



Chepyegon v Joshua Cheburet Kiptum t/a Josesta Enterprises (Civil Appeal E014 of 2023) [2024] KEHC 2670 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL E014 OF 2023
RB NGETICH, J
MARCH 14, 2024**

BETWEEN

MUSA CHEPYEGON APPELLANT

AND

JOSHUA CHEBURET KIPTUM T/A JOSESTA ENTERPRISES ... RESPONDENT

JUDGMENT

1. The plaintiff instituted this suit against the defendant on 29th March, 2021 for monetary claim of Kshs 240,000/=. The defendant acted in person until 8th May, 2023 when he appointed the firm of Tarigo & Company to come on record.
2. The suit did not proceed for 2 years as the defendant proposed an out of court settlement. When the matter came up for hearing on the 5th June, 2023, the plaintiff's advocate sought an adjournment and leave to amend the plaint to regularize the name of the defendant. The application was allowed which triggered this appeal by the defendant. By ruling delivered on 5th June 2023, the trial court allowed amendment so as to add an alias name Samwel Chepyegon to the initial name of the applicant.
3. The Appellant herein Musa Chepyegon being dissatisfied by the said ruling filed this Appeal on the following Grounds:-
 - i. That the learned Magistrate erred in law and in fact in allowing the application by the Respondent to amend its Plaint after close of pleadings.
 - ii. That the learned Magistrate erred in law and in fact in finding that the Appellant would suffer no prejudice if the Respondent amended its Plaint to add an alias indicating the Appellants actual name.



- iii. That the learned Magistrate erred in law and in fact in finding that the said amendment allowed for the Appellant to respond to it despite this being an application made past the intended time for filing.
 - iv. That the learned Magistrate erred in law and in fact in allowing the application for amendment despite it being sought in order to mislead the court on the identity of the defendant as the same was sought as a last resort to ensure the Appellant is placed as the actual defendant.
 - v. That the learned Magistrate erred in law and in fact in failing to consider Order 8 rule 3(3) that guides on the parameters for allowing such an amendment.
 - vi. That the learned Magistrate has shown elements of biasness against the Defendant from the time he took over the matter, more so enter proceedings of 20th February, 2023, 8th May, 2023 and 5th June, 2023.
4. The Appellant prays:-
- a. The Appeal is allowed.
 - b. The Ruling of the Subordinate Court is set aside with Costs.
 - c. The Costs of this Appeal is borne by the Respondent.
 - d. Any other Orders the Honourable Court deems just and expedient.
5. The appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 22nd January, 2024. The Appellant submits that it is trite law that an amendment be made either before close of pleadings without leave of Court, but once the pleadings are closed, the party intending to amend a pleading has to do so only with leave of court. That in this case, the Respondent made an oral application after the close of pleadings on 20th February 2023 when he was supposed to proceed with the hearing but instead made the application for the amendment which was an afterthought to effectively delay the matter and mislead the court as to the Appellants capacity.
6. The Appellant submits that the Amendment was intended to infringe upon the rights of the Appellant and was not in line with Order 8(3) of the Civil Procedure Rules on the ground that the time limited for amendment was long overdue by a period of 6 months from the time when pleadings were closed. That the matter was previously to proceed for hearing on 8th May, 2023 when counsel for the appellant came on record; that the respondent would have made the application to amend but did not apply.
7. That under order 8 rule 3(3) of the *Civil Procedure Code*, an amendment should be a genuine mistake and should not mislead or cause any reasonable doubt as to the identity of the person to sue or intended to be sued.
8. That when the matter came up for call over, the respondent confirmed that the matter was ready to proceed but unfortunately, they ambushed the defence by submitting that they wanted to amend pleadings while all along they were ready to proceed and the pleadings and all the documents they sought to rely on bore the name Musa Chepyegon.
9. The Appellant referred to *Halsbury's Laws of England, 4m Ed.* (minus), Vol, 36(1) at paragraph 76, concerning amendments of pleadings as hereunder: -

“...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 later stage of the trial if on analysis of 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...

10. The appellant submits that there was no genuine reason for the amendment but was a delay tactic employed by the Respondent to ensure that the Appellants case does not proceed and frame him to fit their narrative and as sworn by the amended affidavit sworn by the Respondent, he did not even know the Appellants name yet he claims to have advanced him a large sum of money.
11. That it would be highly prejudicial to the Appellant as he was eager to conclude the matter and have him absolved of all claims made by the Respondent. He relied on the case of *John Nyagaka Osoro v Reynold Karisa Charo & 5 others* [2021] eKLR that quoted the Court of Appeal in *Central Kenya Limited v Trust Bank limited* (2000)2 E.A 365 and argued that the amendment is highly unjustifiable and unfair.
12. On whether the court was biased, the appellant referred this court to proceedings of 20th February 2023 and submit that the court declined to acknowledge the loss experienced by the Appellant and accord him necessary support on extension of time and on 8th June,2023, the Court ordered the Appellant to pay costs despite the fact that the appellant's counsel had just come on record and needed to familiarize himself with the case; and finally, the ruling the subject of this appeal. He submitted that there is clear bias and urged this court to set aside the ruling herein and subsequent amendment.

