REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 1 OF 2000

KULOBA …………….... PLAINTIFF

VERSUS

ODUOL……..……….. DEFENDANT

RULING

1. Introduction

The plaintiff in this case alleges that on 5th January, 1999 the defendant, an advocate of this Honourable Court, drew or caused to be drawn an affidavit sworn by one Nassir Ibrahim Ali. That affidavit was alleged to be defamatory of the plaintiff, who is a judge of this Honourable Court. On 4th January, 2000, the plaintiff filed this suit against the defendant claiming damages and an injunction. In paragraph 5 of the plaint, it was alleged as follows:

“5. The plaintiff has established and the fact is that at 8.09 am on the said date, prior to the filing of the said affidavit in Court, the defendant published the said affidavit to the media with the sole and dominant motive of giving the publication the widest possible coverage and causing maximum damage to the plaintiff.” On 31st January, 2000 the defendant filed his defence in which he specifically denied, at paragraph 6, the foregoing matter. On 18th April, 2001, the plaintiff filed the application presently before the Court under order VIA rules 3, 5 and 8 of the Civil Procedure Rules (hereinafter referred to as “the Rules”) seeking to amend his plaint. The proposed amendments were as follows:

‘(a) At paragraph 4: To state that the affidavit was not only drawn but also published,

(b) At paragraph 5 quoted above: By deleting the same and substituting thereof the following:

“5a. The said allegations (in the affidavit complained of) were false.

5b. The plaintiff has established and the fact is that at 8.09 am on the said date (ie 5th January, 1999), prior to the said affidavit being read in Court, there was a re-publication of the said libel of and concerning the plaintiff by the defendant to the Kenya Television Network and the media generally with the sole and dominant motive of giving the publication the widest possible coverage and causing maximum damage to the plaintiff.”

(c) At paragraph 8: Changing the word “Published” to “re-published”

(d) At paragraph 9 (c), (d), (e) and (f): substantially similar changes as in

(c) above.’

In his affidavit in support of the application, the plaintiff stated at paragraph 4 that “the breach of the defendant lies in the fact that…(he) republished the said affidavit to the media, and in particular to the Kenya Television Network on the same date (ie 5th January, 1999) before it was read out in Court”.

The defendant is opposed to the application. In his replying affidavit filed on 25th May, 2001 the defendant has deponed that he would be prejudiced by the intended amendment as it sought to set up “a fresh cause of action which is otherwise barred by the Limitation of Actions Act.”

The issue before this Court, therefore, is whether the proposed amendment should be disallowed on the grounds that it seeks to introduce a **new** cause of action which is now time-barred. If I may, let me first set out the applicable law relating to an application of this nature.

II The Law

I will start with the law applicable to periods of limitation in cases of defamation. Thereafter, I will deal with the law on amendment of pleadings.

(a) Periods of Limitation in Cases of Defamation Section 4(2) of the Limitation of Actions Act (cap 22) provides as follows:

“4…

(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date” (underlining supplied).

The proviso in that subsection was introduced by section 20 of the Defamation Act (cap 36). The matter is quite clear and I need not say anything on it at this point.

(b) The Law on Amendment of Pleadings Here, I will set out the statutory provisions first and thereafter discuss the general principles including case law and what the commentators have said on the subject.

1. Statutory Provisions

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 proceeding 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 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 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."

2. Case Law and Commentaries

The question of amendment of pleadings has been considered widely by the Courts and been the subject of wide discussion by legal scholars. In *Eastern Bakery v Castelino* [1958] EA 461, Sir Kenneth O'Connor, P sitting with Gould JA 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 case. 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] EA 353). Chanan Singh, J in deciding a similar application in *Barclays Bank DCO v Shamsudin* [1973] EA 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, 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, LJ in *Pontin v Wood* [1962] 1 QB 594, p 609; [1962] 1 All ER 294, 298)." Lord

Denning in his character said as follows in *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703 at p 718 in this respect:

