REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 171 OF 2003

FREDRICK M. WAWERU ……..…...……. 1ST APPELLANT

JOSEPH M. MUCHIRI ……..…...…….. 2ND APPELLANT

VERSUS

PETER NGURE KIMINGI ……..…….…...…..… RESPONDENT

(An Appeal from the Ruling of (Mr.) C.K. Njai, SPDR in High Court of Kenya at Nairobi Civil Case No. 3785 of 1989 delivered on 24th May, 2002).

JUDGMENT

By a Plaint dated the 21st August, 1987, the Appellants claimed general and special damages from the Respondent arising from a motor vehicle accident that took place on 4th September, 1986 along the Thika/Juja Road. The Plaint was based on the tort of negligence. The Appellants alleged that the accident was caused by the negligence of the Respondent, owner and driver of the motor vehicle that collided with the Appellants' motor vehicle.

Now, some 15 years later, on 5th March, 2002 the Appellants filed an application for leave to amend the Plaint "so as to join Kenyan Alliance Assurance Company as the Defendant herein in place of the Defendant herein." That application was filed under O 6A Rules 3, 5 and 8 of the Civil Procedure Rules, which essentially provide for Amendment of pleading with leave.

The application came up for hearing before the Honourable C.K. Njai, Senior Principal Deputy Registrar (as he then was), and in a Ruling dated 24th May, 2002 he rejected the application, essentially on the ground that a new Defendant could not be joined in a suit long after the limitation period had expired.

It is against that Ruling that this appeal has been preferred. There are seven grounds of appeal as follows:

1. The Honourable Senior Principal Deputy Registrar erred in law, in holding that the Application seeking leave of the Court to amend the Plaint, was not made timeously, and was not made in good faith which holding occasioned a miscarriage of Justice.

2. The Honourable Senior Principal Deputy Registrar erred in failing to hold that even if the Proposed Amendments would convert an action in Tort to one on Contract, the new Cause of action arose out of

the same facts or substantially the same facts and were curable by Order VIA Rule 3 of the Civil Procedure Rules.

3. The Honourable Senior Principal Deputy Registrar erred in holding for the reasons that he did so, that the delay was inordinate contrary to Order Rule 3 of the Civil Procedure Rules, when that was not the case at all.

4. The Honourable Deputy Registrar erred in holding there was no material to enable him determine whether the mistake sought to be corrected was a genuine one or not, when in fact he had all such evidence before him and merely failed to address it properly and thus occasioned a miscarriage of Justice.

5. That instead of addressing his mind to the Application before him, the Honourable Senior Principal Deputy Registrar used his own conjectures, hypotheses, suppositions, and inferences to the effect that it would be unjust to allow the amendment to include a new party when in fact that a new Party was not in fact a Party to the Application to Amend the Plaint at that stage, instead of granting the Application, and leaving it to the new Defendant to plead Limitation, which is a Defence and thus pleaded Limitation for a mere Intended Defendant who was not yet a Party; instead of allowing that Party to plead for itself; and thus visited injustice to the Plaintiffs thus causing a miscarriage of justice.

The finding of the Senior Principal Deputy Registrar is against the weight of the evidence before him, and is founded on a misinterpretation of the Law, thus occasioning injustice.

6. THAT as there is no wrong without a remedy and justice works both ways, the Senior Principal Deputy Registrar erred in law and in fact in denying the Plaintiff's leave to amend and thus left them without a remedy, and applied justice partially instead of being impartial, and thus occasioned a miscarriage of justice; since no hardship and/or prejudice would be suffered by the Defendant on record and/or by the Intended Defendant since it would have an opportunity to file a Defence and deny liability and also plead limitation if it so wished.

7. The Senior Deputy Principal Registrar trespassed into the arena of conflict by acting as a Defence Counsel for the Intended Defendant, instead of acting as an Arbitrator in the dispute, and exercise his discretion impartially, so as to do justice to all the Parties and not to the Defendant on record who would suffer no prejudice by being released from the Litigation totally, and also compensated with Costs; and also the intended Defendant who would have an opportunity to defend itself and plead limitation as a Defence.

