



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 4 OF 2016

MIRIAM NJERI

(Suing through on behalf of herself and on behalf of the estate

MARGARET NJERI NJUGUNA.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

NATIONAL POLICE SERVICE COMMISSION.....2ND DEFENDANT

SALIM MOHAMED.....3RD DEFENDANT

CORAM: Hon. Justice Reuben Nyakundi

Komora & Associates Advocates for the Plaintiff

Attorney General – Malindi

Salim Mohamed in person

R U L I N G

The application is brought by a Notice of Motion dated 15th April, 2021 under sections 1A, 1B & 3A of the Civil Procedure Act, Order 8 Rule 3 and 5 (1) of the Civil Procedure Rules. The application is seeking the following order that; -

(1) That this Honourable Court be pleased to grant the Plaintiff/Applicant leave to amend her plaint to include the figures of special damages and such amendments be automatically effected as per the attached draft without need for a fresh application for amendment.

The grounds of this application are well set in the affidavit in support of this application sworn by Miriam Njeri on 15.4.2021. This affidavit contains evidence in support of the application premised alongside the following grounds; -

- a. That the Plaintiff/Applicant is the administrator of the estate of Margaret Njeri Njuguna(deceased).**
- b. That the Plaintiff/Applicant has sued the defendant for special damages, general damages in addition to costs and interest.**
- c. That the Plaintiff is apprehensive that if the sought orders of special damages granted there is need to indicate the figures thereto.**
- d. That it is necessary for the Plaintiff/Applicant to be granted leave by this Court to amend her Plaint and to include figures of special damages and have all issues heard and disposed of expeditiously.**
- e. That the ends of justice will be served and no prejudice will be suffered by either party through such amendment.**

The Respondent filed grounds of opposition filed in Court on 27th April, 2021; -

- i. That the delay in amending the Plaintiff to introduce special damages to the tune of over 23 million is inordinate and inexcusable.**
- ii. That the suit was filed 5 years ago and the Applicant has not demonstrated adequately to the Court the delay in amending the Plaintiff and the proposed amendment is an afterthought.**
- iii. That the prayer for special damages has been omitted from the final prayers and therefore cannot be assessed by the Court for payment of the requisite court fees imposed under Section 10 of the Judicature Act.**
- iv. That the order sought for declaration under paragraph 15 (a) is misconceived and misguided and cannot issue. The Plaintiff clearly seeks to evade including the huge special damages figures otherwise inserted at paragraph 10 and 12 contrary to section 96 of the Civil Procedure Act on payment of Court fees.**
- v. That the amended plaintiff is incompetent and fatally defective.**
- vi. That the Application herein is an attempt to delay expeditious determination of the case and is therefore likely to occasion prejudice to the Defendants in the fair trial of the suit.**

The Respondent prays to this honourable Court to dismiss the application for lack of merit. Both parties through their respective Counsels filed written submissions to buttress the arguments for and against the reliefs for amendment of plaintiff.

Determination

Taking into account the pleadings as averred in the Plaintiff and the defence, I note the main issue upon which the Court is moved to consider an amendment is to vary or crystallize a claim on special damages. The application in question is brought under order 8 rule 3 of the Civil Procedure Rule which stated *inter alia*; -

“The court may at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such a manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

This is the procedure the Applicant has invoked for this Court to exercise discretion. However, the law demand of the Court not to exercise such discretion arbitrarily or capriciously. This power is to be exercised within the bounds of the principles expounded in *Matagala Vincent V Uganda Revenue Authority Misc. Application No. 25 of 2013* thus; -

- i. Amendments sought before the commencement of the hearing of the case which pleadings the intended amendment relates should be freely allowed if the amendment can be made without prejudice to the other party. Application for such amendment should be made at the earliest stage of the proceedings.**
- ii. Where an amendment is not any different in quality form the cause of action, it should be allowed. A court will, however not exercise its discretion to allow an amendment which substitutes a distinctive cause of action for another or to change by means of the amendment of the subject matter of the suit. The Court will refuse to exercise its discretion where the amendment would change the action into one of a substantially different character.**
- iii. No amendment would be allowed which would prejudice the rights of the opposite party existing at the date of the proposed amendment. The amendment should not work injustice to the other side. However, an injury which can be compensated by the award of costs is not treated as an injustice.**
- iv. An amendment would be necessary within the meaning of Order 6 rule 19 of the Civil Procedure Rules if it is for the purpose of determining the real questions in controversy between the parties.**
- v. Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.**
- vi. An application made malafides should not be granted.**
- vii. No amendment should be allowed where it is expressly or impliedly prohibited by law (e.g. Limitation).**