"Some of the judges in those cases spoke of the defendant having a 'right' to the benefit of the Statute of Limitations: and said that that 'right' should not be taken away from him by amendment of the writ. But I do not think that was quite correct. The Statute of Limitations does not confer any right on the defendant. It only imposes a time limit on the plaintiff. Take the statute here in question. It is section 2 of the Limitation Act, 1954. It says that in the case of actions for damages for personal injuries for negligence, nuisance or breach of duty 'the action shall not be brought' after the expiration of three years from the date on which the cause of action accrued. In order to satisfy the statute, the plaintiff must issue his writ within three years from the date of the accident. But there is nothing in the statute which says that the writ must at that time be perfect and free from defects. Even if it is defective, nevertheless the Court may, as a matter of practice, permit him to amend it. Once it is amended, then the writ as amended speaks from the date on which the writ was originally issued and not from the date of the amendment. The defect is cured and the action is brought in time. It is not barred by statute …In my opinion, whenever a writ has been issued within the permitted time, but is found to be defective, the defendant has no right to have it remain defective. The Court can permit the defect to be cured by amendment: and whether it should do so depends on the practice of the Court. It is a matter of practice and procedure."

In the same case Russel, LJ 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 … [N]o 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." 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.

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? I will answer these questions shortly.

III Analysis

Mr K'Owade for the defendant began by arguing that order VIA of the Rules could not apply to change the statutory provisions under caps 22 and 36 which limit the time within which a defamation case may be brought. There were suggestions in his submission that that order was inconsistent with the express stipulations of the mentioned statutes and contrary to section 31 (b) of the Interpretation and General

Provisions Act (cap 2) which provides that no subsidiary legislation should be inconsistent with any Act. It is common knowledge that subsidiary legislation must conform with the statement of Parliament in its enactments. Section 81 of the Civil Procedure Act under which the Rules are made itself provides that the Rules must conform with the Act. However, Mr K'Owade's argument here will not come to bear. The answer to that argument is found in the statements of Lord Denning and Rusell, LJ in the *Mitchell* case reproduced earlier in this ruling. The learned judges in that case discussed this matter very well. In broad terms, Lord Denning stated that the periods of limitation do not confer any right to a defendant but only imposes an obligation on the plaintiff to bring his claim within the stipulated period. Once the claim is brought within the period amendments can be allowed, even outside the period of limitation in the specified situations. This is not an attack on the statutory period of limitations but a matter of practice and procedure. It cannot be said with justification that allowing an amendment under the Rules outside the periods of limitation is inconsistent with the statutory law on the matter. The function of the Court in that case is to weigh the interests of both parties and to decide whether the amendment sought will enable it to determine the real question or issue in controversy between the parties.

This is a matter of procedure and practice and does not in any way refer or affect the statutes on periods of limitations. In fact, the rule complained of is clear in terms of what amendments outside the period of limitation may be allowed – those that flow from the same set of facts or substantially same facts with the claim originally pleaded. That should have been enough for this matter. However, when I had already drafted this ruling for typing, Mr K'Owade sent me two local authorities on the point. I believe he has sent these also to Mr Gautama, counsel for the applicant. This practice is irregular and I am sad to say that this is not the first time Mr K'Owade has done that. It ought to be discouraged for obvious reasons: It deprives the other side an opportunity to respond and it sometimes confuses the work of the Court. However, I will consider those authorities in the interests of justice. They are as follows:

1. *Joseph Ochieng & 2 others trading as Aquiline Agencies v First National Bank of Chicago* Nairobi Court of Appeal 149 of 1991 (unreported) (Gachuhi, Tunoi & Shah, JJ A) and

2. *Julia Akelo Kuguru v Seth Lugonzo & Another* Nairobi (Milimani) HCCC No 197 of 2001 (unreported) (Ringera J)

The second decision (2) above followed the first one. I note that the first decision has come to be relied on by many practitioners as the authority on this subject for good measure as it discusses the principles on the subject well. In that case, Shah, JA said as follows at page 13 of his judgment:

"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. If I may, let me give the following two examples to illustrate the point:

(a) X enters into a contract with Y which is breached in a manner giving rise to both a contractual and tortious claim. He brings an action within three years for a claim in tort but omits his contractual claim. Eight years after the cause of action arose he applies to amend his plaint to bring the claim in contract. Is this an amendment that can be allowed under order VIA rule 3(2) of the Rules? I think so

(b) In a similar case to (a) above the claim is brought after three years but before the end of six years and being a claim in contract it is allowed. In that case, I do not think that the plaintiff will be allowed to amend his plaint to introduce the claim in tort which by all circumstances is barred by limitation. This is not covered by order VIA rule 3(2) of the Rules.

The *Julia Akelo Kunguru* case squarely fell within situation (b) above. The counterclaim sought to be introduced by amendment by the 1st defendant in that case was already statute barred at the time of filing suit and it did not matter that the application had been brought at an early and opportune moment. As will be seen later, that is not the case here. I would go further and state that the *Joseph Ochieng* case was also decided on the facts that the Court was of the view that the proposed amendments were sought in bad faith; that they were unsupportable; and were sought by a party whose conduct was found to be slovenly.

In most effects, the party seeking amendment in the case before me has surmounted those handicaps. Mr K'Owade cited several authorities to convince me to come to a contrary decision. I considered all of them and I remained resolute on the conclusion I have already come to. However, for the conclusiveness of record and out of respect to him, I will make the following comments in respect of those authorities. I will start with the case of *Sheikh Mohamed Bashir v United Africa Ltd & Others* [1959] EA 864 p. I do not think that that decision is relevant to the case before the Court. That case, in may view, dealt specifically with a situation where an Act of Parliament had provided for a special procedure. In that case, the procedure under the Rules will not apply where there is a corresponding process – I should add that the Rules will be disregarded where they are inconsistent with the special procedure under the particular Act. This should also cover the authority in *Emmanuel Karisa Maitha v Said Hemed Said & Another* Mombasa Civil Appeal No 292 of 1998 (unreported) (Gicheru, Omolo & Shah, JJ

A). That case was an election petition which has its own special procedure under the National Assembly and Presidential Elections Act (cap 7). The sections of Caps 22 and 36 relevant in this case cannot be said to be procedural sections: They are substantive sections which do not provide for any procedure sufficient to oust the application of the Rules of this Court in considering a question under them. The next authority is *Wilkinson v Andiff (BLT) Ltd* [1986] 1 WLR 1352. Again, that authority is not very helpful. It dealt with a different situation. The extension of time. The principles in that case are not similar to the ones to be applied in an application like the one now before the Court. Mr K'Owade's final argument was that the amendment sought to introduce a new cause of action. It was seen earlier that our Rules of Procedure allow such amendment in specified circumstances. Mr K'Owade did not argue that this was not one of such circumstances and so his argument goes no further. However, was there a new cause of action in this case?

To answer that, I will refer to what the English Court of Appeal said in *Dornan v J W Ellis & Co Ltd* [1962] 1 All ER 303. In that case the plaintiff brought an action for damages for personal injuries against his employers. The claim was based on breach of statutory duty and negligence by failure to take reasonable care for the safety of the plaintiff but not on vicarious liability for any breach of duty or negligence by S, a fellow employee.

After the period of limitation had expired the plaintiff applied for leave to amend his statement of claim by adding further particulars alleging negligence on the part of S. This amendment was refused by the ttrial court but allowed by the Court of Appeal. It was held that although the further allegations would raise an issue of vicarious liability they constituted merely an extension of the original claim and did not introduce a new cause of action. Holroyd Pearce, LJ said as follows at p 304:

"The learned judge felt that he was precluded from granting the amendment and refused it, not as a matter of discretion on particular facts, but because he was prevented from granting it by reason of the rule which is clearly set out in the words of Lord Esther, MR, in *Weldon v Neal…* In the present case the learned judge took the view that the new allegations of negligence against S were different in quality from the allegations previously made against the defendant in their own person. The previous allegations he said, were not allegations of respondeat superior. I agree with him that the allegations previously made were of a different nature from the allegations against S, but in my judgment, however, the amendments are not necessarily precluded by the cases of *Marshall* and *Batting* which were very different from the present case. In those two cases the amendments not only produced a new case, a new set of ideas; it actually produced a new cause of action, since the cause of action for breach of statutory duty is different from the cause of action for common law negligence… I find myself unable to share the learned judge's view that this is a case where, as a matter of principle, no amendment can be allowed. The fresh allegations do not introduce a new cause of action… the original allegations were not against S but they were allegations that the defendant company's servants or agents had failed in the provision of goggles and properdrill…the allegation against the fellow workman was an extension of the case rather than a new case. It must be a question of degree in this case on its particular facts…Had the learned judge considered it as a matter of discretion, and come to the conclusion that, though it was possible for him to allow it, yet taking everything into consideration he ought not to do so, I should not interfere with his discretion in the matter. But he did not deal with it in that way."

