



**Mwangi v Trivedy & another (Civil Case E181 of 2021)
[2024] KEHC 14737 (KLR) (Civ) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14737 (KLR)

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

**CIVIL
CIVIL CASE E181 OF 2021**

CW MEOLI, J

NOVEMBER 21, 2024

BETWEEN

DR JOSEPH C MWANGI PLAINTIFF

AND

DR JYOTEE TRIVEDY 1ST DEFENDANT

LIONS SIGHT FIRST EYE HOSPITAL 2ND DEFENDANT

RULING

1. The Plaintiff herein, Dr. Joseph C. Mwangi (hereafter the Applicant) took out the Notice of Motion dated 31.05.2024 (the Motion) expressed to be brought under Sections 1A, 1B, 3A, 63(e) and 100 of the *Civil Procedure Act* (CPA) and Order 8, Rules 3(1), 5 and 7, and Order 51, Rule 1 of the Civil Procedure Rules (CPR). Seeking leave to amend his plaint dated 21.07.2021 and consequently, leave to file a supplementary list and bundle of documents and that the draft amended plaint annexed to the Motion be deemed as duly filed upon payment of the requisite court fees.
2. The Motion is premised on the grounds on its face and the affidavit of the Applicant. In summary, he stated that at the onset, he instructed his advocates on record to institute the present suit by way of a plaint dated 21.07.2021 seeking various reliefs against Dr. Jyotee Trivedy (hereafter the 1st Respondent) and Lions Sight First Eye Hospital (hereafter the 2nd Respondent) for medical negligence. He stated that upon service of summons, the Respondents entered appearance and filed their statements of defence separately, denying the key averments in the plaint and liability. That the parties herein equally filed their respective pre-trial documents, in readiness for hearing.
3. He further swore that when the suit came for hearing on 16.10.2023, the parties' respective counsels collectively applied to have the matter referred for Court Annexed Mediation with a view to exploring an alternative means of resolving the dispute, which application was allowed. The Applicant averred



- that unfortunately, the Court Annexed Mediation process was unsuccessful, resulting in referral of the matter back to the court. He further averred that on 2.05.2024 the suit was scheduled for hearing on 10.06.2024.
4. That during the pendency of the Court Annexed Mediation, the Applicant discovered the existence of crucial material that was not previously available to him at the time of filing suit. Hence the instant Motion, which seeks to amend the plaint as well as the accompanying documents accordingly, to reflect the new position.
 5. The Applicant averred that the amendments sought are necessary for the ventilation of his claim as well as the determination of all the issues in controversy amongst the parties herein, and that unless the orders sought are granted, he stands to suffer prejudice. Adding that his claim will further be at risk of being marred with inconsistencies. That separately, the Respondents herein do not stand to be prejudiced if the instant Motion is allowed.
 6. To oppose the Motion, the 2nd Respondent relied on the replying affidavit sworn by its General Manager, Rizwana Peerbhoy, on 9.08.2024. Therein, the deponent stated that the Motion constitutes an abuse of the court process, is an afterthought and has been filed in bad faith, the Applicant having moved the court too late in the day. The deponent further stated that the amendments sought if granted; will certainly prejudice the 2nd Respondent in particular. The deponent additionally stated that the nature of amendments sought cannot be deemed to be matters not within the prior knowledge of the Applicant, as they relate to special damages and damages for loss of current and future earnings, all of which would ordinarily be expected to constitute matters within his knowledge. That the amendments sought will neither assist the court nor the parties in ventilating the real issues in controversy. That in the present instance, no reasonable grounds have been advanced to justify granting of the prayers sought in the Motion.
 7. The Applicant rejoined with a supplementary affidavit sworn on 11.11.2024 averring inter alia, that prior to losing his eyesight as a result of the alleged medical negligence on the part of the Respondents, he worked as a consultant specialist in Nairobi County, earning a monthly salary of approximately Kshs. 200,000/-. And that the evidential material pertaining to his claim for loss of current and future earnings was not available to him at the time of filing suit. The Applicant restated his earlier averments that the recent discovery of the said material has necessitated the instant Motion, that the amendments sought are necessary for the proper determination of the issues in dispute, and further restating that the Respondents do not stand to suffer any grave prejudice if the said Motion is allowed. In closing, the Applicant stated that the Motion has been brought in good faith.
 8. The parties were directed to file and exchange written submissions on the Motion. To support the Motion, counsel for the Applicant anchored his submissions on the decision in *Institute for Social Accountability & another v Parliament of Kenya & 2 others; Commission for the Implementation of the Constitution* (Interested Party) [2014] KEHC 7356 (KLR); Section 100 of the CPA; and Order 8, Rule 3 of the CPR, on the amendment of pleadings. Counsel further cited the decision in *Rose Kandie & Jackson Kattam v Esther Jepkemboi Kiplangat* [2016] KECA 602 (KLR) on the discretionary power of the court in considering an application seeking to amend pleadings.
 9. Counsel submitted that in the present instance, the Applicant seeks to amend his plaint to include a prayer for special damages and loss of earnings, which amendments are not only necessary but equally merited, on the basis of the earlier averments by the Applicant. Counsel here reiterating that the material relied on in seeking the amendments was not available to him at the time of instituting the suit. And that the Applicant has since obtained the statement of accounts from the various hospitals where he worked, to support the additional prayers upon which amendment is sought. Counsel additionally



