



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 784 OF 2006

JARED OMBARIA OIMA

(Suing as the Legal Representative of the

Estate of the late HARRISON ODHIAMBO OIMA).....APPELLANT

VERSUS

MUIGAI MUTUTA NJAU.....RESPONDENT

(Being an Appeal from the Ruling of C.W. Meoli (Ag Chief Magistrate) in the Chief Magistrate's Court at Milimani, Civil Case No. 152 of 2003, delivered on 27th October 2006.)

JUDGEMENT

1. The Appellant **Jared Ombaria Oima** filed this appeal which arose from an application filed on 2nd March 2006 seeking leave to amend the Plaintiff before the Trial Magistrate. Upon hearing the application, the Magistrate ruled against it denying the Appellant the opportunity to amend his plaint.
2. The Appellant, aggrieved by the Trial Court's decision filed this appeal on the following grounds:
 1. ***The Learned Magistrate erred in law and in fact in holding and filing to appreciate that the amendments that were sought could not change or bring the new cause of action;***
 2. ***The Learned Magistrate erred in law and in fact in holding that the Appellant did not account for his delay in bringing his application seeking leave to amend and thus dismissing the same;***
 3. ***The Learned Magistrate erred in law and in fact in considering matters which were immaterial to the application seeking leave to amend and thus dismissing the same;***
 4. ***The Learned Magistrate erred in law and in fact by holding that the Appellant's application seeking leave to amend the plaint was an after thought;***
 5. ***The Learned Magistrate erred in law and in fact by holding that a party to a suit had limited time within which to seek leave to amend its pleadings;***
 6. ***The Learned Magistrate erred in law and in fact by holding that the amendments sought would prejudice the Respondents and yet the matter had not been heard and determined;***
 7. ***The Learned Magistrate erred in law and in fact in holding that if allowed, the amendments were to deny the Respondent an opportunity to respond and yet the suit had not taken off for hearing and determination."***
3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v. Sunday**

Post Limited (1958) EA at Pg. 424, it was held **inter alia** as follows:

"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

3. The counsels for the parties, orally submitted on their behalf. **Mr. Nyakiangana** submitted that the dismissal of the application seeking for leave to amend the Plaintiff was based on the allegations that it was an afterthought and that it would prejudice the Defendants. He averred that there was a paragraph in the plaintiff that read that the special damages would be particularised since the documents were not in possession of his client. He argued that Order 8 rule 3 of the Civil Procedure Rules was not well applied since the court has discretion to allow amendments any time before judgment.
4. **Miss Muigai**, for the Respondent argued that the particulars sought to be introduced by the Appellant before filing of the suit and that the suit was filed 3 years after the documents were made. She contended that the receipts for the special damages were not annexed to the supporting affidavit but instead the same were introduced through their Replying Affidavit. She further asserted that no good explanations were advanced for the making of the application for amendments and that the cause of action in respect of the claim had expired. She relied on the case of **Joseph Ochieng & 2 Others vs First National Bank of Chicago [1995] eKLR**
5. I will deal with all the grounds of appeal together since they basically touch on the denial of leave to amendment.
6. This Court can only interfere with the exercise of discretion by a lower court where the court has not exercised its discretion judiciously; where it has misdirected itself in some matter with the result that it arrived at a wrong decision; or where it is apparent that the decision of the lower court is clearly wrong. In the often cited words of Sir Charles Newbold P. in **Mbogo & Another V Shah [1968] EA 93** at page 95: "***...a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.....***"
7. I have looked at the subject application, the proceedings and the Ruling of the Trial Magistrate. Indeed as submitted by the Applicant, the plaintiff dated 10th January 2003, pleaded special damages by indicating 'To be furnished.' The Courts normally allow amendment of pleadings at any stage of the proceedings where it is done without occasioning injustice or prejudice to the other party, in the case the Respondent and which prejudice can be compensated by an award of costs. The power to amend pleadings is donated by **section 100** of the Civil Procedure Act and further **Order 8 Rule 5 of the Civil Procedure Rules**. The Rule provides thus:

"5. (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.

(2) This rule shall not have effect in relation to a judgment or order."

Therefore the court derives its discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue which has been raised by parties from this provision. This power is exercised for purposes of attaining justice for the aggrieved party.

8. Looking at the court record, I note that the plaintiff was filed on 10th of January 2003, the defence

was filed on 6th January 2004 which was a year later. The matter then was first listed for hearing on 8th March 2004. On the same day, **Miss Muigai** sought leave to issue a 3rd party notice and later requested for more time to issue the third party notice and in the preceding hearing date, the Respondents advocate was absent. Generally, the matter for one reason or the other had not proceeded to full hearing at the time when the Appellant sought for leave to amend his plaint through an application dated 7th March 2006.

9. I fail to see what harm the Respondent would suffer if the leave sought to amend the plaint is granted. In the 3 judge bench case of **Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR**, Lenaola, Mumbi and Majanja J while determining whether to allow the petitioner to amend their consolidated petitions the court observed 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.”

10. Therefore, in my view costs can adequately compensate the Respondent for the delay occasioned by the filing of the application for amendment. Given that the matter had not proceeded to full hearing, I find that the delay was not inordinate. Furthermore, as I have stated hereinabove that the Respondent has not demonstrated what prejudice he will suffer should the Appellant be allowed to amend his pleadings to include the special damages. In fact the Respondent has not shown that the Appellant's suit is so hopeless that no amount of amendment would cure the defect detected. The amendment to include special damages will make the function of the court more effective in determining the merit of the suit.
11. Before I conclude, I would like to point out that I have considered the Court of Appeal case of **Joseph Ochieng & 2 Others vs First National Bank of Chicago [1995] eKLR**, cited by the Respondent, though the facts of the case are somewhat similar to the present case, the court appreciated that to allow an amendment before the trial begins, is different from allowing it at the end of the trial. The case also had a history of amendments that had been done severally with the leave of court which is not the same in the present case. The Appellant's application for leave to amend was the first to be sought.
12. In the end, I find merit in the appeal and I hereby set aside the order issued on 27th October 2006 of the Trial Magistrate substitute it with an order allowing the motion dated 2.3.2006 and direct the Appellant to file the amended plaint within 14 days from the date of this judgement. The Respondent will also have leave to file an amended defence within 14 days from the date of service upon its counsel of an amended plaint if need be. Costs of the Appeal and of the application for leave to amend the plaint to abide the outcome of the suit.

Dated and delivered in open court this 22nd day of April, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent