REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 198 of 2002

ALICE WAMAITHA MWANGI …….....……..….PLAINTIFF

VERSUS

NATION MEDIA GROUP LTD. …….....…….DEFENDANT

R U L I N G

Alice Wamaitha Mwangi, the plaintiff herein, invoked the provisions of VI A rules 3(1) and (5) of the Civil Procedure Rules in a summons dated 21 February 2006 in which she sought to be given leave to amend the plaint.

The summons is supported by the affidavit of Alice Wamaitha Mwangi sworn on 22nd February 2006.

On its part, Nation Media Group Ltd., the defendant herein, vehemently opposed the summons by filing grounds of opposition and a replying affidavit of M'bwana S. Bwika sworn on 2nd March 2006.

The background of this matter started on the 12th day of January 2001 when the plaintiff filed a plaint before the Chief Magistrate's court, Mombasa against the defendant claiming for interalia general and exemplary damages for libel. It was alleged that the defendant published in its 'Taifa Leo' publication of 20th November 2000 some defamatory matter against the plaintiff. The defendant defended the action by filing a defence. By a consent order recorded on 16.4.2002 before Mr. Justice D.A. Onyancha the suit was withdrawn from the Chief Magistrate's Court and transferred to this court for hearing and determination.

The suit proceeded for hearing on the 2nd day of April 2003 and the plaintiff closed her case on 20th day of July 2003 after 3 witnesses had testified. On the 13th day of October 2003, the defendant opted to close its case without calling for evidence to support its defence. On the 20th day of July 2005 the parties recorded a consent order before Lady Justice Khaminwa to file written submissions. The parties duly complied with consent order. While perusing the written submissions I noted that the learned advocates had separately filed their written submissions without exchanging the same. This became apparent when I realized that the defendant had raised a preliminary objection against the competency of the whole plaint without attracting a response from the plaintiff's counsel. I then stalled the process of writing the judgment and directed the learned advocates to exchange the written submissions and thereafter to address me over the preliminary matter before giving a date for judgment. There was a lull until a judgment notice was published notifying the parties of the date of judgment. I believe the notice provoked the plaintiff to file the summons dated 21.2.2006, the subject matter of this ruling. Let me now

consider the merits and the demerits of the application.

In the aforesaid summons, the plaintiff sought for leave to amend the plaint with a view of introducing the English translations of the Kiswahili quotation of the defamatory publication set out in paragraph 4 of the plaint. The proposed amended plaint is annexed to the affidavit in support. It is the submission of Mr. Gikandi for the plaintiff that the amendment should be allowed to enable this court determine the real issues in controversy. It is also argued that the amendment if allowed will cause no prejudice to the defendant. The plaintiff attempted to explain as to why there was a delay in making this application. It was pointed out that this suit was originally filed before the Chief Magistrate's Court and later withdrawn from that court and transferred to this court. It is the submission of Mr. Gikandi that it was not necessary to amend the plaint before the Chief Magistrate's Court because the offending paragraph was in Kiswahili one of the languages of the subordinate court. Mr. Gikandi admits that he inadvertently forgot to seek for leave to amend the plaint when it was transferred to this court basically because the defendant did not raise any objection until pleadings were closed. He further argued that the defendant's loss or damage would be compensated by an award of costs.

Mr. Ndegwa learned advocate for the defendant strenously opposed the application. He beseeched this court to disallow the application because the defendant would be seriously prejudiced in that it would be difficult to secure the attendance of witnesses who included freelance journalists. It was also argued that the pendency of the case has caused stress on the defendant to the extent that the value of its shares at the Nairobi Stock Exchange have been affected downwards.

It is the argument of the defendant's advocate that the intended amendment would introduce a new cause of action which is already time-barred. It is also alleged that the plaintiff filed the application to amend the plaint malafides.

I will consider the issues all together. The general principle is that the court may at any stage of the proceedings allow either party, to alter or amend his pleadings in such a manner and on such terms as may be just and that such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the litigants. The position is that the court has an unfettered discretion. The court will exercise this discretion taking into account the circumstances of each case. The court of Appeal of Kenya in the case of **Joseph Ochieng & 2 others =vs= First National Bank of Chicago C.A. NO. 149 of 1991 (U.R)** discussed at length about the exersice of this discretion. This case was heavily relied upon by Mr. Ndegwa advocate for the defendant. The court of Appeal referred to the English Case of **Ketteman =vs= Hansel Properties Ltd. [1988] 1 ALL E.R. 62** in which it was said:

"*Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion …… a judge is entitled to weigh the balance the strain the litigant imposes on the litigation particularly if they are personal litigants rather then business corporations, anxieties occasioned by facing new issues one way or the other. Further more to allow the amendment before a trial begins, is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew a fight on an entirely different defence*"

I will apply this principle in this matter. This matter was filed before the Chief Magistrate's court. The main complaint is set out in paragraph 4 of the plaint. The plaintiff complained that the defendant published defamatory words in Kiswahili language and placed her photograph alongside that publication. She said those words which were in Kiswahili language were defamatory to her. There was no English translation of the Kiswahili words in the plaint before the Chief Magistrate's Court. No English translation of the words was introduced when the matter was transferred to this court. Section 86 (i) of the Civil Procedure Act clearly states that the language of this court and that of the court of appeal is English. The languages of the subordinate court are English and Kiswahili. It is not denied by the defendant that it never raised an objection for want of the English translation of the Kiswahili words until the late stage of submissions. Mr. Gikandi concedes that he inadvertently forgot because there was objection to make the application for leave to amend because all along there was objection forthcoming

from the defendant's counsel until pleadings closed. Mr. Ndegwa does not deny that he waited until the stage of submission to raise an objection against the plaint. I realized the fact and that is why I suo moto arrested the judgment and invited the parties to address me over the issue. The fact of delay to seek for leave to amend will be considered, however, it may be a good ground for doubting the genuiness of the acknowledgement, but not a good basis for refusing the application. Delay until the trial is closed would not be a ground for refusal since the amendment does not, like in this case involve the introduction of new set facts. Mr. Gikandi has admitted his mistake. I see no malafides on his part or on the part of the plaintiff. Let me borrow from the statement of Lord Esher in the English case of **Steward =vs= North Metropolitan Tramways co. [1886] 16 QBD 556** in which he said:

The rule of conduct of the court in such a case is that however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs but if the amendment will put them in such a position that they must be injured it ought not to be made".

In this matter the kinds of damage mentioned by Mr. Ndegwa advocate for the defendant that are likely to be suffered by the defendant can easily be compensated by costs. I do not think the proposed amendments would seriously prejudice the defendant. No new cause of action has been introduced save for the fact that an English translation would be introduced. It cannot be said that it would take away the defendant's defence because in the first place the defendant did not raise it in its defence. It would have been a different matter if the defendant raised it.

For the above reasons, I will allow the application for amendment. Consequently leave of 7 days is granted to the plaintiff to file and serve the amended plaint from the date hereof. The defendant is at liberty to file an amended defence within 7 days from the date of service of the amended plaint. The plaintiff to pay the defendant costs assessed at Kshs.8,000/- within the next 21 days and in default execution to issue. This suit should be fixed for mention before this court for further directions on the way forward within 15 days from the date of this order.

Dated and delivered this 21st day of March 2006.

J.K. SERGON

J U D G E

In open court and in the absence of the parties but with Notice.

Sergon, J