Mr. E.T. Gaturu, Counsel for the Appellants, submitted before this Court that the findings of the Senior Principal Deputy Registrar were contrary to O.6 R.3 of the Civil Procedure Rules; that the Senior Principal Deputy Registrar should not have been the one to invoke the plea of limitations – that should have come from the new Defendant, once added; that the new Defendant would have suffered no prejudice because it was aware of the accident, and had indeed settled several claims arising therefrom; that the delay in bringing the application (which had been adequately explained) is not a bar to the grant of Orders sought; that the new cause of action against the proposed Defendant arose from the same transaction (he cited the cases of *Phillips, Harrisons & Crossfield Ltd –vs- Kassam* (1982) K.L.R. 458, *D.T. Dobie & Co. (Kenya) Ltd –vs- Muchina* (1982) K.L.R.1., *Kassam –vs- Bank of Baroda (Kenya) Ltd* (2002) K.L.R.1. 294); that the delay was not deliberate and not prejudicial (*Crown Berger (K) Ltd –vs- Palsa Hardware (K) Ltd* – Civil Case No. 1017 of 2002 (Unreported); that mere delay was not a ground for refusal of leave (*Central Kenya v. Trust Bank* (C.A. No. 222 of 1998); that costs would be an adequate compensation for any prejudice likely to have been suffered by any party; that the Respondent's counter-claim had in fact been settled by its Insurers, hence there would be no prejudice to him; and finally, citing the case of *Latis Construction Co. Ltd –vs- Bellways Garden Ltd & Consolidated Bank* – Civil Case No. 256 of 2005 (Unreported), which Mr. Gaturu said was in consonance with the case before this Court, he argued that the amendment sought should have been allowed even if its effect was to add or substitute a new cause of action.

The Honourable Mr. Justice (Retired) A.B. Shah, lead Counsel, appearing with Mr. Tiego, for the Respondent, submitted that the Senior Principal Deputy Registrar came to the correct conclusion that O.6A R.3 did not apply to joining new Defendants outside the limitation period; that the limitation period having long expired, the Appellants had attempted to turn an O.6A R.3 application (amendment of pleadings) to an O.1 R.9 and 10 application (substitution of parties); that the limitation period applied to the new Defendant who would suffer prejudice (he cited the Case of *Joseph Ochieng v. First National Bank of Chicago* (CA 149 of 1991); that the Senior Principal Deputy Registrar exercised his discretion correctly by disallowing an application whose effect would have been to extend time to file suit, where such extension was barred by the statute of limitations (he cited the cases of *Mary Osundwa v. Nzoia Sugar Co. Ltd* (Civil Appeal No. 244 of 2000 (Unreported) and *Atieno v. Omoro* (1985) KLR 6775 and *Liptons Cash Registers v. Hugin* (1982) 1 AER 595; that the effect of the application before the Senior Principal Deputy Registrar was to "remove" the Respondent from litigation, when the Respondent had a counter-claim against the Appellants; and finally that most of the authorities cited by the Appellants in fact supported the Respondents.

This Appeal raises an important issue of law and procedure. The issue here is not just one of the amendment of Plaint, and the circumstances in which it can be done. Rather, the issue is one of substitution of a party, through an amendment application, long after the limitation period to commence the action has expired. In other words, subjecting a party to litigation some 15 years after the cause of action against that party expired, through an application to "amend" the Plaint. Can that be done?

What happened here is simple: in 1987, the Appellants commence in action in tort against the Respondent; 15 years later they realize their action should have been in contract against a whole new party. But, of course, they cannot sue that party because they are completely out of time in law. So, instead, they find a clever way of seeking leave to "amend" the Plaint, to "remove" the original parties, and "substitute" them with a "new" Defendant. And, they forget in the process, that the Respondent they want to substitute actually has a counter-claim against them, and do not stop to ask, but what about that counter-claim?