In *Gasu Transport (Bus) Services Ltd V Obere EA 88 1990 SCCA No.4*. The Supreme Court of Uganda discussed the principles that should guide the amendment of pleading in the following expressions that; -

“The amendments should not cause injustice to the other party. An injury that cannot be compensated by the award of costs is treated as an injustice. The amendment being sought in bad faith to defeat the defence. Multiple of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed. An application that is made malafide should not be granted. No amendment should be allowed where its expressly or impliedly prohibited by any law. It

is also trite that a fear of the amendment varying substantial part of the reliefs prayed for in the plaint should not be a bar to an application for amendment.”

The principles set out in *Eastern Bakery V Castellino*[1958] 462 emphasize that position to wit;-

“The Court will not refuse to allow an amendment simply because it introduces a new case. It is only when the amendment changes the character of the cause of action and where the prejudice must rise when applied is likely to occasion an injustice to the defendant. See also Central Kenya Ltd V Trust Bank Ltd [2000] 2EA 365.”

In determining whether the standards adopted by the Courts on amendment has crossed the line I consider such factors herein to be necessary;-(i) When the plaintiff acts with impermissible motive, ill will towards the defendant. (ii) When the claim sought to be included is unreasonable and disproportionate to the legitimate goal of the litigation. (iii) When the Plaintiff seeks leave to include an amendment which is vexatious, capricious and an abuse of the Court process or not capable of being sustained by a reasonable tribunal. Nevertheless, to grant or to deny an application for amendment of pleadings is a function of unfettered discretion of the Court. To buttress this legal position the Court of Appeal in *Elijah Kipng’eno Arap Bii V Kenya Commercial Bank Limited* [2013] eKLR opined 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 V 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 Limitations Acts.”

In a nutshell these principles will mirror fundamentally in the decision I am about to make on amendments to the Plaint as originally filed by the Applicant.

If that is so, it is not unthinkable that circumstances could arise where the Courts have to exercise discretion at the behest of a Notice of Motion specifically seeking amendment of the pleadings even at a later stage in the proceedings. The rule of law enforced by the Courts is the ultimate resolution of disputes between parties by rendering the cause of action determined with finality. Perhaps the most obvious benefit of amendments is the cost, efficiency and eases the burden on the courts system for parties to re-litigate on an issue which would be better consolidated in the initial claim. One key point is that amendment properly articulated by a litigant manifests the character of the claim reasonably to be defended by the defendant. In the premise of the instant application the claim intended to be pleaded and amended is on special damages of over Kshs.23,000,000/-. Despite the misgivings by the Respondent the nature of it has to be strictly proved on a balance of probabilities by the Applicant.

Therefore, the object of Section 100 of the Civil Procedure Act and Order 8 rule 3 of the Civil Procedure Rules is to minimize litigation, minimize the delay and to avoid multiplicity of suits. In my considered view to do justice in this matter there is need to grant leave for the Applicant to amend her plaint so as not shut her out of the seat of justice merely on technicality of pleadings. From the motion and affidavit in support of the relief the cardinal test on the amendment being necessary for the determination of the real question in controversy has been satisfied by the Applicant. It is my finding that the amendment if allowed would not prejudice or occasion an injustice to the Respondents. For the sole reason that the proposed amendments intend to introduce a pecuniary claim of Kshs.23,000,000/=. As a consequence, I exercise my discretion in favor of the applicant.

In view of the aforesaid, the discretion of the Court is hereby exercised guided by the principles mentioned hereinabove to grant leave for amendment of the Plaint as intimated by the Applicant. Invariably, the Notice of Motion dated 15th April, 2021 is allowed with costs to abide the outcome of the suit. I so order.

DATED, SIGNED AND DELIVERED AT MALINDI DISPATCHED VIA EMAIL THIS 16TH DAY OF JULY, 2021

.....

R. NYAKUNDI

JUDGE

elishadullu@gmail.com,agmalindi@gmail.com)

In the presence of Komora for the Applicant.