No. 2790

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 135 OF 2008

EVANS OMARI SIANYO …… APPELLANT

-VERSUS-

NATION MEDIA GROUP LIMITED …….. RESPONDENT

JUDGMENT

(Being an appeal from Ruling of the Senior Resident Magistrate's Court at Kisii Hon. Mr. C. G. Mbogo in CMCC No. 682 of 2005 delivered on 23rd day of July, 2008)

By an application dated 28th March, 2008 and filed in court on 31st March, 2008, the appellant then as applicant sought leave of the Chief Magistrate's Court, Kisii to amend the plaint and that the costs of the application be provided for. To the appellant the amendment was necessary to enable the court deal with the real issues in controversy and that it was important for the appellant to plead the exact words alleged to be defamatory, the plaint as drawn did not state the entire contents of the article alleged to be defamatory but only stated in part, that for the court to consider the material complained of satisfactorily then, the entire article that was defamatory of the appellant needed to be set out in the plaint, the intended amendment would not prejudice the respondent at all as it was merely technical omission to the pleadings curable by amendment and finally, that equity-favoured the granting of leave sought.

The affidavit in support of the application was sworn by **Mr. Kennedy Bosire Gichana**, learned counsel for the appellant. In the main he deponed that on 13th February, 2008, he attended court for defence hearing of the case. However for want of witnesses, the defence closed its case and the suit was set for submissions on 28th February, 2008. While preparing for the said submissions, he discovered that the plaint did not contain the exact words alleged to be defamatory of the appellant. He further deponed that if the said amendments were allowed, no prejudice would be occasioned to the respondent and will help in determining the real issues in controversy between the parties on merit, instead of dealing with the suit on technicalities. In the circumstances it was fair and just that the appellant be allowed to amend his plaint.

The respondent filed grounds of opposition and stated interlia that the application was mischievous, misconceived and otherwise bad in law. The application had been made too late in the day, after the proceedings had closed and suit reserved for submissions. The appellant was thus guilty of laches. The intended amendment was calculated to defeat and or pre-empt the submissions and or authorities filed and served on the appellant by the respondent. The intended amendment was calculated to introduce a new cause of action, more so the particulars of claim, long after the lapse of the limitation period. The

application was calculated to deprive and or deny the respondent an accrued right. The appellant had not shown any sufficient cause or basis to warrant the intended amendment and the supporting affidavit reeked or was wrought with conscious and deliberate falsehoods. The appellant was guilty of dilatoriness and lethargy. Consequently he was not entitled to equity. The intended amendment was calculated to defeat the entire proceedings hitherto taken. Consequently, the application if allowed would occasion wastage of precious judicial time, incapable of compensation vide costs. The intended amendment did not raise any reasonable cause of action to warrant judicial discretion and was devoid of merit whatsoever. Indeed it was an abuse of the due process of court. The respondent did not follow up the grounds of opposition with a replying affidavit.

The application was heard interpartes before **C.G Mbogo**, the then SPM, at Kisii Law Courts and in a reserved ruling delivered on 20th July, 2008, the learned magistrate dismissed the application holding thus:

"…Having heard the applicant's counsel and the respondent's counsel, it is my finding that the amendments can be made at a very late stage when it is necessitated solely by drafting error and there is no element of surprise. This was also held in the case of General Manager E.A Ralorys –vs- Thierstein (1968) E.A 354. As regards the test of good faith, the same was held in the case of Julia Akelo Kunguru –vs- Seth Logonzo and others inNbi (Milimani) HCCC No. 197 of 2001 as whether the amendments are sought at an early opportune meant having regard to the progress of the case and where appropriate whether they seek to set up a substantial cause of action. In my view the applicant falls on this test as it is clear that the application to amend which is dated 28/03/08 and filed in court on 31/3/08 appears to have been prompted by the respondents 1st authorities dated 22/03/07 and filed in court on 28/03/08 the day the application was drafted. The applicant cannot be said to have made the application at an early opportune moment having regard to the fact that both parties had close their case. It is also my view the intended amendment is intended to introduce an element of surprise. The authorities cited to me by the respondent's counsel are relevant to the issues before me and that the application has no merits. Same is hereby dismissed with costs to the respondent…".

That above dismissal of the application prompted this appeal. In a three point memorandum of appeal, the appellant faulted the ruling on the grounds that:-

"1. The learned trial magistrate fundamentally erred in law in taking into account wrong principles thereby arriving at a wrong finding dismissing appellant's application for amendment.

2. The learned trial magistrate erred in law and in fact in arriving at a finding that there was inordinate delay in filing application for amendment of pleadings when no prejudice was suffered by respondents.

3. The learned trial magistrate erred in law and in fact in arriving at a wrong finding by considering extraneous and irrelevant issues…".

When the appeal came before me on 3rd March, 2011 for directions, parties agreed to canvass the same by way of written submissions amongst other directions. Subsequently, they filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

It is trite law that a court 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, allow any party to amend pleadings. There is therefore no limitation as to when amendments can be contemplated and effected. Amendments can be entertained all the way before judgment. As I understand it, however, the law on amendments of pleadings is as follows:-

- **A party is allowed to make such amendments as it may be necessary for determing 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.**

- **Whether or not to allow the amendment is an exercise in the discretion of the court and like every discretion it must be exercised judicially and not capriciously or whimsically. The appellate court will not however interfere with such exercise of discretion unless it is satisfied that the lower court misdirected itself and arrived at a wrong decision or that the trial court was wrong in the exercise of the discretion and as a result of that there has been injustice.**

- **The application too ought to be made in good faith. The test of such good faith is whether the amendment is sought at an early opportune moment having regard to the progress of the case and where appropriate, whether it seeks to set up a substantial cause of action.**