Now, these are the simple facts, and when faced with the application to amend, the Senior Principal Deputy Registrar, in exercise of his discretion, says – No, you cannot amend, you are introducing a whole new cause of action and you are out of time. He clearly had the discretion to disallow that application, and I am mindful of the fact that I cannot interfere with the exercise of his discretion unless he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest that he was clearly wrong in the exercise of his discretion and that as a result, there has been misjustice (*Mbogo & Another v. Shah* (1968) E.A. 93).

So, back to the main issue: was the Senior Principal Deputy Registrar right in refusing to exercise his discretion to allow the amendment?

The general power of this Court in respect of amendment is found in section 100 of the Civil Procedure Act which provides as follows:

"*100. 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 proceeding.*"

That power is also found in Order VIA of the Rules. That Order deals with amendments which can be done with and without the leave of the Court. Here, we are concerned with amendments which require the leave of the Court. That is dealt with under Order VIA rule 3 of the Rules. Under sub rule 1, the Court is empowered to allow a party to amend his pleadings 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." The Rule deals with various situations when amendments can be allowed but our concern here is with subrules (2) and (5). Those subrules provide as follows:

"*(Order VIA rule 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 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 to do so.

……..

(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 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."

The question of amendment of pleadings has been considered widely by the Courts and been the subject of wide discussion by legal scholars. I had the occasion to consider and discuss these issues in greater detail in the case of *Richard Kuloba v. James Ochieng Oduol* (HCCC No. 1 of 2000, reported in (2001)1 EALR 101, and I will do so again. In *Eastern Bakery v. Castelino* [1958] E.A. 461, SIR KENNETH O'CONNOR, P. sitting with GOULD J.A. and SIR OWEN CORRIE, Ag. JA in the former Court of Appeal for Eastern Africa enunciated the following principles as governing the Court in deciding whether or not to allow amendments:

(a) Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect, there is no injustice if the other side can be compensated by costs.

(b) The Court will not refuse to allow amendment simply because it introduces a new cause. However, 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 general principle stated in that case is that an amendment should not be allowed if it causes injustice to the other side. At the time of the *Castelino* case, our Order VIA Rule 3(2) and (5) above had not been enacted. That rule clearly allows for amendments outside the period of limitation and which introduce a new cause of action in stated situations. It is unclear whether *Castelino* excludes all amendments outside the period of limitation but I think this is catered for by the new rule. (See also *Motokov v. Auto Garage Ltd & Others* (No.2) [1971] E.A. 353). CHANAN SINGH, J. in deciding a similar application in *Barclays Bank D.C.O. v. Shamsudin* [1973] E.A. 451 substantially followed the provisions of Order VIA Rule 3 at a time when those provisions had not been enacted. What I am trying to bring out is that the Courts had recognized the need for allowing certain amendments which were outside the period of limitation and or which sought to introduce a new cause of action even before Order VIA Rule 3 of the Rules was enacted. Such amendments are those which flowed from the same facts as the originally pleaded claim. The rationale of allowing such amendments is that they do not cause any prejudice to the other party who is taken to have knowledge of such cause at the time the original pleading is filed. In considering similar provisions under the English Rules, the Learned Authors of THE SUPREME COURT PRACTICE 1988 said as follows at page 351:

"……. *if the proceedings had been, from the beginning, properly formulated or constituted in the circumstances specified …. the defence of limitation would not have been available to the Defendant, and accordingly, if in its discretion, the Court thinks it just to grant leave to amend the defects in the writ or pleading within the scope of the circumstances specified …., so that such defects in the proceedings are treated as having been cured ab initio, the Defendant is not being deprived of the benefit of a defence which he would not have had if the proceedings had been so properly formulated or constituted in the first place. To contend that in the cases specified in these paragraphs, so that the Defendant had an existing right which will be prejudiced by the amendment is to argue in a circle, since he only has an existing right if one presupposes that the Court will not use its powers to amend under O.20 r.8 and O.15 rr. 6, 7 and 8 (see per Holroyd Pearce, L.J. in Pontin v. Wood [1962] 1 Q.B. 594, p. 609; [1962] 1 All ER 294, 298)."*