submitted that the amendments sought are not aimed at introducing a new cause of action, rather, they are purely intended to bring clarity regarding the quantification of loss suffered by the Applicant, as a result of the alleged medical negligence on the part of the Respondents.

10. On the subject of prejudice, counsel reiterated the averments earlier made in the supporting affidavit that the Respondents do not stand to be prejudiced substantially or at all, if the order seeking leave to amendment is granted. Counsel citing the decision in *Eastern Bakery v Castelino* [1958] E.A. 461 where the Court held that an order for the amendment of pleadings would not be granted if the same would result in grave prejudice to the opposing party. Counsel added that in any event, the Respondents would be at liberty to seek leave to amend their respective statements of defence if they so desired. Counsel further asserting that the Motion has been brought in good faith, notwithstanding the delay, and therefore urged that the court exercises its discretion by allowing the Motion.
11. In urging the court to dismiss the Motion, the 2nd Respondent's counsel based his submissions on the decision in *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] KEHC 2539 (KLR) on the principles for consideration by a court, in an application seeking leave to amend pleadings. Counsel proceeded to echo his client's sentiments raised in the replying affidavit, that the Motion has been brought more than six (6) years since the cause of action arose and over three (3) years since the suit was filed, which constituted inordinate and inexcusable delay. Counsel further submitted that contrary to the Applicant's assertions, the amendments sought are in respect to matters which were well within the knowledge of the Applicant at all material times and hence should not be allowed. Counsel equally faulted the Applicant for failing to annex a list of the proposed supplementary documents he wishes to file subsequent to the amendments, stating that in the circumstances, there was no way of ascertaining the nature of documents intended to be relied on. On those grounds, counsel urged the court to dismiss the Motion with costs to the 2nd Respondent.
12. The record shows that in the course of the proceedings in respect of the Motion, the 1st Respondent's counsel indicated and confirmed that they would not be opposing the said Motion. However, the court observed that at the final stage, the said counsel filed written submissions in opposition thereto. Notwithstanding the contradictory position taken by and on behalf the 1st Respondent above, the court will nonetheless consider his submissions which now form part of the record. The counsel equally relied on Order 8, Rules 3 and 5 of the CPR on the general power of the court in applications for amendment of pleadings.
13. Counsel further cited the decision in *Kyalo v Bayusuf Brothers Limited* [1983] K L R 229 where it was held that an application seeking to amend pleadings should only be allowed where brought within reasonable time. It is the submission by counsel that in the present instance, the Motion has not only been brought too late in the day, but is a mere afterthought, purely aimed at delaying the progress of the suit. That if allowed, the proposed amendments will in turn introduce new facts and a new cause of action and will greatly prejudice the Respondents herein. Further relying on the decision in *Central Kenya Ltd v Trust Bank Ltd & 4 others* [2000] KECA 367 (KLR) on the principles pertinent to the granting of leave to amend pleadings. For those reasons, counsel for the 1st Respondent echoed the sentiments by the 2nd Respondent that the Motion ought to be dismissed with costs.
14. The court has considered the rival affidavit material, the contending submissions on record, and the authorities cited by the parties. What is primarily sought in the Motion is leave to amend the plaint, to include a prayer for special damages in the sum of Kshs. 2,000,000/- and a further prayer for damages for loss of current and future earnings to the tune of Kshs. 38,471,192/- for a period of 12 years from 2015 until 2027 when the Applicant attains the retirement age of 65 years; and further, consequent leave to file supplementary documents.



15. Order 8, Rules 3 of the CPR provides that:

- (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 subrule (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 subrule (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.
- ...
- (5) An amendment may be allowed under subrule (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”.

