



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Civil Case 243 of 2002

MOHAN GALOT PLAINTIFF

VERSUS

BRITISH AIRWAYS..... 1ST DEFENDANT

TRAVEL 'N' STYLE LIMITED 2ND DEFENDANT

RULING

1. By his Notice of Motion dated 5th June, 2012 brought under Section 3A of the Civil Procedure Act, Order 8 Rule 3(1) and Order 51 (1) of the Civil Procedure Rules, the Plaintiff has sought leave of court to amend his Plaint. The Plaintiff's contention is that on a new firm of Advocates, Oluoch – Olunga being appointed, they discovered that the Plaint did not contain the particulars of special damages. That the Plaintiff, as a lay man did not know that his former advocates had not pleaded the sum of US\$62,290 and NZ\$300 extra accommodation costs he had incurred in Singapore and that there would be no prejudice to be occasioned by the proposed amendment.

2. Mr. Oluga, learned Counsel for the Plaintiff submitted that the Plaintiff was not seeking to introduce any new cause of action as contended by the Defendants, that the cause of action remained the same only that the Plaintiff intended to add the particulars of damages that had not been claimed, there was no introduction of new facts, issues or parties but only figures, that therefore the question of limitation under the Limitation of Actions Act Cap 22 or the Carriage By Air Act, 1993 does not arise. Counsel further submitted that under Order 8 Rule 3(1) of the Civil Procedure Rules a party is allowed to amend its pleadings at any stage of the proceedings, that the suit herein has not proceeded for trial. On the delay, Counsel submitted that the Defendants had not shown any effort they had made to have the suit tried although they were also under an obligation to list the same for trial under the former Order VI Rule 5(d) of the Civil Procedure Rules, that the mistake of the Plaintiffs former Counsel should be excused and that there would be no prejudice to be suffered. Counsel urged that the application be allowed as prayed.

3. In opposing the application, the 1st Defendant filed Grounds of Opposition and a Replying Affidavit by Sophie Onyango. The 1st Defendant contended that the claim is statutorily statute barred by virtue of Section 4(1) (a) of the Limitation of Actions Act, that the amendment offends Article 29 of the Carriage By Air Act, 1993 which bars claims for damages if an action is not brought within 2 years from the date of carriage, that introducing the claim will change the cause of action thereby subjecting the 1st Defendant to prejudice, that allowing the same will amount to aiding a negligent pleader.

4. Ms Bubi holding brief for Mr. Onyanacha, learned Counsel for the 1st Defendant submitted that the application was mischievous as what was sought to be introduced was not new, the same had been in the

knowledge of the Plaintiff for ten (10) years, that allowing the amendment would defeat the 1st Defendant's defence that the Plaintiff's suit discloses no cause of action, counsel relied on the cases of **James Ochieng Oduor T/A Ochieng Oduor & Co. Advocates –vs- Richard Kuloba CA No. 2 of 2002 (UR), Central Bank of Kenya Ltd –vs- Trust Bank Ltd (2008) E.A 365, Gladys H. Muchena –vs- Aga Khan Education Services Kenya HCCC No.1238 of 2003 (UR)** on the proposition that, amendments will be allowed, inter alia, if they are sought timeously, that they do not introduce any new cause of action, that they will not cause any injustice to the other party and are sought bona fides. Counsel further submitted that the claim was statute barred and that the court lacks jurisdiction to entertain the same.

5. On the part the 2nd Defendant filed a Replying Affidavit by Samvit Joban Gatra. It contended that ignorance of the law is not a defence as the Plaintiff was drawn by a professional, that they seek to introduce a new cause of action and was aimed at delaying the hearing of the suit. Mr. Kinyanjui for the 2nd Defendant submitted that Section 4(1) Cap 22 bars the proposed amendment that allowing a late amendment amounts to abuse of court process. Counsel relied on the cases of **Easter Bakery –vs- Castellino (1958) EA 461 and Bayusuf Brothers Ltd –vs- Kyalo (1981) KLR 407.** Counsel urged for the dismissal of the application.

