



**Mwau v Nation Media Group Limited & 2 others (Civil Case
1 of 2005) [2024] KEHC 762 (KLR) (Civ) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 1 OF 2005**

**JN MULWA, J
FEBRUARY 1, 2024**

BETWEEN

JOHN HARUN MWAU PLAINTIFF

AND

NATION MEDIA GROUP LIMITED 1ST DEFENDANT

WILFRED KIBORO 2ND DEFENDANT

WANGETHI MWANGI 3RD DEFENDANT

RULING

1. This suit was instituted by a plaint dated 31/12/2004 and amended by an undated Amended plaint filed on 15/07/2005. The plaintiff who is the Applicant, by the motion dated 16/05/2023 seeks leave of court to further amend the said Amended plaint upon grounds stated at its face stating that the intended amendments would simplify the case for the court due to its age, and will not prejudice the Defendants.
2. The Applicant by his supporting affidavit sworn on 16/05/2023 deposes that the initial plaint was filed in a hurry, did not set out all material facts hence wishes to set the record clearly and set out the real issues in controversy in detail.
3. In opposition to the application, the Defendants filed Grounds of Opposition dated 28/09/2023 stating that: -
 1. The defendants shall be deprived of their rights to rely on the [Limitation of Actions Act](#) in the event that the amendments are allowed.
 2. The proposed amendments introduce new particulars and new claims that are time barred.



3. The application has been brought late in the day, is made in bad faith and is an abuse of court process and will delay the hearing and determination of the dispute.
4. The plaintiff is represented by M/S B. M. Musyoki & Co. Advocates while the Defendants are represented by M/S Mohammed Mungai LLP Advocates.

On 3/10/2023 parties were directed to file submissions within 7 days. At the time of preparing this ruling long after the time granted, none of the parties had filed submissions.

5. I have considered the Applicants supporting affidavit and the grounds of opposition filed by the Respondents.

Amendment of pleadings is provided for Under Order 8 of the *Civil Procedure Rules* (CPR). This could be with leave or without leave once, at any time before pleadings are closed.

The plaintiff by the Application before me seeks leave to amend the undated Amended Plaintiff upon grounds I have already stated.

6. Order 8 Rule 5 of *CPR* gives the court general powers to amend as

5 (1) For the purpose of determining the real question in controversy between the parties, or of 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 manner as it directs and on such terms as to costs of otherwise as are just.

7. Before allowing amendments as proposed by an Applicant, it is prudent to look at the purposes and intent of amendments of pleadings.

The court in *Institute for Social Accountability & Another v Parliament of Kenya & 3 others* [2014] eKLR, held as follows: -

“The object of amendment is to enable the parties to alter their pleadings so as to ensure that the litigation between them is concluded, not on false hypothesis of the already pleaded or the relief or remedy claimed, but on basis of the true state of the facts which the parties redly and finally intend to rely on....”

8. However, while the court would ordinarily allow amendments, it will also consider the delay and prejudice that the opposite party may suffer as a result of such amendments, if allowed.
9. Further, if the amendments tend to, or introduce new causes of action or inconsistent causes of action, the court will be reluctant to allow such amendments – *Lewar Ventures Limited v Equity Bank (Kenya) Ltd* [2022] eKLR.

I have considered the said Amendments proposed in the draft Further Amended Plaintiff.

10. Generally, these amendments in my considered view seek to add new causes of actions which are now time barred.

It is trite that a suit based on defamation ought to be filed within twelve months.

11. The court previously granted leave to the Applicant to amend its pleadings, which it did by the Amended Plaintiff. It seized the opportunity to put clarity to the then filed pleadings by adjusting and re-adjusting its claim against the defendant’s pleadings.

Once again, the Applicant seeks further court’s indulgence to do that which it did, or ought to have done.



Clearly, after ten years, the Defendants will be forced to go back to the root cause of the suit and seek to adjust their statement of defence should the court allow the proposed amendments – *Kassam v Bank of Baroda (Kenya Limited)* [2002] eKLR.

12. As expected by any litigant, this not only prolongs the hearing and determination of the case, but also is a waste of time and resources, to them as well as to the court.

In the proposed amendments, the applicant has not stated that it was not seized of the said material facts ten years ago nor why after such a long period of time, it thinks it proper and fair to introduce the new amendments. Could it be lack of diligence on the part of the Plaintiff, the drafters or his legal counsel at the time?

13. The court in *Kassam v Bank of Baroda* (*supra*), for similar conduct by the applicant, held that balancing factors must be considered as hereunder: -

“in some of these instances, there is no practical way to allow the amendments and at the same time avoid the prejudice.

In others, an adjournment may be necessitated. In its turn, this may bring with it other evils such as further delay of the case and concomitant expense, disruption of the court calendar and so on...”.

14. It is trite that the court has discretion to allow amendments at any stage of the proceedings before judgment, if the application is made in good faith, and does not occasion prejudice to the opponent, which cannot be compensated by an award of costs. Additionally, the court must be persuaded that the proposed amendments do not change the character of the suit or defence, and that the object for the amendment is not an abuse of the court process.

15. The court of Appeal rendered itself in *St Patricks' Hill School Ltd* [218] eKLR on the principles governing amendments of pleadings thus: -

- a. The power of the court to allow amendments is intended to determine the time substantive merits to the case.
- b. The amendments should be timeously applied for;
- c. Power to amend can be exercised by the court at any stage of proceedings;
- d. That as a general rule however, late amendment is sought to be made should be allowed if made in good faith provided costs can compensate the other side.
- e. The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act which subject however to powers of the court to still allow an amendment withstanding the expiry of current period of limitation.”

16. Upon consideration of the respondent’s grounds of opposition, I am persuaded that the proposed amendments will introduce totally new claims and reliefs different from the original claims, as well as causing injustice to the defendants, as the claim will be reframed, in turn demanding of the defendants to reframe their statement of defence, and probably seek new or fresh witnesses, who due to time lapse may not be readily available – see *Ivita v Kyumbu* [1984] KLR 441.

17. Further, the inordinate delay in bringing the Application has not been explained in any way after the court allowed amendments earlier on by the Amended Plaintiff. There being no reason at all for



the unexplained delay, it could only be deduced that it is brought without good faith. Costs cannot be used to compensate a wronged party in all circumstances. I therefore find that the prejudice and harm that may be caused to the Respondents/Defendants should the Application be granted cannot be compensated by costs. The prolonged and in excusable delay will no doubt cause injustice to the Respondents, the original plaint having been filed nineteen years ago.

For the foregoing, I find no merits in the Application dated 16/05/2023. It is dismissed with costs to the Respondents.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY, 2024.

J. N. MULWA

JUDGE

