



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 96A OF 2016**

**EQUITY BANK LIMITED.....APPLICANT**

**VERSUS**

**GEORGE AMOS WAGARA.....1<sup>ST</sup> RESPONDENT**

**RIFT VALLEY BOTTLERS LIMITED.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal preferred against the ruling of Hon. A. OBULTSA Senior Principal Magistrate**

**at Eldoret delivered on 29<sup>th</sup> May, 2016 in Eldoret CMCC No. 811 of 2012)**

**JUDGMENT**

1. The 1<sup>st</sup> Respondent filed an application dated 8<sup>th</sup> February 2016 seeking leave to amend his plaint which was opposed by the appellant. The court in its ruling, however, allowed the application.
2. Dissatisfied with court decision, the appellant preferred the current appeal vide memorandum of appeal dated 10 June 2016 and record of appeal dated 16 October 2018. The grounds of appeal are set therein in the memorandum of appeal and the appeal was canvassed through written submissions.
3. The 1<sup>st</sup> Respondent had sued the 2<sup>nd</sup> Respondent and the appellant seeking a declaration that the appellant is only entitled to enforce the impugned contract through the 2<sup>nd</sup> Respondent. The appellant in its defence pleaded that it is not party to the 1st & 2nd Respondents contract. Consequently, the court adopted as judgment the consent between 1st and 2nd Respondents where the suit was largely compromised.
4. Later, the 1<sup>st</sup> Respondent filed the application to amend the Plaint in order to seek expansive prayers against the appellant and the court granted the orders. The applicant's lament is that the trial court ought not to have granted leave to amend the plaint without setting aside the consent judgment. By doing so, the trial court allowed the appellant to litigate outside the parameters of the judgement consent.
5. It is further contended that the amended plaint tends to open up settled issues and introduces new causes of action and a claim for damages for breach of contract which was not pleaded at the time of negotiation.
6. Further that the consent judgment in effect was binding to all parties. It has not been set aside, varied or vacated yet the amendment was allowed by the trial court thereby re-opening the consent.
7. The appellant relied on the decision in **Ndirangu —Vs -a Commercial Bank of Africa Nairobi HCCC NO. 1803/85 where the court set out the grounds to set aside a consent judgment stating that such grounds are similar to those that would justify setting aside a contract.**
8. It is pointed out that the particulars of breach of contract stated in the draft amended plaint are not new or distinct as they were also part of claim in the plaint.
9. That the appellant ought to have amended the plaint to include a claim for damages for breach of contract when this matter was active before the court and when parties entered into consent.
10. It is also argued that the consent entered into compromised the first issue against the defendant. The only issue that was not agreed upon

was for the supply of products Kshs. 180,000/- that would proceed for litigation.

11. Furthermore, the amendments ought to introduce a new claim for damages for breach of contract against the appellant and the 2<sup>nd</sup> Respondent.

12. It is argued that parties are at liberty to amend their pleadings at any stage before: judgment is entered and after close of pleading. An amendment is only acceptable if the same is necessary for determining the real issues in controversy and further if it is just in the circumstances.

13. The appellant submitted further that the consent judgment was binding upon parties and trial court. That the amendments to the plaint were introduced after matters had been put to rest.

14. The appellant stands to suffer great damage and loss if the amendment is allowed since the only issue against it for determination was compromised through the consent

15. Lastly, that a new claim for damages after 2 years of entering into a consent and compromising the case is a clear mischief and has been brought to frustrate the defence. The respondents did not file their written submissions.

16. The law as regards the grant of leave to amend are well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs.

17. The main principle is that an amendment should not be allowed if it causes injustice to the other side. In the case of **Abdul Karim Khan v Mohamed Roshan (1965) EA.289 (C.A)**, the court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and entirely alters the nature of the defence or plaint.

18. Further, in the case of **Simonian v Johar, (1962) EA.336 (K)**, the court approved amendment to a plaint which raised new causes of action because they were not of a different character from or foreign to or inconsistent with the original cause of action but stemmed from the same transaction.

19. In the case of **Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991** the court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows:

- a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b) the amendments should be timeously applied for;
- c) power to amend can be exercised by the court at any stage of the proceedings;
- d) 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;
- 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 subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.

20. The above-mentioned parameters are not exhaustive as far as the grant of leave to amend plaints is concerned. What that means is that the court has a very wide berth in granting leave to amend.

21. It is clear from the above principles laid down in the cases that an amendment of pleadings in general should be allowed before the final judgement is delivered. I take note that the instant case is still at its hearing stage and the Plaintiff has not even closed its case.

22. Whether or not the plaintiff is entitled to leave to amend his plaint in accordance to the rules is a discretion to be exercised by the court within the ambit of the principles of natural justice.

23. Lord Denning stated in **Reg V Gaming Board Ex. Benalim 1970 2 QB 417** as follows; ***“It is not possible to lay down rigid rules as to when the principles of natural justice are to apply nor as to their scope and extent. Everything depends on the subject matter.”***

24. The thrust of this principle is that in judicial proceeding like in the instant case ordinary people would reasonably expect that a decision that will affect rights of a litigant be made fairly so as not to deprive him or her the opportunity to be heard on a key issue before final judgement.

25. Allowing the amendments will cause no prejudice on the part of the appellant parties will be allowed to be on equal arms so that their case can be heard on merits. The application is thus allowed, and costs are awarded to the applicant.

**WRITTEN AND DATED THIS 15<sup>TH</sup> DAY OF DECEMBER 2020 AT ELDORET**

**E-DELIVERED ON 8<sup>TH</sup> FEBRUARY 2021**

**H.A. OMONDI**

**JUDGE**