16. Order 8, Rule 5 on its part expresses that:

- (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.
- (2) This rule shall not have effect in relation to a judgment or order.”

17. From a reading of the foregoing provisions, it is clear that the courts have wide and unfettered discretion to allow the amendment of pleadings at any stage of the proceedings before judgment is entered, for purposes of determining the real question in controversy. Nevertheless, the said discretionary power ought to be exercised in a judicious and just manner.

18. The foregoing position is echoed in Bullen Leak and Jacobs Precedents of Pleadings, 12th Edition page 127:

“...the power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise.”



19. The Court of Appeal in the case of Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR citing the above treatise observed as follows:

“A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

20. In light of the above, the question to be determined here is whether the Applicant ought to be granted leave to amend his pleadings and the consequential prayers in his Motion. The plaint was originally filed on or about 21.07.2021 (Annexure “JCM-1a”) followed by the filing of the respective statements of defence by the 1st and 2nd Respondents together with the requisite pre-trial documents. The record further confirms that while the matter had been certified ready for hearing, it was referred to Court Annexed Mediation by the order made on 16.10.2023. The Mediation process failed, resulting in the referral of the matter back to court. The record shows that the matter was thereafter scheduled for hearing on 10.06.2024. However, before the scheduled hearing date, the Applicant moved this court by way of the instant Motion.
21. While the court's discretion in allowing amendment is wide, the amendments sought at this state relate to special damages and damages for loss of earnings/future earnings, both of which the Applicant seeks to include as part of the reliefs sought in the plaint. The said proposed amendments are reflected in the draft amended plaint marked as annexure “JCM-3” to the Applicant's supporting affidavit.
22. The Applicant claimed that the material relating to the proposed amendments was not within his knowledge at the time of filing the suit. Upon its perusal of the material annexed to the Applicant's supplementary affidavit, specifically the statement of accounts indicating income purportedly earned by the Applicant between the years 2014 and 2019 (annexure “JCM-1”), it is apparent that the said material was or ought to have been well within the knowledge of the Applicant at all material times. There is no credible proof proffered by him to indicate that the said statement of accounts was either unavailable or inaccessible to the Applicant at any given time prior to the suit and present motion. The court therefore finds the averments by the Applicant that he had no prior knowledge of the same, to be unconvincing and untenable.
23. Further to the foregoing, it is apparent that the proposed amendments are being sought more than three (3) years since the date of filing suit. In the court's view, the Motion has been brought too late in the day and without any reasonable explanation to justify the inordinate delay.
24. Moreover, considering the pertinent events in the matter, the court agrees with the Respondents' stance that the Motion has not been brought in good faith and is merely an afterthought on the part of the Applicant. Neither the Applicant nor his advocate has sufficiently explained the reason for failure to include the proposed prayers in his original pleadings, yet the relevant supporting material was at all material times reasonably expected to be within his knowledge and/or possession.



25. The court is ultimately not persuaded of the bona fides of the intention behind the filing of the Motion. Additionally, the court does not doubt the plea by the Respondents, given the nature of the proposed amendments, that they will be gravely prejudiced, if the leave sought is granted. Primarily through delay and further costs. While the Plaintiff is entitled to be heard on his case, he has not offered any persuasive explanation why he could not have brought his entire claim with the original plaint, or failing that, applied earlier to amend. In these circumstances, the Applicant's assertions that the Respondents will not be prejudiced if leave was granted appear flippant and oblivious of the dictates of the overriding objective codified in Section 1A and 1B of the CPA.
26. In the court's considered view, to grant the orders sought in the present circumstances would run afoul of the overriding objective in section 1A and 1B of the CPA. The Court of Appeal stated the following in *Karuturi Networks Ltd & Anor v Daly & Figgis Advocates*, Civil Appl. NAI. 293/09:
- “The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court.”
27. In view of all the foregoing considerations, the court does not feel inclined to exercise its discretion in favour of the Applicant. The court finds the Notice Motion dated 31.05.2024 to be without merit. It is hereby dismissed with costs to the 1st and 2nd Defendants/Respondents. Appropriate directions will hereafter be given for the expeditious hearing of the suit.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF NOVEMBER 2024.

C. MEOLI

JUDGE

In the presence of

Mr. Macharia for the Plaintiff/Applicant:

Ms Nyakiano holding brief for Ms Njoki for the 1st Defendant

N/A for the 2nd Defendant/ Respondent:

C/A: Erick