Respondnet's Submissions

13. The Respondent filed their submissions dated 24th November, 2023. On whether the learned magistrate erred in law and fact in allowing the application by the Respondent to amend its plaint, they state that the application for leave to amend plaint was made on 5th June 2023 when the matter had not been scheduled for hearing and the court has the discretion to grant leave to amend pleadings at any stage of the proceeding.
14. The Respondents relies on the provisions of Article 159(2) (d) of the *Constitution* and argues that the amendment made on the plaint is not likely to cause any injustice or prejudice to the appellant and while opposing the application Mr Tarigo did not state any injustice the appellant was likely to suffer if amendment was allowed and cited the case of *Lewar Venures Limited v Equity Bank (Kenya) Limited* (2022) eKLR.
15. On whether the learned magistrate failed to consider order 8 rule 3 (3) of the *civil procedure Code* that guides on the parameters for allowing such an amendment, the respondent submits that it came to the plaintiff's attention that the appellant has two names and sought leave of court to amend the name by adding an alias. That the learned magistrate took into consideration the provisions for order 8 rule 3(3) of the *Civil Procedure Code*.
16. The respondent submits that this court's discretion to allow or refuse a party to amend pleadings is discretionary as was held in the case of *Andrew Wabuvele Biketi vs. Chinese Centre for the Promotion of Investment Development & Trade in Kenya Limited & 2 Others* 120151 eKLR. Further that the discretionary power of the court to allow or refuse an application for amendment of pleadings should be exercised judicially and in consideration of the facts of the case in particular and placed reliance on the case of *Bosire Ogero v Royal Media Services* 120151 eKLR among other cases cited.



17. In respect to argument that the court was biased, the respondent submits that on 20.2.2023, the matter was listed for a mention for fixing a hearing date and the Appellant prayed for a date in 3 months' time as he was bereaved and the court allowed with a condition that the case shall proceed on 8/5/2023.
18. The respondent further submitted that on 8th may 2023, Mr Tarigo sought adjournment and the case was listed for 5th may 2023 and on 5th may 2023, the trial court allowed the plaintiff/Respondent leave to amend the plaint and the Defendant/Appellant was also granted corresponding leave to amend defence if need be; reason given for the court's decision was that no prejudice shall be suffered by the defendant if the plaintiff is granted leave to amend the plaint. The respondent urged this court to dismiss this appeal lack of merit.

Analysis And Determination

19. I have perused and considered the record of appeal together with the rival submissions by the parties and find the following as issues for determination: -
 - i. Whether the trial court erred in allowing the Plaintiff/Respondent leave to amend the pleadings and if the same was prejudicial to the Appellant/Defendant.
 - ii. Whether there is demonstration of bias towards the appellant by the trial magistrate.
20. The general power to amend is contained in Section 100 of the *Civil Procedure Act* which provide that 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 necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.
21. In view of the above, the court has discretion to allow amendment at any stage of trial for purposes of determining real question or issue raised by the parties.
22. Section 100 of the *civil procedure Act* is elaborated in Order 8 of the *Civil Procedure Rules* of 2010 which provide as follows: -
 - “ 3. Amendment of pleading with leave [Order 8, rule 3.]
 - (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may 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, allow any party to amend his pleadings.
 - (2) Where an application to the court for leave to make an amendment, such as is mentioned in sub rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
 - (3) An amendment to correct the name of a party may be allowed under sub rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.



- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub rule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- (5) An amendment may be allowed under sub rule (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 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.
23. A look at Order 8 Rule 3 (1) will demonstrate that an amendment can be allowed at any stage of the proceedings. There is no doubt that a party can be allowed to amend pleadings even where hearing in a matter has commenced. This however is subject to court's discretion. It is the duty of the court to weigh the merits of the application and exercise its discretion in a manner that accord justice to the parties.
24. In the case of *Central Bank of Kenya Ltd v Trust Bank Ltd* [2002] EA 365 where the Court of Appeal stated that the only considerations to be taken by the court in an application for leave to amend are:
- (i) Prejudice to the other parties;
 - (ii) Whether the amendments would unduly delay the resolution of the issue in controversy between the parties;
 - (iii) Whether the amendments are necessary for the just determination of the suit.
 - (iv) That delay is not a ground for declining leave to amend unless the delay would prejudice the other parties.
25. In view of the above, the above factors are to be considered by the court in determining whether to allow the applicant's prayer to amend pleadings. On perusal of the court record, the hearing in this matter was yet to commence and the appellant was granted corresponding leave to amend defence if need be. The Appellant's argument is that the application to amend came late. However, it is worth noting that order 8 allow amendment at any stage of trial. Further the appellant herein did not demonstrate before the trial court any prejudice that was to be occasioned by the amendment. On the other hand, the plaintiff/Respondent is claiming an amount of Kshs. 240,000/= from the appellant and in view of the fact that he has the burden of proving the claim, he stood to suffer prejudice if the applicant was declined. From the foregoing, I find that the trial magistrate rightfully exercised discretion by allowing amendment and granting corresponding leave to the appellant to amend defence if need be.
26. On whether the court was bias or has acted partially while dealing with this matter. I take note of the fact that the appellant never raised the issue with the judicial officer. The issue of bias nor application for the judicial officer to recuse himself for any reason was not raised or filed. I will not therefore consider that ground of appeal.

Final Orders: -

27.
1. The appeal herein is hereby dismissed.
 2. Costs to the respondent.



**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 14TH
DAY OF MARCH 2024.**

RACHEL NGETICH

JUDGE

In the presence of

Ms Kirui holding brief for Tarigo for Appellant.

No appearance for Respondent.

Elvis, Court Assistant.