6. I have carefully considered the Affidavits on record, the written submissions and the authorities relied on. The principles applicable when dealing with amendments are well known. In the case of **Eastern Bakery -vs- Castellino (1958) EA 461** the Eastern Court of Appeal held at page 462 that:-

“It would be sufficient for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs 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

The main principle is that an amendment should not be allowed if it causes injustice to the other side.”

How then do these principles apply to the application before me?

7. It is clear that what the Plaintiff is seeking to introduce is, a claim for US\$62,290 and NZ\$300. I have perused the original Plaintiff and I have seen that the Plaintiff had pleaded therein that he had incurred extra expenses of NZ\$ 300 and US\$270 in fare and accommodation. He therefore claimed damage. However, in the plaintiff he never prayed for this special damage in his prayers. He now wishes to specifically plead an additional claim for US\$62,290 together with the aforesaid NZ\$300.

8. This has been strenuously opposed by the Defendants basically on the basis that the claim has been caught up by limitation, that it is seeking to introduce a new cause of action, and that it will prejudice the Defendants.

9. As I have already stated the Plaintiff had properly pleaded the sums of NZ\$300 and US\$270. What is new is the whopping claim of US\$62,020 that is now sought to be pleaded and claimed. I am convinced that there has been no any good ground that has been advanced for the 10 year delay in pleading and/or claiming this sum. As submitted by the Defendants, the Plaintiff was drawn by an advocate, these figures were in the possession and knowledge of the Plaintiff they were either not divulged to the Advocate or they are being sprung up at this stage as an ambush. I agree with the Defendants that for this particular claim, it is all new, it was never brought to the attention of the Defendants and the court for more than ten (10) years since the filing of the suit. In my view, to allow the Plaintiff introduce it on this claim will not only be prejudicial to the Defendants, who must have only been aware of the sum of NZ\$300 and US\$270, but will also defeat a defence of limitation on that claim. Accordingly, to the extent of introducing US\$62,020, I reject the Plaintiff's application.

10. This brings me to the claim for NZ\$300 and US\$270. These two were clearly pleaded by the Plaintiff in paragraph 8 of the Plaint. In paragraph 9 of the Plaint, the Plaintiff pleaded that he had suffered loss and damage. In my view, this was a proper notice to both the Defendants and the court of the loss the Plaintiff had suffered. Out of the negligence of the drafter of the Plaint, the said sums were not specifically prayed for, although they had been specifically pleaded. For that reason, my view is that specifically claiming them will not in any way be an introduction of a new cause of action. That loss was pleaded way back in 2002 and all the parties knew that such loss had been suffered only that it had not been specifically claimed in conformity with the rules of pleading.

11. My reading of order 8 Rule 3 of the Civil Procedure Act is to the effect that a claim may be made outside the limitation period if a relief therefore had been claimed. In the case before me, not only had the loss been pleaded, the Plaintiff only claimed general damages and failed to specifically pray for that loss. My view therefore is that, specifically claiming the said loss which had been specifically pleaded will not offend the Limitation Act as it will not be a new claim at all. The case of **Bayusuf Brothers Ltd vs. Kyalo** cited by the 2nd Defendant does not apply as in that case an amendment was being introduced after evidence had been tendered which is not the case here. The pronouncements in the cases relied on by the Defendants are correct in law but for the reasons I have stated, they are distinguishable.

12. I am therefore convinced that to deny the Plaintiff to specifically claim the NZ\$300 and US\$270 already pleaded in paragraph 8 of the Plaint as a loss that had been suffered will be sacrificing substantive justice at the alter of legal technicality of limitation. This, I would not do!

13. For the foregoing reasons, I allow the application only to the extent that the special damages to be claimed are limited to the sum of NZ\$300 and US\$270 pleaded originally in paragraph 8 of the Plaint.

The costs of the application to abide the suit.

DATED and DELIVERED in Nairobi, this 26th day of September, 2012.

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A. MABEYA
JUDGE