Wesonga v Bomata Enterprises (Civil Appeal E584 of 2024)
[2025] KEHC 8816 (KLR) (Civ) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8816 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E584 OF 2024

DKN MAGARE, J

JUNE 12, 2025

BETWEEN

DENNIS MASAKHWE WESONGA ..... APPELLANT

AND

BOMATA ENTERPRISES ..... RESPONDENT

RULING

1. This ruling is in respect of two applications dated 20.05.2025 and 15.06.2024. The matter was listed before me on 5.5.2025 during the service week. I directed that judgment be delivered on 29.05.2025. While brewing the judgment, this application dated 20.05.20245 popped up in the CTS. I gave direction and allowed parties to file whatever documents they wished to file.

2. The application dated 15.06.2024 sought the following orders:

    a. The name of the Respondent be amended from Bomata Enterprises to Bomata Enterprises Ltd in the Memorandum of Appeal and subsequently all other relevant documents in the case.

    b. The Respondent be granted leave to amend the defense to reflect the amended name.

    c. The applicant be granted leave to amend the memorandum of appeal to reflect the amended name.

3. The same was based on the grounds that the correct name was Bomata Enterprises Ltd. It was necessary to correct all other subsequent documents. The amendment is necessary for clarity and accuracy of the proceedings. There will be no prejudice to the Respondent.

4. The second application was thus spent as it sought to arrest my judgment. Though I did not arrest it, I schooled this ruling for today and judgment on 21.07.2025. The respondent replied to the application

dated 15.06.2024. The affidavit was sworn by Odiwuor Bob Joshuwa Otieno Patrick. He stated that the respondent in the small claims court was Bomata Enterprises not the company. Thus the appellant was trying to have a second bite on the cherry. He stated that the omission is fatal.

5. Parties filed submissions which I do not find it necessary to set in extensio, save to say that I have read them fully.

Analysis.

6. The applicant is not engaged in an exercise that will bring clarity and orderliness to the case but to murky waters. It is an attempt in skulduggery, subterfuge and there was no factual dispute on parties in the lower court. The new party sought to be introduced was not served to enter appearance. The witnesses in the court below stated that they were employees of Bomata Printers. The question as to who is a proper defendant never arose.

7. Secondly, the purpose of amendment is to correct an error. It is not to introduce a respondent at the appeal level. The parties currently in the appeal were the parties in the court below. Though indicating as an amendment, the applicant seeks to change the substratum of the case.

8. A general rule on amendment was laid down in the case of Eastern Bakery vs Castelino, [1958] EA at p. 461 where it was held as hereunder-

> It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.

9. Amendments may be allowed, any time before a final judgment. In this case, the amendment sought, is a disguised amendment to the lower court pleadings, including the defence and judgment.

10. In the case of Omwange v Gichana (Commercial Case E163 of 2022) [2023] KEHC 24620 (KLR) (Commercial and Tax) (22 September 2023) (Ruling), Mwangi J posited as follows regarding inconsistent causes of action:

> In the case of Joshua Kimani v Kiso Enterprises Ltd & 3 others [2020] eklr, the Court held as follows –"The Learned Authors of Halsbury's Laws of England, 4th Ed (Re-Issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings –".....The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion....The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it, it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...

11. In Angelina Chepng'etich Kimaiti v Tom Mong'are Nyariki & another [2021] eKLR, the court, Mugo Kamau J, posited as follows in regard to amendments:

> As to the first issue, amendments of pleadings can be allowed at any stage before Judgment. But it is most ideal to allow pleadings before tendering of evidence starts in order to avoid the recalling of witnesses which may at times be inevitable particularly where the amendments introduced affect the evidence already tendered. The only amendments that can be allowed after the witnesses are put on the witness box are minor amendments, say those to do with clerical errors, correct spelling of people's names, places, anomalies in the dates, typographical

errors, spelling mistakes, minor inaccuracies in measurements or quantities, slight inexactness in colours, impressions and such other minor things which do not substantially alter the substratum of the case. Such are excusable. But it would be an abuse of the process of the court to allow a party to amend his case after evidence has been adduced so that the amended pleadings suit the evidence on record. This, in my view, is not what the provisions of order 8 Rule 3 of the Civil Procedure Rules were meant to achieve. The purpose of amending pleadings was to ensure that nothing is left out of the case since should one not include all the causes of action in the suit, he cannot file another suit for the cause of action that ought to have been included in the suit. Such would be Res Judicata. Order 8 Rule (5) of the Civil Procedure Rules gives the court powers to allow an amendment notwithstanding that its effect will be to add 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 amendment.

12. What in reality the Appellant is seeking, is to withdraw a suit against Bomata Enterprises, for which rights have already vested and file another against Bomata Enterpises Limited, a party who was not party to the suit in the lower court. By amending the name of the Respondent, it will be introducing a party, who is not party to any judgment. The name of the respondent is exact same name in the lower court. There is thus no error in the name to be amended. Reading the affidavit in support, words of Justice Odunga J, as he then was, in Kioko Peter v Kisakwa Ndolo Kingóku [2019] eKLR rung in my mind. He stated as doth:

> What the Court said was that the applicant ought to have applied for review before the lower court. In my view to marked such remarkable averments can only be taken to be meant to mislead the court. Parties and Counsel ought to give the court's some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 he expressed himself in the following terms:
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> > "I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."
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> 5. In the South African case of Matatiele Municipality & Others vs. President of the Republic of South Africa & others (1) (CCT73/05) (2006) ZACC 2: 2006 (5) BCLR (CC); 2006(5) SA 47 (CC) it was held that
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> > "In my view a person who deliberately either by commission or omission misleads the court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonest in my view is an Act which is antithesis to transparency and vice versa..."

13. This court has no jurisdiction to amend pleadings in the lower court, for a concluded suit. Ipso facto, the court cannot order amendment of documents not filed in this court as of right. The only document capable of being amended in this court is a memorandum of appeal. However, the current application is not an amendment but disguised joinder. This court is forbidden to assume jurisdiction by craft or

innovation. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

> "This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

14. The upshot of the foregoing is that the applicant is keen on stealing a march on the respondent and Bomata Enterprises Limited. In the circumstances, the application dated 15.06.2024 lacks merit and is accordingly dismissed.

15. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

16. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

17. The application was baseless. The Respondent is entitled to costs. The application is dismissed with costs of Ksh 7,000/= to the Respondent.

Determination.

18. In the circumstances, I make the following orders: -

    a. The application dated May 20, 2025 is spent.

    b. The application dated June 15, 2024 is dismissed with costs of Ksh 7,000/=.

    c. Judgment shall be delivered as scheduled.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF JUNE, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Appellant in person

Mr. Ouma for the Respondent

Court Assistant – Jedidah