



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL SUIT NO. 288 OF 2004**

**MARTHA. W. KARUA..... PLAINTIFF**

**VERSUS**

**AFRICAN BROADCASTING CORPORATION T/A KISS FM STATION..... 1<sup>st</sup>  
RESPONDENT**

**CAROLINE MUTOKO..... 2<sup>nd</sup> RESPONDENT**

**WALTER MONG'ARE Alias NYAMBANE..... 3<sup>rd</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Application dated 23<sup>rd</sup> April 2004 is brought under Order VIA Rule 3(1) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions. The prayers are that;

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1. The Plaintiff be and is hereby granted leave to further amend the Plaintiff

2. Costs be in the cause.

3. There be any other or further order as the court may deem just and expedient.

2. As is usual, the grounds in support are set out in the Application and these are that: -

a) At the time of filing suit the Plaintiff did not have the recorded cast/text which gives rise to the suit.

b) Subsequently to the filing of the suit, the Plaintiff came into possession of a recorded cast that did not contain the entire literature that forms the basis of the suit after which the plaintiff was amended on 31<sup>st</sup> March, 2004 and the amended Plaintiff filed in court on 2<sup>nd</sup> April 2004.

c) The Plaintiff now has a record of the entire cast broadcast and published by the defendants and each one of them on 24<sup>th</sup> March, 2004 during the 1<sup>st</sup> Defendants/Respondents morning talk show.

d) In view of the contents of the entire recorded text it is imperative that the Amended Plaintiff be further amended for a proper and informed determination of the issues in controversy.

**e) It is in the interest of justice that the Plaintiff be further amended.**

**f) No prejudice will be occasioned to the Respondents if the orders sought are granted.**

3. In her Affidavit in support, the Applicant deposes to a number of issues in explaining the necessity for the proposed amendments for which leave is now sought; -

**(i) That when she filed this suit on 25<sup>th</sup> March 2004, she was relying on what she herself had heard on the radio on the morning of 24<sup>th</sup> March 2004. It was not possible therefore, at that time and with accuracy to set out the exact words used in the talk show, subject of these proceedings.**

**(ii) That the Amended Plaintiff now on record is based on a transcript record of the talk show as done by her friend, one Grace Ngige.**

**(iii) That a person who for reasons of privacy does not wish to be named in these proceedings subsequently gave the Applicant a complete word by word transcript of the offending talk show and it is this information that she now wishes to put on record.**

4. The Applicant concedes that it is imperative under our Civil Procedure that in a defamation suit, specifically in libel proceedings, she ought from the outset to have set out the offending words verbatim. Since she could not do so for reasons given, she now wishes to do so and to discharge that legal obligation.

5. The Application is opposed on purely legal and technical grounds and in furtherance thereto, the Respondents filed a number of grounds in opposition viz; -

**i) the Application is defective in that paragraphs 6 and 8 of Affidavit sworn by Martha Karua on 23<sup>rd</sup> April 2004 in support of the Application offends rules 3 and 5 of Order XVIII of the Civil Procedure Rules and ought to be expunged.**

**ii) The amendments are intended to further depart from the original pleadings the basis upon which the ex-parte orders herein were obtained.**

**iii) The amendments sought are admittedly not fundamental for the determination of the real question in controversy or correcting any defect or error in the Plaintiffs pleadings.**

**iv) The Application for amendment is an abuse of the court process.**

**v) The interests of justice would be better served by declining the Application to amend in the circumstances.**

### **Submissions by Counsel**

6. Mr. Waweru Gatonye, lead counsel on behalf of four other advocates who were recorded as part of the Applicant's defence team submitted that as in other jurisdiction, amendment of pleadings is ordinarily allowed as a matter of course, to allow all issues to be properly placed before the court, so that the court can make a fair determination of the matter. In any event, it is contended that the proposed amendments would cause no prejudice to the Respondents and if prejudice is detected by the court, the same can be compensated with costs. Further, that the amendments proposed are intended to clearly and with focus show the court what issues are exactly in controversy.

7. I was thereby referred to the Principles for grant of leave for amendment of pleadings as set out by Mulla's "*The Code of Civil Procedure*" which I shall return to in greater detail later in this Ruling. Closer home, I was referred to the case of *Blue Shield Insurance Co. Ltd, vs. Mbondo HCCC No. 1811 of 1999 at page 3* where Ringera, J. (as he then was) held that amendments should be granted unless prejudice would be caused to the other party and that prejudice is such that it cannot be compensated in

costs. Apaloo, J.A. had similarly held in ***Philip Kiptoo vs. Augustine Kubende {1982 - 1988} 1 KAR 1036*** and added that a case should be heard on its merit and not technicalities and that any injury to an opposing party can be cured by costs.

