



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 578 of 2009**

**DICKENS ODHIAMBO.....PLAINTIFF**

**VERSUS**

**1. NATION MEDIA GROUP**

**2. ROYAL MEDIA SERVICES LTD**

**3. KENYA BROADCASTING CORPORATION LTD**

**4. KENYA TELEVISION NETWORK LTD.....DEFENDANTS**

**R U L I N G**

1. Before the court are two applications. They are the 2<sup>nd</sup> Defendant's **notice of motion dated 18<sup>th</sup> May, 2011** brought under **Order 2, rule 15 (1) (a)** of the **Civil Procedure Rules** (the **Rules**) and **section 3A** of the **Civil Procedure Act, Cap 21** (the **Act**) seeking to strike out the suit herein, and the Plaintiff's **notice of motion dated 11<sup>th</sup> July, 2011** brought under **Order 8, rules 3, 4 and 5** of the Rules seeking to amend the plaint. The two applications were heard together.
2. The grounds on the face of the Plaintiff's application are essentially that he requires to plead further and better particulars of facts giving rise to the cause of action in his suit.
3. In his supporting affidavit he depones that his plaint of 12<sup>th</sup> October, 2009 does not sufficiently set out the particulars giving rise to the cause of action, and that the same ought to be amended; that the said amendment will enable the proper determination of the real issues in controversy between the parties; and that the Defendants will not be prejudiced by the proposed amendment, nor will they suffer any loss that cannot be compensated by costs.
4. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants objected to this application by grounds of opposition dated 27<sup>th</sup> and 20<sup>th</sup> July, 2011 respectively.
5. The 2<sup>nd</sup> Defendant in its grounds of opposition contends that the proposed amendment seeks to introduce a new cause of action which is time-barred; that the amendments, if allowed, will not cure the defect in that the draft amended plaint does not disclose any reasonable cause of action against the 2<sup>nd</sup> Defendant; that the Plaintiff has not offered sufficient reason for the omission from the plaint of the text of the alleged defamatory broadcast; and that the provisions of Order 8, rules 3, 4 and 5 of the Rules are not intended to aid a negligent pleader.
6. The Plaintiff's counsel submitted that the effect of the intended amendment is to plead further and better particulars of the claim since the plaint was not drafted as it ought to have been drafted.
7. As regards the notice of motion dated 18<sup>th</sup> May, 2011, the Plaintiff's counsel stated that it is upon the ground that the defamatory words have not been pleaded that it sought to amend the plaint. Further, counsel urged that the amendment sought will cure the defect and that the Plaintiff's claim should be

heard on merit.

8. The 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not object the Plaintiff's application, with the 3<sup>rd</sup> Defendant abandoning its grounds of opposition.
9. The 2<sup>nd</sup> Defendant's counsel submitted that this is a case of libel in which special rules of pleading apply. The defamatory words therefore are material and must be set out with particulars in the plaint. He referred the court to the textbook ***Gatley on Libel and Slander*, 3<sup>rd</sup> Edn., Sweet and Maxwell, London** pages 812-815. He further submitted that failure to set out the actual words complained of is fatal to the claim as the claim will not have disclosed a reasonable cause of action. He added that the defect, which is admitted, is not curable by amendment. On this point counsel relied on the case of **Kenneth Kariuki Githii -vs- Royal Media Services, Nakuru HCCC No. 238 of 2006 (unreported)**.
10. Finally, counsel submitted that the court's discretion to allow an amendment should not be exercised since the amendment will introduce a new cause of action with the effect of defeating the defence of limitation of time. He relied on the case of **James Ochieng' Oduol t/a Ochieng' Oduol & Company Advocates –vs- Richard Kuloba, Civil Appeal No. 2 of 2002**. Counsel emphasised that the amendment was sought after the application to strike out the plaint was filed and served and that the words sought to be pleaded are not new to the Plaintiff.
11. In response counsel for the Plaintiff submitted that the facts in the case of **James Ochieng' Oduol (supra)** and the case herein are different in that in James Ochieng' Oduol's case, what was sought to be introduced was a re-publication of the defamatory words while in the instant case the Plaintiff does not intend to plead anything new.
14. Having considered the two applications, the grounds of objection, the submissions by counsels and the cases cited, I will first deal with the Plaintiff's application as determination of the same may also determine the 2<sup>nd</sup> Defendant's application. The issues in that application are -
- (a) Whether the effect of the proposed amendment would be to substitute a new cause of action?
  - (b) If so, whether that cause of action will be statute- barred.
  - (c) Whether the proposed amendment will occasion the 2<sup>nd</sup> Defendant prejudice which cannot be compensated in costs?
  - (d) Whether leave to amend should be granted?
15. The general power of this Court in respect to amendment is found in **section 100** of the Civil Procedure Act which provides as follows:

**“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit; and all such amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.”**

16. That power is also found in Order 8 of the Civil Procedure Rules. Under rule 3(1) thereof, the Court is empowered to allow a party to amend his pleading 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.

17. Rule 3 (2) provides as follows:

**“(2) Where an application to the Court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the time of filing of the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in such subrule if it thinks just so to do.”**

And rule 3(5) provides –

**“(5) An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”**

18. The Court of Appeal in **British India General Insurance Co. –vs- Parmar [1966] EA 172** amplified the above provision in Order VIA, rule 3(5) (now Order 8 rule 3(5)) where it held:

**“Amendments may be approved even though they raise new causes of action, provided they are not of a different character to or inconsistent with the original cause of action and stem from the same transaction.”**

19. It is therefore clear that an amendment may be allowed if it will not cause injustice to the other side, and that that side can be compensated in costs.

20. I have perused the draft amended plaintiff. The proposed amendment merely expands the basis of the Plaintiff’s claim, but the prayers remain the same. I do not see in the draft amended plaintiff a new claim different in character to or inconsistent with the original cause of action. The proposed amendments stem from the same transaction. Further, the 2<sup>nd</sup> Defendant has not demonstrated that he would suffer prejudice or injustice that cannot be compensated in costs.

18. Regarding limitation, I have already found that the proposed amendment does not introduce a new cause of action. So, there is no issue of any new cause of action being time-barred as there is no such new cause of action.

19. As to delay in applying for leave to amend, I note that the case is still at its early stages in that hearing had not commenced and appeared not to be near commencing. It thus cannot be said that there has been undue delay in applying. The fact that the Plaintiff applied to amend after the 2<sup>nd</sup> Defendant applied to strike out the plaintiff is neither here nor there. If the deficiency in his plaintiff was brought to his attention by the application to strike out, well and good. He acted immediately to apply for leave to amend.

20. In the result, and for the reasons given above, I will allow the Plaintiff’s application to amend. An amended plaintiff shall be filled within fourteen (14) days of delivery of this ruling. By the same token, the 2<sup>nd</sup> Defendant’s application to strike out must be refused. It is hereby dismissed. Costs of both applications shall be in the cause. It is so ordered.

21. The delay in preparation of this ruling (and the attendant distress to the parties) is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully recovered my health.

**DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF OCTOBER 2012**

**H.P.G. WAWERU  
JUDGE**

**DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER 2012**