REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 301 OF 2011

JANE AWINO OWOKO

(Suing as personal representative of

Benedict C.W. Owoko deceased) .....APPELLANT

VERSUS

TEACHERS SERVICE COMMISSION..... RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrates Court at Milimani Commercial court at Nairobi delivered by the hon. Mrs. Oganyo the Principal Magistrate on the 1st February, 2011)

JUDGEMENT

1. Jane Owino Owoko (Appellant) in her capacity as the legal representative of the estate of Benedict C.W. Owoko, deceased filed an action against The Teachers Service Commission (Respondent) before the Chief Magistrate's Court, Milimani vide the plaint dated 26th January 2009. In the aforesaid plaint the respondent sought for judgement against the respondent in the following terms:

a. ***A declaration that the deceased was until the date of his retirement an employee on permanent and pensionable terms or equivalent and therefore eligible to be paid or paid to his estate pension payable to retired teachers of equal grade.***
b. ***A declaration that the defendant compute and pay to the estate of the deceased his due pension or equivalent thereof.***
c. ***Costs of this suit.***

2. The respondent filed a defence to deny the appellant's claim. The suit was heard and evidence closed. What was outstanding was the final submissions by the parties.

3. While the suit was pending, the filing and hearing of final submissions, the appellant filed an application seeking to have the plaint amended vide the motion dated 17th December 2010. The motion was strenuously opposed by the respondent. The application was heard and by her ruling delivered on 1.2.2011 the appellant's motion was dismissed.

4. The appellant being dissatisfied, filed this appeal to challenge the dismissal order.

5. On appeal, the appellant put forward the following grounds of appeal.

1. ***The learned magistrate erred in law and fact in holding that the Chamber summons application dated the 17th December, 2010 by the Appellant was an abuse of the court process when there was evidence.***
2. ***The learned magistrate erred in law and fact in holding that if the amendments were allowed the respondent will be prejudiced and not capable of being compensated by costs.***
3. ***The learned magistrate failed to apply the relevant law and parameters set in Order 1A rules, 3, 5, 7 and 8 in allowing amendments of pleading before judgment is delivered.***
4. ***The learned magistrate misdirected herself in basing her ruling in the case of Harrison C. Kariuki –v- Blue Shield Insurance Company Limited High court Civil Case No. 2205 of 2000 in which case the application to amend was declined on the basis that the amendments sought were extensive and introduced a new cause of action.***
5. ***The learned magistrate erred in failing to appreciate that the amendments sought were to compute the amount of penalty charges for the late payment of national social security funds contribution by the Respondent based on the evidence and documents already on record.***
6. ***The learned magistrate erred in failing to give any or any adequate consideration to Section 14 of the national Social Security Fund Act Chapter 258 Laws of Kenya to the effect that late payment of National Social Security funds by the respondent ought to attract 5% penalty per month for 28 years.***
7. ***The learned magistrate erred in comparing and equating the amendments sought with opening up proceedings and causing hardship and injustice which cannot be compensated by costs.***
8. ***The learned magistrate erred in failing to appreciate that in accordance with the respondent's witness own evidence national social security funds contributions were paid after the deceased had retired on age grounds.***
9. ***The learned magistrate erred in equating the present case with Harrison C. Kariuki –v- Blue Shield Insurance Company Limited High court civil case no. 2205 of 2000 notwithstanding the facts, particulars and circumstances of the said two cases were varsity different.***
10. ***The learned magistrate erred in misinterpreting or misapplying the clear principles of amendments of pleadings before judgment.***
11. ***In dismissing/disallowing the Appellant's application to amend the learned magistrate departed from the well established provisions and principles applicable under Order VIA rules, 3, 5, 7 and 8 of the Civil Procedure Rules and Sections 3, 3A, 1A and 1B of the Civil procedure Act as amended.***
12. ***The learned magistrate erred in disallowing the appellant's application dated the 17th December, 2010 filed on the eve date and awarding costs thereof to the respondent by mere reasons that the appellants advocates to bear negligence.***
13. ***The learned magistrate to erred in failing to give any or any adequate consideration to the cases of Gladys N. Muchena –v- Aga Khan education Services Kenya High Court Civil Case no. 1238 of 2003, Mobile Oil Kenya Limited-v- John Khamis Shabaan High Court Civil Case No. 998 of 2002 and Francis Ndung'u Kabirii –v- Njau Katirii and Paulina Gachambi Kariuki High Court Civil Case No. 2018 of 1990 as referred to by the appellant's advocates during the hearing of the Chamber Summons Application dated the 17th December, 2010 viz-a-viz Harrison C. Kariuki –v- Blue Shield Insurance Company Limited High Court Civil Case No. 2205 of 2000.***
14. ***The learned magistrate erred in failing to appreciate that the appellant's said application dated 17th December, 2010 was a formalization and computation of penalties chargeable under Section 14 of the National Social Security Funds Act Chapter 258 and was properly and lawfully before the court.***

6. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the arguments which were presented before the trial court. I have also considered the rival written submissions. It is the submission of Mr. Wasuna learned advocate for the appellant that the learned trial magistrate erred when she failed to appreciate that any pleading can be amended freely at any time of the proceedings before judgement and can only be disallowed if the application is intended to cause the opposite party prejudice or injustice which cannot be compensated.