In the case of *Mitchel v. Harris Engineering Co. Ltd*. [1967] 2 Q.B. 703 RUSSEL, L.J. said as follows at p.721:

"*We were referred to a number of cases in which the Courts have declined to permit amendments which would have the effect of depriving a party of the ability which he would have in any fresh proceedings to take advantage of the Statute of Limitations. It was urged that these were based rather upon an inability in point of substantive law to deprive a person of a right conferred upon him by the Statute of Limitations than upon settled practice …. But I take these cases to have been decided on grounds of settled practice, albeit attributable to the parties position vis-à-vis the Statute of Limitation. So far as I am aware no judge said that it would be outside the jurisdiction of the Court to allow the amendment in question: and if it were thought to be a question of substantive law, this would surely have been the immediate and short answer to the applications to amend."*

I must say once again that the English provisions on the question are materially if not word for word similar with our Order VIA Rule 3(2) and (5) of the Rules.

The Learned Author of THE CODE OF CIVIL PROCEDURE (V. Prakash and M. Siraj Sait (1995) Professional Book Publishers, New Delhi) and MULLA THE CODE OF CIVIL PROCEDURE (Abridged Edition) (12th Ed.) (P.M. Bakshi, N.M. Tripathi Private Ltd, Bombay) also discussed the matter and agree that amendments that do not cause injustice to the other side should be allowed. In THE CODE OF CIVIL PROCEDURE, it is stated at page 281 "one cause of action cannot be substituted by another cause by way of amendment …. [No] amendment can be allowed when the effect of the amendment is to take away from the other side a valuable right accrued to it by the lapse time." MULLA has similar statements. However, it appears that the Indian position is slightly different in view of the express provisions of our Order VI Rule 3 of the Rules and may not provide a clear guide on this question.

The English case of *Liptons Cash Registers* (supra) provides an interesting comparison to the case before this Court. There, long after the limitation period in an action in contract had expired, the Plaintiff, concerned about the Defendant's financial position, sought to join two other Defendants. Although the amendment was allowed, the Court preserved the new Defendants' right to plead limitation. In the course of his Judgment, Hawser, J stated as follows:

"*Before expressing my view as to the course taken by Walton J, it is necessary to look at the authorities which have been cited. They are: (a) Weldon v Neal (1887) 19 QBD 394. The headnote says:*

'*A Plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by the Statute of Limitations.*'

Perhaps if I could just refer to Lindley LJ's Judgment where, having said that he agreed with Lord Esher, MR, he said (at 395-196):

'*I am of the same opinion. I do not think it would be just to the defendant to allow these amendments, the effect of which would be to deprive him of his defence under the Statute of Limitations.*'

(b) Mabro v Eagle Star and British Dominions Insurance Co Ltd [1932] 1 KB 485, [1932] All ER Rep 411. That was a decision of a two-judge Court of Appeal consisting of Scrutton and Greer LJJ. The headnote says ([1932] 1 KB 485):

"*The Court will not, under Order xvi., r.2 allow a person to be added as plaintiff to an action if thereby the defence of the Statute of Limitations would be defeated.*

Scrutton LJ said this ([1932] 1 KB 485 at 487, [1932] All ER Rep 411 at 412:

'*In my experience the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has*

never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the Court to disregard the statute.'

(c) Davis v Elsby Bros Ltd [1960] 3 All ER 672, [1960] 1 WLR 170. That was a case in which the court refused to allow by amendment the substitution of a new defendant, the claim against whom was statute-barred. The case turned mainly on the question of whether the proposed amendment was a correction of a mere misnomer or the substitution of a new party. Of course the question of principle arose. Pearce LJ, having referred to Mabro's case said this ([1960] 3 All ER 672 at 674, [1961] 1 WLR 170 at 173):

'In my opinion the addition of a defendant is governed by the same considerations as the addition of a plaintiff. Therefore the principle of Mabro's case prevents the amendment in this case if the amendment involves the addition of a party and not the mere correction of a misnomer. That principle also applies to the substitution of a party, since substitution involves the addition of a party in replacement of the party that is removed. Moreover, if contrary to that principle, a party were added or substituted, then the final words of R.S.C., Ord. 16, r. 11, would defeat the purpose of the addition or substitution since the new defendant could still rely on the statute against the party so added. Those words are: "… and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."'

