



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 32 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT

-VERSUS-

LYDIA NGINI LETININA.....DEFENDANT/ RESPONDENT

RULING

[1] Before me is a Motion dated 25/01/2019 expressed to be brought pursuant to **Sections 1A, 1B, 3A, 100 and Orders 8 Rule 3; 51 Rule 1 of the Civil Procedure Rules** and all other enabling provisions. Therein, the applicant seeks amongst other orders the amendment of its plaint dated 8th November 2018.

[2] The application is premised upon grounds are set out in the supporting affidavit of Benson Wambua Kyeli, advocate of the High Court of Kenya, sworn on 25/01/2019. He averred that the claim against the respondent is for recovery of public money allegedly misappropriated or embezzled by the respondent while discharging her duties as an officer of the County Government of Samburu. He stated that they unintentionally failed to specifically plead the loss or damage as special damages. It is therefore imperative to amend the plaint so as to properly inform the respondent about the case against her and for purposes of complying with the requirement of law that claims for special damages must be specifically pleaded and strictly proved. According to him, no prejudice will be occasioned on the respondent if the amendment is allowed especially because the application was made before pre-trial directions have been issued.

[3] The respondent opposed the application and filed grounds of opposition dated 19/02/2019. It is argued that the application is untenable, misconceived and an injustice to the respondent for, it does not show that the intended amendment includes facts of a decisive character which were not outside the applicant's knowledge. Moreover, the applicant's failure to include their claim for special damages must be deemed to have relinquished.

Submissions

[4] This matter was canvassed by way of written submissions. The applicant submitted that their application is merited for their claim against the respondent is for special damages which they inadvertently failed to specifically plead. **Order 8 Rule 5 (1) of the Civil Procedure Rules** gives the court wide discretion as far as amendment of pleadings is concerned. The application has been made in good faith and only seeks to amend the plaint so as to narrow down the real issue. Nonetheless, by allowing the amendment it will not cause any injustice to the respondent. They relied on **Bosire Ogero Royal Media Services [2015] eKLR**, **St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR** and **Kampala Coach Limited v First Community Bank Limited & another [2016] eKLR** to support their submissions.

[5] The respondent submitted that the applicant sought general damages against the defendant. They knew that the damages alleged could be liquidated prior to the suit but however chose to only seek general damages. Thus, they ought not to be allowed to abuse the court process. Furthermore, they already enjoy interlocutory orders prejudicial to her. By seeking to amend the pleadings, on information it was seized with at the time of obtaining the orders, the applicant can only be guilty of non-disclosure, an infraction entitling this court to discharge the interlocutory orders. She relied on **Patel v Amin [1988] eKLR** and **Rubina Ahmed & 3 others v Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR** to support her submissions.

ANALYSIS AND DETERMINATION

[6] The issue of determination is *whether to allow the amendment of the plaint.*

[7] **Order 8 Rule 5(1) of the Civil Procedure Rules** states as follows:

“(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.”

[8] The subject of leave to amend pleadings is replete with judicial authorities. I do not wish to multiply them or duplicate efforts. I am content to cite Kariuki J in the case of **Kampala Coach Limited v First Community Bank Limited & another [2016] eKLR** where he stated as follows:

“I will buttress these points through the case of Eastern Bakery v Castelino [1958] EA 462 (CAU) where it was held at page 462 that:-

“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 writ”Further to the above, the Court of Appeal also stated in the case of **Central Kenya Limited –v- Trust Bank Limited (2000)2 EA 365 that ;**

“..... a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

From the foregoing case law and legal texts cited, it goes without saying 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.

Thus, 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.

[9] The applicant seeks leave to amend the plaint so that it may specifically plead special damages arising from the respondent’s alleged misappropriation of public funds while discharging her duties as an officer of the County Government of Samburu. They had not pleaded special damages specifically. I am acutely aware that the respondent submitted that the applicant sought general damages against the defendant, yet, they knew that the damages alleged could be liquidated prior to the suit. I am also aware that the respondent argued that the applicant should therefore not be allowed to abuse the court process. Furthermore, they submitted that the applicant already enjoys interlocutory orders prejudicial to the applicant. She was of view that, by seeking to amend the pleadings, on information it was seized with at the time of obtaining the orders, the applicant can only be guilty of non-disclosure, an infraction entitling this court to discharge the interlocutory orders.

[10] Ordinarily, a claim for recovery of stolen public funds should entail *inter alia* a plea of quantifiable sum allegedly stolen or embezzled. A diligent asset recovery practitioner should be guided accordingly in the drafting of chic pleadings which duly inform the respondent of the case he or she is faced with. However, whereas I agree with the respondent that the applicant ought to have been aware of this legal incidence, I am prepared to subject their request to other objective tests of the law to wit: (1) *whether the amendment is introducing a new or inconsistent cause of action*; (2) *whether the amendment is necessary for determining the real question in controversy*; and (2) *whether any delay in bringing the application for amendment is likely to prejudice the respondent beyond compensation in costs*.

[11] By seeking to amend the plaint in order to plead special damages for loss or damage arising from alleged misappropriation and or embezzlement of public funds is not really introducing a new or inconsistent cause of action. Likewise, the amendment is necessary for the determination of the real issue in controversy in these proceedings. The application was also made before pre-trial directions had been given- this is perfect time for such interlocutory applications. The respondent will also have an opportunity to respond to the amended plaint as provided under the law. Accordingly, although I note that there has been general delay in these proceedings yet the applicant enjoys interlocutory orders; it bears repeating that the amendment will not, however, occasion prejudice which cannot be compensated by way of costs; it will also assist the court to determine the issue in controversy completely and effectually. For those reasons, I allow the application but with specific timelines. The applicant shall file and serve an amended plaint within 14 days of today. Time is of the essence. The applicant shall also take steps towards setting down this case for hearing.

[12] As this is a claim of recovery of public property, I will not make an order for costs. It is so ordered.

Dated, signed and delivered at Narok through Teams Application this 23rd day of November 2020

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F. GIKONYO

JUDGE