8. Mr. Orengo, lead counsel on behalf of the Respondent conceded that whereas amendment of pleadings should be approached liberally, the circumstances of this case are such that the Application should be refused. It is his view that multiplicity of amendments such as the case here is prejudicial to the Respondents. She had been granted leave to amend the Complaint which she did without opposition by the Respondents and she should not be allowed to have a bite at the cake of amendment again. He also argued quite forcefully, that in cases of libel, form is very important. A Plaintiff must pursuant to Order 6 Rule 6A of the Rules give particulars of the offending words. It is not enough to scatter certain words allegedly spoken and hope that the court will neatly gather the defamatory meaning there from. I am asked to be guided by the Ruling of Nyamu, J. in ***Biwott vs. Muite HCCC No.1369 of 2003 (unreported)*** where the learned judge refused to grant leave to amend a pleading as he found it to be an abuse of court process. The proposed amendment was intended to quote word by word, the alleged offending words which had not been done in the original Complaint.

9. I am also referred to the lawyer's bible on defamation, ***Gatley on Libel and Slander, 8<sup>th</sup> edition*** for an exposition of the fact that the words used must be set out, otherwise there would be no cause of action. (See also ***Nakahiho vs. Kibirege {1973} E.A. 102 at 103*** and ***Collins vs. Jones {1955} 1 All E.R. 145*** which were cited on the same point).

10. I was also asked to find that since the Applicant obtained ex-parte injunctive orders on the basis of a now admittedly defective Complaint, those orders ought to be discharged and reference was made to the decision of Ibrahim, J. in ***Simon Ng'ang'a Njuguna vs. Barclays Bank HCCC No. 403 of 2003 (unreported)*** where the learned judge firmly held that ex-parte orders obtained as said should not stand if there is a marked departure from the original pleadings.

And so the matter was left to me.

### **Principles for allowing amendments of Pleadings**

11. Firstly, whether or not a court should grant leave to amend a pleading is a matter of discretion and as has been said more often than not, discretion must and should be exercised judicially and so that in such exercise, no party is unduly prejudiced or injured.

12. Secondly, I am as are counsel in agreement that ***Mullah, the code of Civil Procedure***, (and I shall make reference to the ***16<sup>th</sup> edition (2002)***) is the starting point for any clear understanding as to what issues should guide a court confronted with an Application such as the one before me. At page 1823 thereof it is said by the learned authors Sir Solil Paul and Shri Anupam Srivastava;

***"On the basis of different Judgments, it is settled that the following principles should be kept in mind in dealing with applications for amendment of pleadings -***

- i) All amendments should be allowed which are necessary for determination of the real controversies in the suit;***
- ii) The proposed amendments should not alter and be a substitute of the cause of action on the basis of which the original writ was raised;***
- iii) Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations would not be allowed to be incorporated by means of amendment.***
- iv) Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;***

v) ***Amendment of a claim or relief barred by time should not be allowed.***

vi) ***No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;***

vii) ***No party should suffer on account of technicalities of law and the amendment should be allowed to minimize the litigation between the parties;*** viii) ***The delay in filing the petitions for amendments of pleadings should be properly compensated by costs;*** ix) ***Error or mistake which if not fraudulent should not be made on ground for rejecting the Application for amendments of pleadings."***

13. From submissions before me by both counsel, it seems that I am required to apply only four (4) principles viz. (i), (ii), (iv) and (vi) above.

#### **Amendments necessary to determine real issues in controversy**

14. In the instant case and because this has a bearing on my finding on the other issues, it is important to set out what really is the issue in controversy and which this court is being asked to determine. There is no dispute that on 24.3.2004, the 1<sup>st</sup> Defendant through its station, Kiss FM radio and by the words of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, uttered and disseminated by broadcast certain words of and about the Plaintiff. As I said elsewhere in this Ruling, and on the basis of those utterances, I granted an interim Ex-parte injunction to the Plaintiff on 25.3.2004. The words uttered were said by the Plaintiff to be defamatory and being apprehensive that other or the same words would be used again, she sought this court's protection and I gave it. Subsequently, an Amended Defence was filed and a whole page of the words uttered was inserted at paragraph 5 of the Plaintiff and a number of particulars added at paragraph 6. This is the Plaintiff that is sought to be further amended.

15. The Defendants meanwhile filed a Statement of Defence to the amended Plaintiff and raised the defence that there is no cause of action, which I shall return to in the next principle and more importantly, at this point, that in fact the words complained of, were ***"true in substance and in fact and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest without malice."***

16. What does the intended amendment seek to do? In my view, and I say this having taken note that in fact what is sought to be amended is not the original Plaintiff but the Amended Plaintiff, the instant amendment only adds to the facts already on record. It is as if the words at paragraph 5 of the amended Plaintiff are an abridged version of what the intended paragraph 5 in the intended amended Plaintiff now has. That in my view is proper so that the court can be able to determine the real issues, word by word, in question. Mullah at page 1832 says that when it is merely additional facts that are being put on record through the amendment, the amendment ought to be allowed. I agree and shall apply this principle to this case.