Briefly, those are the principles of law to be applied in deciding this application. It is common ground that leave in these matters is a discretionary power: a power that is wide provided that if the Court decides to allow an amendment it should do so upon such terms as are just. Now, the question is whether, looking at the circumstances of this case, it is fair and just to allow the amendment sought. Is it one of the amendments contemplated under Order VIA Rule 3 of the Rules? Does the Defendant stand to suffer any prejudice that cannot be compensated by costs?

So, then, the jurisprudence relating to amendments is clear: that one cause of action cannot always be substituted by another by way of amendment ……. No amendment can be allowed when the effect of the amendment is to take away from the other side a valuable right accrued to it by the lapse of time. The Court of Appeal decision in the *Joseph Ochieng* case (supra) confirmed the position as much where Shah, J.A. (as he then was) said:

"*The Learned Judge was right in saying that Order VI rule 3(5) does not permit an amendment to be made to complete a defective cause of action where the statute of limitation would have barred the claim."*

My understanding of this is that a claim that is itself barred by the statute of limitation cannot be introduced by an amendment.

What was sought before the Senior Principal Deputy Registrar was to introduce a new cause of action and a claim that was statute barred. This obviously is not permissible. But, the application went much beyond a simple amendment: it sought to introduce a new Defendant, and to remove the existing two Defendants. The application, as I have said before, was brought under O.6A R.3 of the Civil Procedure Rules. That rule reads as follows:

3. (1) Subject to Order I, rules 9 and 10, Order XXIII, rules 3, 4, 5 and 7 and the following provisions of this rule, the court may 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 his pleadings.

As the opening line says, it is subject to O 1. Rules 9 and 10. Order 1 R. 10 states as follows:

10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for

the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant said, if the court thinks fit, on the original defendants.

It is clear that what the Appellant sought to do before the Senior Principal Deputy Registrar was to "substitute" a party in the guise of an "amendment application" under O.6A R.3. Of course, it was convenient to use O.6A R.3, and easier to argue, that the amendment sought arose out of the same cause of action. The Appellants were wrong in invoking O.6A because what they were seeking went beyond a simple amendment of the Plaint; they sought to introduce a new Defendant who clearly had the defence of limitation available to him. He would have certainly invoked that defence if a whole new suit had been filed against him, but instead the Appellants sought to sneak him in through an amendment application, in a round-about way.

But that round-about way, attempted to do three things – none of which are permissible. First, it sought to introduce a whole new cause of action in "contract" after the expiry of the limitation period. The Court simply has no jurisdiction in extending time for filing suit in cases involving contract. In the case of *Mary Osundwa* (supra) the Court of Appeal, while considering the effect of Section 27(1) of the Limitations of Actions Act, stated:

"This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort."

It would have, therefore, been futile for the Senior Principal Deputy Registrar to have allowed the amendment, as eventually it would have been caught up with the defence of limitation. Second, the Applicants sought to introduce a whole new party. The rule under which they applied did not permit this, and if they had invoked the correct rule, O.1 R10, they would have faced a similar argument of limitation. Finally, they sought to remove the Respondent from litigation in the face of a counter-claim, in order perhaps, to avoid a Judgment arising from that counter-claim.

Accordingly, and for all the reasons outlined, I am firmly of the view that the Senior Principal Deputy Registrar exercised his discretion correctly in accordance with the law in refusing the application for amendment. This Appeal is dismissed with costs to the Respondent. The lead Counsel for the Respondent has applied for costs of two Counsels, on the basis of the complexity of this matter which required considerable amount of research. I agree with that and order costs for two Counsels.

Dated and delivered at Nairobi this 13th day of February, 2007.

ALNASHIR VISRAM

JUDGE