- **As far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the court will not permit him to reopen the same subject of litigation only because they have from negligence, inadvertence or accident omitted that part of their case; amendment of pleadings and joinder of parties is meant to obviate this.**

- **Amendments should be freely allowed and at any stage of the proceedings, provided that the amendment will not result in prejudice or injustice to the other party which cannot be compensated for in costs.**

See generally: **Eastern Bakery –vs- Castelinoe (1958) E.A 46**
Mehta –vs- Shah (1965) E.A 321 British India Assuarance –vs- Par Mar (1966) E.A 172

Joseph Ochieng & Anor –vs- Fist National Bank of Chicago C.A No. 149 of 1995 (UR)

Central Kenya Ltd –vs- Trust Bank Ltd & Others (2000) 2 E.A 365

Julia Akelo Kunguru –vs- Seth Lugonzo & Others (2001) LLR 1102.

Applying all the foregoing considerations to the circumstances of this appeal, I have no doubt at all in my mind that this appeal is bound to fail. The amendments sought came too late in the day. The historical background of this dispute is that, the appellant filed a suit being Kisii CMCCC No. 682 of 2005 against the respondent seeking general and aggravated damages for libel vide a plaint dated 15th July, 2005. He applied and obtained interlocutory judgment in default of the respondent's appearance. Subsequently, the case proceeded by way of assessment of damages. On 3rd July, 2006, the appellant was awarded kshs. 1,000,000/= general damages and kshs. 200,000/= aggravated damages. However these ex-parte proceedings were subsequently set aside on the application of the respondent on 14th September, 2006. The hearing commenced afresh. Only the appellant testified and closed his case. The respondent did not bother to call evidence. Parties then agreed to tender their submissions on 31st March, 2008. Prior to that the respondent had served the appellant with its list of authorities, which authorities showed that they were attacking the plaint for failing to set out the actual defamatory words complained of. It would appear that the authorities aforesaid stung the appellant into action for it immediately filed the application to amend the plaint so as to cover the deficiency aforesaid. From this history, it is clear that since 15th July, 2005, the respondent must have been aware of the deficiency in his plaint. He had all the time to take remedial steps by amending the same in good and ample time. He did not do so. No explanation whatsoever has been offered by the appellant for the delay in making the application. Amendments should be timeously applied for. Certainly in the circumstances of this case, the same was not timeously sought. It was sought after considerable delay, bearing in mind that the appellant had testified and the case closed twice.

In my view the amendment was prompted by the respondent's list of authorities served on the appellant's counsel on the issue. In the circumstances, it cannot be said that the amendment was sought in

good faith. It was calculated to take away accrued legal right to the respondent in the nature of the defence it had advanced. In seeking reliance to the authorities cited, the respondent was telling the appellant that in failing to plead the exact words that were defamatory of him, his case had no limbs or legs to stand on and could not see the light of day. Failure to include the exact libelous words violated the rules of pleading with regard to defamatory suits. In making the application therefore, the appellant was simply seeking to pull the rack under the respondent's feet in the nature of the defence aforesaid. As correctly submitted by counsel for the respondent, the appellant by his action aforesaid was determined to steal a match on it as it had sought to challenge the plaint as lacking in a cause of action.

Again counsel for the appellant was neither forthright nor candid when he stated in the affidavit in support of the application that he discovered the error when he was preparing the appellant's submissions. This cannot possibly be correct. The amendment sought was spurred by the authorities of the respondent and the appellant's counsel's realization that he had been presented with a watertight defence that he could not surmount other than by making the drastic application for amendment so late in the day. He had realized that he had committed unforgivable omission in his pleading. He sought to correct that by making the application. An amendment cannot be allowed so as to atone counsel's mistake. Counsel's mistake deliberate or inadvertent cannot be equated to the need to bring forth real issues in controversy for court's determination. As stated in the case of **Joseph Ochieng** (Supra) ***"… Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. I can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than by allowing amendment at a very late stage of proceedings…".*** The appellant's application fell in the category described above. The foregoing notwithstanding, the application ought to have been denied as well on the basis of want of candidness on the part of the appellant. As already indicated the appellant claimed that the need to seek amendment crystallized as he prepared the appellant's submissions. Since whether or not to allow an amendment is an exercise in discretion, it must be denied if a party seeking it is not forthright with the court.

Certainly if the amendment was to be allowed considering the circumstances obtaining, it would have caused injustice and prejudice to the respondent. It would have denied the respondent an accrued defence. I do not think that such prejudice or injustice could have been compensated for in costs. In dismissing the application, the learned magistrate properly took into account proper principles and arrived at a sound decision contrary to the submissions of the appellant. The learned magistrate considered the aspect of delay in making the application and the test of good faith. Those aspects of the application were worthy of consideration by the learned magistrate and he cannot be faulted if on that score he dismissed the application as he did.

The learned magistrate has also been faulted on the grounds that he ought not to have dismissed the application in the absence of any demonstratable prejudice that could have been suffered by the respondent. I think that the prejudice that would have been suffered by the respondent was self-evident. In any event the appellant had not indicated in the application that upon the application for amendment being allowed, the suit should be reopened for further hearing. If the application was allowed as framed, the respondent will not have had any opportunity to challenge or test the contents of the contemplated amendments. Besides the respondent's accrued right would have been taken away. Again contrary to the complaint by the appellant there is no evidence that in arriving at the determination to dismiss the application, the learned magistrate considered extraneous and irrelevant issues.

This appeal is unmeritorious. It is dismissed with costs to the respondent.

Judgment dated, signed and **delivered** at Kisii this 20th day of May, 2011

ASIKE-MAKHANDIA
JUDGE