Jipa Oil Company Limited v HFC Limited (Civil Suit 2 of 2019)
[2024] KEHC 1085 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1085 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL SUIT 2 OF 2019

DKN MAGARE, J

FEBRUARY 7, 2024

BETWEEN

JIPA OIL COMPANY LIMITED ..... PLAINTIFF

AND

HFC LIMITED ..... DEFENDANT

RULING

1. Notices of motion dated 22/11/2022 and 16/12/2022 were certified to be heard together. I came to Kisii for service week and was disappointed that the matter is pending applications instead of full hearing.

2. The Plaintiff sought several prayers vide its plaint dated 8/4/2019. The Plaintiff was amended twice resting with the amendment of 4/11/2022 through a further amended plaintiff dated 4/10/2022. The same is said to be through Order 8 Rule 1 of the *Civil Procedure Rules*.

3. Hitherto there were an application for injunction which related to Kisii Municipality block III/195. The monies that were held in court were ordered to be released to the proposed 3rd defendant.

4. In the further amended plaint, which has only one defendant the plaintiff sought several prayers spanning from pages 18 to 20 of the record. The amendment included addition if claims for Ksh. 438,570,000 and Ksh. 550,000,000/=. A prayer for injunction related to Kisii/Municipality block III/195 was deleted.

5. This triggered the avalanche of applications which are the core of the Ruling I am delivering today. Before I proceed on the said application, I note with concern that though the dispute relates to amounts over one billion, parties have not been diligent in handling the matter in a manner that aids administration of justice expeditious disposal of cases.

6. Article 159 of the *Constitution* provides as doth: -

> " 159.
>
> (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
>
> (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;
>
> (c) alternative forms of dispute resolution including reconciliation

7. In the case of *Francis Mugo & 22 Others v. James Bress Muthee & 3 Others*, Civil Suit No. 122 of 2005 [2005] eKLR, Justice Musinga J, as then he was posited as follows: -

> " While I agree that the choice of [counsel] is a prerogative of a party to a suit, it must be borne in mind that in the discharge of his office, an Advocate has a duty to his client, a duty to his opponent, a duty to the Court, a duty to himself, and a duty to the State, as well [expressed] by Richard Du Cann in The Art of the Advocate. As an Officer of the Court, he owes allegiance to a cause that is higher than serving the interests of his client, and that is to the cause of justice and truth."

8. In the case of *Nuru Ruga Ali & another v Commodity House Limited & 3 others* [2021] eKLR, the court held as doth

> " In that case the jurisdiction and the power of revision can be exercised under the broad rubric of criteria set out therein under section 1A, 1B & 3A of the *Civil Procedure Act* a drawn down from the inherent power of the Court to vary or set aside impugned orders emanating from the subordinate Courts which necessary do not require the laborious process of an appeal under order 42 of the *Civil Procedure Rules*.
>
> On the applicability of the overriding objective principle the courts in *the Estate of Halima Wamukoya Kasabuti V Orient Commerical Bank Ltd* CA No. 302 of 2008(UR 199/2008) *Kariuki Network A Ltd & Another V Duly & Figgs Advocates'* CA NO. 293 of 2009. The question we have to ask ourselves is whether we can take refuge under the oxygen rule enshrined in section 3A and 3B of the *Appellate Jurisdiction Act* (Supra) which underpins the overriding objective principle introduced in the appellate jurisdiction in 2009, long after the appeal subject of this Judgment had been filed in order to breathe life into an otherwise incurably defective appeal as per the contention of the respondent.
>
> On the applicability of the overriding objective principle in the appellate jurisdiction, we wish to draw guidance from case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder. (See the case of *City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited* Civil Application No. Nai 302 of 2008 (UR.199/2008); The aim of the overriding objective

principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of *Kariuki Network Limited & Another versus Daly & Figgis Advocates* Civil Application No. Nai 293 of 2009); that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness (See the *case of Kariuki* (Supra); that in applying or interpreting the law or rules made thereunder, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of *Deepak Manlal Kamani and another versus Kenya Anti-Corruption and 3 others* Civil Application No. 152 of 2009); that there is a mandatory requirement that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals. (See the case of *Dorcas Indombi Wasike versus Benson Wamalwa* Eldoret Civil Application No. 87 of 2004); that the overriding objective principle is intended to re-energize the process of the court, encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the rules made there under are 2" compliant (see the case of *Hunter Trading Company Limited versus ELF Oil Kenya Limited*, Civil Application No. Nai 6 of 2010 (UR3 (2010); that the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective (See the case of *Caltex Oil Limited versus Evanson Wanjihia* Civil Application No. Nai 190 of 2009 (UR). And, lastly, that the "O2" principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the court process (See the case of *Kenya Commercial Bank vs. Kenya Planters Co-operative Union* Nai Civil Application No.85 of 2010 (UR) 62 of 2010.

I think I have said enough on this fundamental procedural jurisdiction. That as it may be I have a christened appeal to evaluate and determine so how has the appellants faired in their quest to overturn the impugned decision."

9. Had parties been aware that this matter needs to be expeditiously settled, the two applications could not have been filed. It is a dent in the administration of justice to be engaging in application for amendment 5 years since the suit was filed. The matter has not proceeded for trial, let alone pre- trial conference. Should parties have done that they will have noted that Order 11 allows parties to indicate if they wish to amend their pleadings and the court is obligated to give timelines. Essentially both the applications are an utter waste of judicial time.

10. Order 11 rule 7 provides as follows: -

"7. Trial Conference

(1) At least thirty days before the hearing date of the suit a Trial Conference shall be convened by the court for the following purposes—

a. planning of trial time;

b. exploring the most expeditious way to introduce evidence and define issues;

c. granting leave to amend pleadings within a specific period not exceeding fourteen days;

d. ordering the admission of statements without the calling of the makers as witnesses where appropriate and the production of any copy of a statement where the original is unavailable;

e. ordering the giving of evidence on the basis of affidavit evidence;

f. ordering for the examination of any witness by the issue of Commission outside court and for the admission of any such examination as evidence in court;

g. making appropriate orders relating to experts reports including their

h. exchange and admissibility at the trial;

i. making appropriate orders concerning the receiving in evidence of any exhibit; and

j. making a referral order for alternative dispute resolution.

(2) It shall be the duty of every party and or his advocate to strictly comply with the provisions of rule 3(2) and to give such information as the judge may require, including but not limited to the number of the witnesses expected to be called and the nature of their evidence, to enable the court to consider and settle the length of time which will probably be required for the hearing of the suit.

(3) Any party or his advocate who willfully fails or omits to comply with the provisions of this Order shall be deemed to have violated the overriding objective as stipulated in Section 1A and 1B of the Act and the court may order costs against the defaulting party unless for reasons to be recorded, the court orders otherwise.

11. The first of the Application sought the following orders: -

a. That the amendments comprised in the Further Amended Plaint dated 4/10/2022 be disallowed and the said Further Amended Plaint be struck out.

b. That the costs of this application be provide for.

12. The subsequent applications dated 16/12/2022 sought the following orders: -

a. That leave be granted to further amend the plaint

b. That the further amended plaint dated 4th of October, 2022 and filed on 4th November, 2022 be deemed to have been duly filed and served.

13. Parties filed consolidated submissions. The one thing that is conspicuously missing from both parties. The parties argued as if each application is a response to another. This is untenable as each factual disposition must be directly traversed. Both Applications are thus unopposed. Things that are conspicuously missing are replying affidavits.

14. Without replying affidavits both applications are unopposed. Parties must recognize that submission are not evidence. They cannot substitute affidavits or grounds of opposition.

Defendant's submissions

15. The defendants averred that the filing of the Further amended plaint was in violation of express provisions of the law. They rely on the case *Centre Shop V Pharis Nkari GitarI & another* [2009] eKLR where Justice Rtd. Mary Kasango sated as doth at paragraph: -

> " The respondent filed its first amended plaint on 30th June 2003. That was without the leave of the court. By that amendment, the respondent without notice to the Diocese removed its name. the respondent again filed another amended plaint in September 2003. This too was without the leave of the court and on this occasion brought into the proceedings the appellant and removed the name of Selasio Kaburu as a defendant. Again without leave of the court, the respondent on 24th October 2003 filed an amended plaint bringing back Selasio Kaburu as the first defendant. All those amendments undertaken by the respondent were not backed by the Civil Procedure Rules and in my view were unlawful. In addition to those irregularities, I note that the respondent failed to abide by Order VIA Rule 7(1) (2) and (3). That rule provides:-
>
> "7.
>
> (1) Every pleading and other document amended under this Order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made.
>
> (2) All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.
>
> (3) Colours other than red shall be used for further amendments to the same document."

16. They submit that the further Amended plaint is unlawful. Reliance is placed on the case of *Garley Enterprises Ltd v Agricultural Finance Corporation & another* [2018] eKLR. In that case the Justice G L Nzioka stated as doth: -

> " 36. The provisions of Order VIA Rule 7, stipulates how the proposed amendments should be effected and/or indicated on the existing plaint or defence to be amended. These provisions states as follows:
>
> 7.
>
> (1) Every pleading and other document amended under this Order shall be endorsed with the date

of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made.

(2) All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.

(3) Colours other than red shall be used for further amendments to the same document.

37. It therefore pre- supposes the proposed draft will be annexed to the application to enable the court ascertain whether these provisions have been complied with or not. Therefore, the failure to comply accordingly renders the application fatally defective and on that ground alone, this application should be struck out.

