



**Bottini v Equity Bank Kenya Limited & another (Civil Appeal
61 of 2022) [2023] KEHC 2013 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2013 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 61 OF 2022
SM GITHINJI, J
MARCH 9, 2023**

BETWEEN

GIANCARLO ERNESTO BOTTINI APPELLANT

AND

EQUITY BANK KENYA LIMITED 1ST RESPONDENT

CENTRAL BANK OF KENYA 2ND RESPONDENT

*(Appeal from the whole decision and Ruling and Order made on the 16th day of
June 2022 by Hon. Irene Thamara (RM) in Malindi CMCC No. 287 of 2019)*

JUDGMENT

1. This appeal arises from the ruling and orders made on June 16, 2022 by Hon. I.W Thamara (RM) in Malindi CMCC No. 287 of 2019 wherein the magistrate dismissed the appellant's application seeking to amend the plaint.
2. Aggrieved with the finding, the appellant preferred an appeal based on the following grounds;
 1. That the learned magistrate erred both in law and in fact in holding that by introducing particulars of negligence the plaintiff will be introducing a new cause of action while in reality, the particulars did not alter the cause of action but rather shade light on it (sic).
 2. That the learned magistrate erred in holding that intended amendments were likely to cause prejudice to the defendant when would only help court in addressing the cause of action with particulars and clearly (sic).
 3. That the honourable resident magistrate, misconstrued the applicable principles in decided case cited with the material facts of the present case and set of circumstances thereby denying



the plaintiff the very necessary opportunity to set out correct facts giving rise to the cause of action already pleaded hence prejudicing the plaintiff.

4. That the learned magistrate failed to appreciate the fact that the cause of action though a tort, it also had elements of breach of contract in that he sought restitution besides damages.
 5. That the honourable learned magistrate failed to appreciate that a duty of care by the defendant owed to the plaintiffs by the defendant was in tort of negligence and it was only the particulars that were missing which the amendment intended to cure.
 6. That the learned magistrate erred in saying that the amendments would enable the plaintiff to defeat the provisions of S. 4 (2) of the *Limitation of Actions Act* when it is clear the suit was in the year 2019, barely one year from when the cause of action arose in 2017.
 7. Clearly the honourable magistrate misapprehended the facts, the applicable statutory provisions of the law and precedents thereby reaching at a wrong conclusion to the prejudice of the Plaintiff/Appellant.
3. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses during the trial and should therefore make due allowance for that. This duty was well stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”

4. The discretion of this court to interfere with the determination of the trial court also exercising its discretion should be exercised within the confines of the principles set out by Sir Clement De Lestang, VP in *Mbogo v Shah* 1968 EA 93, where he held as follows: -

“I think it is well settled that this court will not interfere with the exercise of the discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

5. The appeal was canvassed by way of written submissions. I have considered the grounds on the Memorandum of appeal, submissions as well as the authorities relied on by the parties and the issue arising for determination is;
1. Whether the trial court erred in finding that the intended amendments would defeat the provisions of Section 4 (2) of the Limitations of Actions Act?



6. Order 8 rule 3 of the Civil Procedure Rules provides for amendment of pleadings with leave of the court as follows: -

“(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.”

7. Further, Order 8, rule 5 gives the court the general power to amend.

“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 or otherwise as are just.”

8. For the court to allow the amendment, it has to first look into the intent and purpose of the amendment and whether any prejudice will be occasioned to the other party or parties in dispute and whether such prejudice can be compensated by way of costs.

9. In Institute for Social Accountability & another v Parliament of Kenya & 3 others [2014] eKLR the Court held: -

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”

10. The Court of Appeal outlined the principles for consideration in amendment of pleadings in Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR as follows: -

“The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows: -

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend



can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that 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 Limitation Acts.”

11. The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows; that the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.
12. I have evaluated the proposed intended amendments. The appellant wishes to amend the plaint to include the exact date of fraud and particulars of negligence and loss which relate to the main issue in dispute. In my view, these amendments will alter the initial cause of action. At the time of filing of the suit, there was no date indicated on when the alleged fraud took place. In essence then, the amendment to include a date in 2017 clearly goes to the core of section 4 (2) of the *Limitation of Actions Act*. The upshot of the above is that I find no merit in the appeal and the same is hereby dismissed with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 9TH DAY OF MARCH, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of;

1. Ms Vanani for 1st Respondent
2. Mogaka Bwongaki and Co are for the Appellant (absent)