#### **Does the proposed amendment alter the cause of action?**

17. To this question and in view of what I have said above, there is no change in the cause of action. Ultimately the question to be addressed is whether the words uttered and not denied by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were defamatory of the Plaintiff or not. I have seen nothing in the amended pleadings nor heard anything from submissions pointing towards a change or alteration on the cause of action. A clear case of such alteration was found in ***Sreedevi Vijayan vs. State Bank of Travancore 2001(1), Kerula Law Journal (KLJ) 611***, where Mohamed Shaji, J. found that in the original Plaintiff, the claim was for Rs 35,000 advanced in cash as an overdraft to the Defendant while the amendment related to an earlier transaction between the parties which had nothing to do with the overdraft in cash. The learned judge refused to allow the amendment as it clearly amounted to a totally different and distinct cause of action. The case in the matter before me is certainly quite at variance and I shall not apply this principle here.

#### **Is there prejudice to the Defendant if amendment is allowed?**

18. I have stated before that the Statement of Defence is in relation to the amended Plaintiff and not the original Plaintiff. The original Plaintiff may not have word by word what was alleged to have been defamatory utterances. Had the proposed amendment been in relation to that Plaintiff, then the Defendant may properly have raised the question of prejudice because I agree with counsel for the Defendants that where the words allegedly uttered are not set out in the Plaintiff then there is no basis for the suit (*see Nakahiho vs. Kibirege (1973) E.A. 102 at 103 and Harris vs. Harris (1879) 4C.P.D. 125 at 128*). However, and without in any way attempting to make a conclusive finding on the issue, as I am aware that there is an Application to strike out the Plaintiff, the Amended Plaintiff from where I sit, has the words that were uttered. The Defendants having seen the words in the amended Plaintiff have pleaded justification. What prejudice would be caused if more words out of an admitted transcript are added to the Plaintiff? With respect, I see none.

### **No party should suffer on account of technicalities.**

19. Courts are moving to a more liberal approach to pleadings which in my view is a good thing. Procedures and technicalities were made I think, with the intention of aiding in the administration of justice and parties as much as possible should not be refused a relief on account of some inadvertence or infraction of the rules of procedure. This is precisely why we have the remedy of costs if there may be inconvenience to the other party. One of the most liberally approached rules is the rule regarding amendments, so far as I can see. Order VIA Rule 1(1) allows a party to amend his pleadings, "**without leave**" of court "**at any time**" before close of pleadings. Order VIA Rule 3(1) which is of relevance here allows "**the court at any stage of the proceedings**", on "**such terms as to costs or otherwise as may be just, allow any party to amend his pleadings.**" These are liberal words and discretion is given wide latitude subject to fairness and a need to do justice to both parties. The right to amendment is one of those that judges find very difficult to deny. As Bramwell, J. said in the off-quoted case of *Tildesley vs. Harper {1978} 10 CD. 393 at 396*, "**with applications to amend ... my practice has always been to give leave to amend unless I have been satisfied that the party applying was acting malafides...**;"

20. I agree and find that I have seen nothing in the Objections filed to the Application to stop me from applying a less than technical approach to this matter and granting the Application for amendment.

### **Discretion**

21. Taking a liberal approach as I have and taking the view that pleadings such as the ones before me should be liberally construed and easily amended; I must be alive to the fact that I am exercising discretion and in so doing must look at the totality of the circumstances of this case in reaching a just conclusion. As was said in *Khan vs. Roshan 11965} B.A. 289*, **grant or refusal of an Application for leave to amend is a matter within the discretion of the court but "surely, the court cannot allow an amendment which creates inconsistency in the Pleadings"**. Thankfully, as I have shown, the pleadings if amended in this case will be neater, focused and able to give the court a clear picture of issues laid before it for determination. The Court of Appeal in *Kyalo vs. Bayusuf {1983} KLR 229* for example refused to overturn the decision of Kneller, J. in the lower court where in exercise of discretion, he refused to allow an amendment because it was late (3 years) and the second defence contradicted the first. Again, in our case, I find that the amended Plaintiff and the proposed Amended Plaintiff in no way contradict each other and one as I said puts all the issues that were left by the other before court without changing the cause of action or the focus of the suit. Neither is there a claim that the Applicant has delayed in bringing forth the Application for amendment as was found to be a fact in the Kyalo case, (above).

### **Conclusion**

22. This case needs to be put on track. Parties should now proceed to the substance of it and put the acrimonious exchanges behind them. As Ojwang, Ag. J. said earlier in the proceeding "**parties should halt the barrage of Applications**" as they are "**unnecessarily time-consuming and will considerably delay the hearing of the case**". I respectfully adopt my brothers' directions and ask that parties should move on to the expeditious determination of the suit without further delay, subject to my orders below.

23. I shall allow the Application dated 23.4.2004 and further order that if they so wish, the Defendants may within fourteen (14) days amend their Statement of Defence.

24. I shall grant costs of the Application to the Plaintiff, in any event.

Orders accordingly.

Dated and delivered at Nairobi this 16<sup>th</sup> day of June 2004.

**I. LENAOLA**

**Ag. JUDGE 16/6/04**

**Before Lenaola Ag. J.**

**Amos CC**

Ruling read in the presence of:

Mr. Gatonye and Miss Ndirangu and Mr. Wanjao for the Plaintiff/ Applicant.

Mr. Saende for Defendant/Respondent

**I. LENAOLA**

**Ag. JUDGE**