38. However, I find that, even when the application is considered on merit, it is revealed that the Applicant has not explained why it has taken them so long to file the application. The Applicant argued that the aim of the amendment is to introduce the value of the suit property and to enable them plead an alternative prayer for payment of a sum of Kshs. 154,000,000, being the current value of the suit property. However I note that transfer issue was a subject of an application made on 25th August 2014. Thus the Applicant was aware of the same as far as that date. Why didn't the Applicant file this application immediately thereafter and/or seek for the subject prayer during the hearing and determination of that application."

17. They state that leave to amend was denied on 27/9/2021. They state that the events for the amended were triggered by the events of 20/4/2021. They rely on the case of *Kassann -vs- Bank of Baroda (Kenya) Ltd* (2002) eKLR.

Plaintiff's submissions

18. They state that they amended without leave and the Defendant field the application that the further amended plaint be struck off. They state that they filed an application dated 16/11/2023. These were directed to be heard together. They submit that the amendment is necessary. They state that the advocate on record misconstrued the Ruling by Justice A. R. Ndungu believing that leave was granted. They rely on the case of *Eunice Chepkorir Soi v Bomet Water Company Ltd* [2017] eKLR where the Court stated that:-

"Order 8 Rule 5(1) of the *Civil Procedure* gives the court a wide discretion as far as amendment of pleadings is concerned. This section provides that for the purpose of determining the real question in controversy between the parties or correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such a manner as it directs as to cost or otherwise as are just. This discretion maybe exercised at any stage of the proceedings, that is to say, before or at the trial, after the trial, after judgment or on appeal. This position has

been rested in various cases notably; *Bosire Ongero vs Royal Media Services* 2015 KLR. In any considered view, the application is merited as it meets the required standard."

19. They state that the Ruling did not bar them from amending. It is their case that amendments cannot be allowed where they will cause injustice to the other side.

20. Theory rely on *Nicholas Kiptooo Arap Koriri Salat vs Independent Electoral and Boundaries Commission & Others* (2013) eKLR, held as follows: -

> " ..... it is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create harsh sips and unfairness."

21. They relied on the case of *Almond Resort Ltd -vs- Mohamed Mahat Kuno* (2019) eKLR. They pray that were reach substantive justice.

Analysis

22. The prayers that were relied on to state that the court had declined to leave were set out in the application dated 24/7/2021as doth: -

    a. Geoffrey Makana and Kanza Estates Ltd. Be joined to his suit as the 2nd and 3rd Defendants/ Respondents.

    b. The plaintiffs be granted leave to further amend the amend plaint dated 23/4/2019.

23. Justice A K. Ndung'u in his decision given on 27/9/2021, and reported in *Josephat Mwangi Moracha & another v HFC Limited* [2021] eKLR declined on of the prayers for amendment. In paragraph 71, 73 and74 stated as doth:-

> " 71. Without annexing a draft further amended plaint, the respondents herein are deprived of the opportunity to determine if a new or inconsistent cause of action is introduced or a vested interest or accrued legal right has affected and that the sought amendment could be allowed without injustice to them. In the circumstances, the failure to annex the draft further amended plaint is fatal to the plaintiffs' application as it is incapable of an informed response from the respondents. This prayer is not available to the plaintiffs.
>
> 73. Granted, circumstances have substantially changed with the advent of the sale of the subject property by public auction. This, I suppose, is the reason the plaintiffs sought to amend the amended plaint to reflect the changed circumstances and to include the proposed 2nd and 3rd defendants.
>
> As stated earlier, the attempt to amend vide this application has come a cropper as the plaintiffs failed to include a draft annexed further amended plaint.
>
> Without a further amended plaint there exists no nexus to connect the proposed 2nd and 3rd defendant to this litigation.
>
> 74. I agree entirely with the submission by counsel for the 2nd and 3rd proposed defendants that the factual circumstances attendant to the issues in dispute in this suit have admittedly substantially changed yet the plaintiffs have

not updated their primary pleading by way of further amendment and the application is therefore for all intents and purposes predicated on a vacuum."

24. My understanding is that the court declined to consider an amendment in the absence of a draft. Further amended plaint. It has nothing with the doctrine of res judicata. An application is res judicata, if it is the same prayers sought. An application for amendment does not buy itself become res judicata unless it is the same amendments that were sought. That is why a pleading may be pleaded several times.

25. Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of Res Judicata in the following terms: -

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

26. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:i.''Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.ii.Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.iii.Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.''

