REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 238 of 2006

KENNETH KARIUKI GITHII.....PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES LTD.....DEFENDANT

RULING

The plaintiff has applied to amend his plaint as per the draft annexed to his affidavit in support of this application. In that affidavit the plaintiff has deposed that he has noted from the plaint that his "lawyers omitted the full text of the broadcast which is crucial and necessary for the determination of this suit."

Paragraph 4 of the plaint which is sought to be amended reads as follows:-

"On or about 25th May 2006, at 10.00 a.m., the defendant aired a programme through its radio station RADIO CITIZEN falsely and maliciously broadcast or caused to be broadcast and published by way of radio and concerned the plaintiff and his official duty the following words.

'the Nakuru District Land Registrar is corrupt … the Registrar has illegally transferred LR. No. Bahati/Bahati Block 1/97 … the Registrar should be transferred from Nakuru for being corrupt …"

The proposed amendments seek to delete the above quotation and substitute it with one in Kikuyu language with an English translation thereof. The English translation reads:-

"We have an old man from Subukia called "ANTHONY GATHUA KARIUKI talking about his piece of land in Bahati-Subukia namely LR. NO. Bahati/Bahati Block 1/97 sold to him by one PETER NJOGU MUCHEMI. That piece of land was taken away from him by the wife of NJOGU MUCHEMI, using the Nakuru Land Registrar. The land was transferred to her instead of being transferred to ANTHONY GATHORA KARIUKI. Where did this registrar go to school? How could he transfer the land to a person who was not a buyer? This is corruption whenever this old man goes to the lands office for help, the registrar tells him to go to court".

The amendment further proposes to add:-

"This broadcast was aired on 6th May 2006, 13th May 2006, 20th May 2006 and 25th May 2006. On the final broadcast, the presenters concluded with the words;

'… On the coming Wednesday, we shall go to the Nakuru Lands Office and inject (sic) the said registrar

form his office' (sic) He had threatened to take him to court if we mention his name again."

The application is strongly opposed by the defendant on the grounds that the plaintiff has not said why his lawyer omitted to fully plead his case; that the amendments seek to introduce a new cause of action which is time barred and will greatly prejudice the defendant and that the provisions of Order 6A Rules 3(1) and 5(1) of the Civil Procedure Rules under which the application is brought are not intended to aid a negligent pleader.

In Eastern Bakery Vs Castelino [1958] EA 461, Sir Kenneth O'Connor, P., at p.462 set out in brief the principles which should guide the courts when dealing with applications for amendments:-

"Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and 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 cause:.... But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by amendment the subject matter of the suit:…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 proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon Vs Neal (1887), 19 Q.B.D. 394; Hilton Sutton Steam Laundry, [1946] K.B. 65*. The main principle is that an amendment should not be allowed if it causes injustice to the other side. *Chitaley, p. 1313*"

In Central Bank of Kenya Ltd. Vs Trust Bank Ltd. & Others,

Nairobi Civil Appeal No. 222 of 1998 the Court of Appeal elaborating on this general principle stated:-

"The guiding principle in application for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot be properly compensated for in costs. *(see Bedco Ltd. Vs Alfa Laval Co. Ltd. [1994] 4 ALL ER 464")*

It is clear from these two cases that amendments especially before the hearing are freely allowed as long as they do not introduce a completely new cause of action or cause prejudice to the other side that cannot be compensated by costs. The defendant in this case, as I have said, opposes this application on the grounds that the plaint sought to be amended does not disclose a cause of action and that the amendments sought to be made introduce a new cause of action which is time barred under the Limitation of Actions Act.

The contention that plaint does not disclose a cause of action is not without substance. It would appear to me that the libel in this case was in Kikuyu language but the plaint has only the English translation of it. The plaint as it stands therefore does not disclose a cause of action. That is fatal.

Although it is clear from the case of Motokov Vs. Auto Garage Ltd. & Other (NO.2) [1971] E.A. 353 that a trial court has power to allow amendments of a plaint disclosing no cause of action, that case is, however, distinguishable from this one in that that was an action on the bill of exchange which, unlike cases of libel, did not require the pleading to take any particular form. As stated in Gatley on Libel and Slander, 10th Edition at par. 26.11 on p. 812, "In a libel claim the words used are material facts and they must therefore be set out verbatim in the particulars of claim, preferably in the form of a quotation: it is not enough to describe their substance, purport or effect." In Fitzsimmons Vs Duncan Ltd [1908] 2 Ir. R. 483, Palles C.B. reiterated this principle when he stated at page 499 that "In libel you must declare upon the words; it is not enough to state their substance." The rationale for this requirement had been stated by Abbott C.J. in the earlier English case of Wright Vs Clements (1820) 3 B. & Ald. 503 at 506:-

"The law requires the very words of the libel to be set out… in order that the court may judge whether they constitute a ground of action."