Davies, LJ; on p 307 summarised it as follows:

"What is now sought is not to make out a new case of negligence but to persist in the old story and invite the judge at the trial to approach it, to interpret it, from a different angle or perspective. It is a different approach to the same main story of the accident."

I also looked at the authority in *A H Nurani v B H Lalji & 3 others* Nairobi Court of Appeal Civil Application No Nai 110 of 2000 (unreported) (Gicheru, Bosire & Owuor, JJ A) It is not relevant at all. It dealt with a case of an informal application for amendment which is not the case here. The judges in that case appear to have considered the prejudice that would be caused to the respondent by deciding an application informally on an issue in which the respondent intended to challenge the applicant's case.

IV Conclusion

So, then, should the proposed amendment be allowed? Does it seek to introduce a new cause of action? What prejudice, if any, will the defendantsuffer if the amendment were allowed? The defendant has objected to the application on the basis that it seeks to introduce a new cause of action and will prejudice his defence. Is that really so? What the plaintiff is attempting to do through this amendment is to say that there was a "re-publication" of the affidavit prior to it being read in Court; that in addition to the offending affidavit being drawn, it was also "published". Now, how does that add a "new" cause of action? We are talking about the same affidavit, the contents of which are known, the substances of which is not in dispute and the "reading" or "publishing", or "re-publishing" of which are additional facts now sought to be incorporated in the plaint. Clearly, the defendant is not dealing with anything "new", and is not called upon to defend a whole new case. It is the same case. As Mr Gautama for the plaintiff argued, the amendment sought was a "house keeping" exercise. That it was nothing more than an attempt to clarify issues and facts. I agree with him. The amendments sought in this case are quite minor and designed to shed light on the claim as originally pleaded and there is nothing new sought to be introduced that will change the case. It is the same story sought to be clarified. Even if the amendment seeks to set up a new cause of action which is outside the limitation period, I am of the view that it is an amendment which is permissible under order VIA rule 3 of the Rules as it is a claim emanating from the same set of facts. As to the question of prejudice, I am not satisfied that the defendant will be exposed by the amendment in a manner that cannot be compensated by costs. This case has not begun, thus no side has gained undue advantage or disadvantage yet. In *Intercom Service Ltd & 4 others v The Standard Bank* Nairobi HCCC No 761 of 1988 the plaintiffs sought the 4th amendment to their plaint in August 2000 in the middle of the trial which was opposed. Msagha Mbogholi, J said:

"The defence is yet to open its case and present its evidence to counter the plaintiff's case. I have asked myself, what prejudice may befall the defendant if the amendment is allowed. With respect, considering that the trial is in progress and that the defendant shall have an opportunity to be heard on the issue, I see no prejudice whatsoever. Aclaim for interest cannot be said to be an introduction of a new cause of action. The discretion vested in this Court defeats that argument." Before I finish, I would like to restate what Bowen, LJ said in *Copper v Smith* (1884) 26 Ch D 700 on the issue of costs being an adequate remedy:

"I have found in my experience that there is one panacea which heals every sore in litigation and that is costs. I have seldom, if ever, been unfortunate enough to come across an instance where a party has made a mistake in his pleadings which has put the other side to such a disadvantage that it cannot be cured by the application of the healing medicine."

(Quoted by Sheridan, J in *Waljee's (Uganda) Ltd v Ramji Runjambhai Bugerere Tea Estates Ltd* [1971] EA 188).

I, therefore, allow the plaintiff's application dated 5th April, 2001 as prayed with thrown away costs to the defendant in any event.

Dated and Delivered at Nairobi this 27th day of November, 2001

A.R.M. VISRAM

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JUDGE