27. In the dicta in *In re Estate of Riungu Nkuuri (Deceased)* [2021] eKLR the court stated as follows:

> " The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
>
> (a) The suit or issue was directly and substantially in issue in the former suit.
>
> (b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> (c) Those parties were litigating under the same title.
>
> (d) The issue was heard and finally determined in the former suit.
>
> (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

28. In the case of *Attorney General & another ET vs* (2012) eKLR where it was held that;

> "The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi s NBK & Others* (2001) EA 177 the court held that

"parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".

In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju v Wambugu and another* Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....".

29. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of *Henderson v Henderson* (1843-60) All E.R 378, observed thus:

> "...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

30. Res judicata applies to applications just like suits. In the case of *Julia Muthoni Githinji v African Banking Corporation Limited* [2020] eKLR the court stated thus:

> 14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was resjudicata and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

31. Similarly, in *Maumbwa & 3 others v Kisemei* (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment *Maumbwa & 3 others v Kisemei* (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) the court stated doth:

> By comparing the two applications and the authorities on res judicata, it is clear to me that the issues being canvassed in the application dated 11th January 2021 is res judicata. The issues in issue in that application were directly and substantially in issue in the application dated 13th September 2017. These issues relate to the same parties and these issues have been tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process.

32. I hold and find that the declining to allow amendment was not decided on merit but a technicality which has now been cured. Courts should allow amendments freely unless this prejudice the other side. For example, even after allowing this amendment, the Plaintiff can still move the court for further

amendment. This is so long as the amendment is not the same as the last. Without a draft amended plaint in the first matte, it is not possible to know whether it is the same amendment.

33. There is no replying affidavit setting out prejudice the Defendant will suffer. In any case the matter has not been heard. The Defendant has an opportunity to respond to the amendment.

34. The question is what do we do with the amendment carried out? My position is that we do nothing? The amendment was a second amendment done under order 8 Rule 1. The said Rule provides as follows: -

> " A party may without leave of the court, amend any of his pleadings once at any time before the pleadings are closed."

35. The amendment without leave is a nullity. It does not need to be set aside. The application to have it set aside was unnecessary. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

36. Why then will the defendant file an application to set aside a nullity? It is probably or avoidance of doubt *ex abundafi cautela.* The court frowns upon wasting time dealing with a nullity. The amendment of 4/12/2022 was a nullity and his no legal effect. The amended plaint dated 23/4/2019 is still the operative Amended plaint. The parties could have easily dealt with this at pretrial conference under order 11 Rule 7 of the *Civil Procedure Rules*.

37. Nevertheless, the amendment sought is a proper one. Though we may not deem the same as filed, it is useful as evidence of intended amendments. In *Dalbit Petroleum Limited vVictory Construction Co. Ltd* the court, L Kimaru J, as then he was stated as doth: -

> " The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs."

38. In *Eastern Bakery vs Castelino* [1958] EA 461, the Court of Appeal of East Africa held at page 462 as follows:

> " It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing 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."

In *Simonian vs Johar* [1962] EA 336, at page 343, Crawshaw J.A. who was delivering the leading opinion of the Court of Appeal in the case had this to say regarding amendments of pleadings, in circumstances where the respondent had complained that he would suffer injustice:

> "I fail to see what injustice could result to the respondents or any of them by allowing the amendments. The trial has not started. Amended pleadings in defence would be no more onerous than pleading to a new suit. Abortive pleadings to date can be compensated in costs. The mere fact that the plaintiff may succeed on the amended pleadings where he would have

failed on the original pleadings is not an "injustice" to the defendants. As to convenience, it seems to me that there would be no greater convenience to the respondents in filing amended written statements of defence than in filing defences to a new suit."

39. I cannot resist the urge to allow the Application for Amendment. It is merited. It does not mean that when the Plaintiff had an abortive start, he cannot have a second chance.

40. As regards to costs, the same follow the event. The event in this case is reinstatement of an unopposed Appeal. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No. 4 of 2012; [2014] eKLR the supreme court stated 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, prior-to, during, and subsequent-to the actual process of litigation."
>
> "[22] 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. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant."

41. In this matter none of the parties are entitled to costs. The order commending itself is that parties shall bear their own costs.

Determination

42. In the circumstances I make the following orders: -

    a. The application dated 22/11/2022 was unnecessary and is accordingly dismissed.

    b. The amendment plaint dated 14/10/2022 is a nullity. The operative document properly on record is the Amended plaint dated 23/4/2019.

    c. Leave is granted to the plaintiff to further amend the Amended Plaint within 15 days from the date hereof.

    d. The Defendant to further Amend defence within 15 days from the date of service.

    e. The plaintiff to file reply to Further amended defence within 7-days of service.

    f. Each party to bear their won costs.

    g. The matter shall be mentioned on 7/5/2024 before the Judge in Kisii for pre- trial directions.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Mutua for the Defendant

Mr. Obule Victor for the Plaintiff

Court Assistant - Brian