This being a legal requirement, failure to comply with it makes the plaint fatally defective.

The second ground upon which this application is also opposed is that the amendments sought to be made introduce a new cause of action which is time barred under the Limitation of Actions Act. To allow them, the defendant further contends, will deprive it of the accrued defence of limitation and thus cause it prejudice.

This contention is founded on Sir Kenneth O'Connor, P's observation in Eastern Bakery Vs Castelino [1958] EA 461, at p.462 that "The court will refuse leave to amend where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ" which in turn was, as is clear form the report, based on the old English cases of Weldon Vs Neal (1887), 19 Q.B.D. 394; Hilton Sutton Steam Laundry, [1946] K.B. 65 which interpreted the old English Civil Procedure Code. That Code has since been amended.

Referring to the new English Rule Lord Denning said in Sterman Vs E.W. & W.J. Moore [1970] 1 Q.B. 596 at p. 604:-

"Since the new rule, I think we should discard the strict rule of practice in *Weldon V. Neal (1887), 19 Q.B.D. 394*. The courts should give O. 20, r. 5(1) its full width. They should allow an amendment whenever it is just so to do, even though it may deprive the defendant of a defence under the Statute of Limitations."

The new English rule referred to above is similar to our Order 6A Rule 3(2) and (5) of the Civil Procedure Rules which provide:-

"3(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 date of filing of the suit has expired, the court may nevertheless grant such a leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(5) An amendment may be allowed under subrule (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 a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendments."

It is clear from this provision that the law allows amendments which introduce a new cause of action even when the limitation period has expired. Interpreting this provision in James Ochieng' Oduol Vs Richard Kuloba, C.A. No. 2 of 2002, the Court of Appeal, however, stated that amendments under this provision are allowed only in peculiar circumstances. As the claim in that case like here was also on defamation I think it is pertinent to fully set out the words of the Court of Appeal in that case:-

"In special circumstances amendment of a plaint may be allowed, notwithstanding that the effect will be to defeat a defence of limitation *(BARCLAYS BANK D.C.O. VS. SHAMSUDIN [1973] E.A. 451).* However, such amendments can only be allowed where peculiar circumstances are present.

What are the circumstances in this case? We earlier reproduced *paragraph 5* of the plaint. It said nothing about republication of the alleged defamatory words. It was not until a defence was filed alleging that no action lies and further denying publication, that the respondent moved the trial court for leave to amend the plaint. The facts which were introduced in the amended plaint were not new. The respondent was all along aware of them but failed to plead them in the plaint. The amendment appears to have been allowed in effect to aid a negligent pleader. The provisions of Order VIA rule 5(1) of the Civil Procedure Rules are not intended to aid a negligent pleader, more so where its effect will be to defeat an accrued defence. A careful reading of Order VIA rule 3 of the Civil Procedure Rules clearly shows that amendments to defeat an accrued defence may only be allowed in exceptional and peculiar circumstances, which in our view are lacking here. We appreciate that particulars were requested for and furnished; and that by dint

of the provisions of Order VI rule 8(b), the particulars now form part of the pleadings. However, in a case as this one where a plaintiff is reacting to a defence raised, the court should be slow in allowing amendments to the plaint which prima facie have the effect of defeating that defence. In exercising his discretion in this matter, Visram, J. failed to appreciate this fact and for that reason we think that he erred."

The position in this case appears to be in all four with the above case. So it is not only the question of being compensated with costs. Amendments that seek to defeat an accrued defence are only allowed in exceptional and peculiar circumstances. There are no exceptional and peculiar circumstances in this case to warrant the granting of leave to amend. The plaintiff does not claim to have known later of the republication of the libel. What was aired and the number of times that was done was within the plaintiff's knowledge. There is therefore no reason why the whole text was not pleaded. As stated by the Court of Appeal in the above case, to allow the amendment would be to aid a negligent pleader.

For these reasons I dismiss this application with costs.

DATED and delivered this 16th day of March 200**9.**

D. K. MARAGA

JUDGE.