7. Mr. Wasuna argued that the appellant's application for amendments were only in relation to computing the amount of penalty charges for late payment of the National Social Security fund contribution by the respondent whose evidence were already on record. The learned advocate further argued that the trial magistrate misapprehended the point when she ruled that the amendment introduced a totally new cause of action yet it was clear to her that even if a new cause of action was introduced, the same would arise out of the same facts hence it will cause no harm to the respondent. The appellant further argued that as a result of the dismissal order total injustice has been occasioned to the appellant hence the order should be revised.

8. The respondent on the other is of the view that the trial magistrate properly exercised her discretion against a negligent litigant. M/s Ruto learned advocate for the respondent, argued that the proposed amendment was an afterthought since the information sought to be introduced through an amendment was always within the knowledge of the appellant. The respondent further pointed out that the appellant did not advance any reason to justify the non-inclusion of the amendment to the plaint as filed. It is said that had the amendment been allowed it would have caused great injustice to the respondent since the witnesses will have to be recalled and submissions will have to be redone. The respondent alluded that the defence witness is no longer available hence the respondent will be at a loss as to how to counter the amendment.

9. I have already reproduced the grounds the appellant enumerated in her memorandum of appeal. Though the appellant put forward a total of 14 grounds, it is clear to me that those grounds revolve around the question as to whether or not the trial magistrate properly exercised her discretion in dismissing the appellant's motion for amendment. I have carefully examined the ruling of the learned Principal Magistrate in order to discover the grounds she applied to dismiss the application. The learned principal magistrate formed the opinion that the appellant had waited for the respondent's case and submissions to be filed so as to get information to enable him seek for an amendment of the pleadings. She was further of the opinion that the prejudice antecedent to the order sought is not capable of compensation in monetary terms. I have on my part re-evaluated the arguments presented before the trial court. The amendment proposed by the appellant was meant to introduce a prayer for payment of 5% per month on late payment of N.S.S.F contribution for 28 years from 1974 – 2002 on 33,558 (563,774/40) and interest till full payment. It is tersely stated in the application that the failure to include such a prayer in the plaint was the mistake of the appellant's previous advocate. It was the intention of the respondent that there was no explanation for delay to file an application. It was also argued that the appellant had sought for the order after seeing the respondent's defence and submissions. The principles to be considered in an application for amendment are well settled. First, amendment of pleadings should be freely permitted so long as no prejudice and injustice will be occasioned to the opposite party.

Secondly, an amendment should be allowed so long as the envisaged prejudice can be compensated in monetary terms.

Thirdly, an order for amendment should be allowed so long as it does not take away a defence put forward by a party. It is clear from the opinion of the learned principal magistrate that she rejected the application on the basis that the appellant is guilty of laches and that she took advantage of the evidence and submissions tendered by the respondent to found her claim. With great respect, I think the learned principal magistrate misapprehended the point here. There is clear evidence that the appellant had put forward documents and correspondences showing that the respondent had complained that the respondent failed remit on time N.S.S.F contribution deducted from the estate of the deceased. However, the learned principal magistrate was right in finding the appellant guilty of laches. She however erred when she formed the opinion that the resultant hardship and injustice on the respondent cannot be compensated by costs. It is apparent from the record that the appellant's counsel had clearly stated that the appellant will not be recalling witnesses to testify in support of the new prayer because there is already evidence the appellant had presented to establish the claim. In my humble view, the prejudice envisaged will basically be that there will be a delay in preparing submissions to align the same to the new prayer. In the circumstances I find that the

leaned principal magistrate did not properly exercise her discretion.

10. In the end and on the basis of the above reasons, I allow the appeal. Consequently, the order dismissing the summons dated 17/12/2010 is set aside and is substituted with an order allowing the aforesaid summons. A fair order on costs which I make is to direct each party to meet its costs of the appeal and the summons. The matter is remitted back to the subordinate court to hear the parties on the submissions and to thereafter render its judgement on the suit on the basis of the amended plaint according to law.

Dated, Signed and Delivered in open court this 19th day of February, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent