue of another suit having been determined. What they were pleading in my opinion is the principle of *res judicata.* It is pursuant to which they pleaded that the court had no jurisdiction. As such, the proposed amendment cannot be said to have been made *mala fides*. In fact, the fact that the Respondent failed to disclose the issue of existence of another suit is what can be said to be *mala fides* and an abuse of the court process. It was the duty of the Respondent herein to disclose to the court all the facts in her possession. Failure to do is in my opinion dishonesty and an attempt to defeat justice. In my opinion the issue raised by the amendment was intended to enable the real question in issue between the parties to be raised on the pleadings. It would be unjust to the Appellants herein if the court would proceed with the defence without the intended amendment as the court will not be having the proper materials before it. It would end up proceeding with a matter which is *res judicata* and beyond its jurisdiction. As such, it is my opinion that the issue of fraud intended to be raised in the amended defense was not *mala fides*. The trial court as thus misapplied the facts and the law.

17. **Further to the above, it is my opinion that the Learned trial Magistrate misapplied the law when it adjudged itself as to the issue of jurisdiction raised by the appellants and further took into account** of considerations of which it should not have taken account of. **As the court rightly put, where a court finds it has no jurisdiction, it ought to down its tools. However, the issue of jurisdiction was not before the court at the time of determining the application. It should be noted that the same was in the draft amended defence. As such determining on the issue of jurisdiction at that time was premature and amounted to taking into account** of considerations of which it should not have taken account as well as misapplying the law. In my opinion, the issue of jurisdiction ought to have made the trial court allow the said application so as to help itself determine the issue as to jurisdiction when properly pleaded and which would have been in limine to the suit. By disallowing the application, the trial court exposed itself to abuse by proceeding on a matter which it appears to have been or which might be *res judicata*. The issue of jurisdiction was a serious issue which ought to have been considered substantively at the right time.

18. The issues which a court ought to take into account in deciding whether to allow an application for amendment are whether the intended amendment is intended to enable the real question in issue between the parties to be raised on the pleadings; whether the amendment will occasion an injury to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order; whether the application is made *mala fides* and not necessary for determining the real question in controversy between the parties {See **Elijah Kipngeno Arap Bii** (supra)}.The Learned trial court did not consider these issues in adjudging himself on the application before him. He thus failed to take account of considerations of which he should have taken account of.

19. It is my considered view therefore that this appeal presents a case where the discretion of the trial court ought to be interfered with by the appellate court. As such the appeal herein ought to be allowed as prayed in the memorandum of appeal *to wit* the ruling and orders of the

Hon. H. Nyakweba Principal Magistrate sitting at Embu in Civil Suit No. 69 of 2018 and delivered on 5th May 2020 be set aside and the appellant be allowed to amend their defence.

20. Costs of the appeal are awarded to the appellants.

21. Orders accordingly.

**Delivered, dated and signed at Embu this 25th day of November, 2020.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellants

.....for the Respondent