



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 104 OF 2019

PETER ODEDE OKWOMBO.....APPELLANT

-VERSUS-

SOUTH NYANZA SUGAR COMPANY.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon. C.M. Kamau, SRM

in the Principal Magistrate's Court at Rongo PMCC No. 94 of 2014

delivered on 4thSeptember 2019)

JUDGEMENT

The appeal arise from the ruling and order of Hon. C.M. Kamau (SRM) delivered on 4/9/2019 in **RONGO PMCC No. 94 of 2014, Peter Adede Okwombe vs South Nyanza Sugar Company.**

Through the firm of **Oduk & Co. Advocates**, the appellant lodged the instant appeal based on the following **four (4) grounds**: -

- a. That the trial Magistrate erred in law and fact in granting the respondent leave to amend the defence, such leave having been previously granted and not acted upon, and failed to appreciate that in the circumstances, the trial court no longer had any jurisdiction and/or any discretion to exercise;**
- b. That the trial Magistrate erred in law and in fact in failing to find that as the appellant had testified and closed his case, it stood to be highly prejudiced as the amendment would allow in matters of law and evidence to which the appellant was ill placed to respond;**
- c. That the trial Magistrate in allowing the amendment appreciated that an award of costs would be satisfactory compensation, but erred in not awarding costs, in any event;**
- d. That the trial magistrate's conduct and finding was prejudicial to the appellant and expressly geared/ tailored towards having the appellant's suit dismissed to the appellants' detriment.**

Thus, the appellant prays as follows: -

- i. The trial magistrate's ruling and order dated 4/9/2019 in PMCC No. 94 of 2019 be set aside.**
- ii. The suit do proceed to deferred judgement on the pleadings filed prior to 4/9/2019.**
- iii. The costs of the Notice of Motion application dated 30/1/2019 and of this appeal be awarded to the appellant.**

The court directed that the appeal be canvassed by way of written submissions and both parties duly complied.

The appellant filed his written submissions dated 21/11/2019 on 8/12/2019.

The appellant submitted on three (3) issues for determination;

a. The trial court lacked jurisdiction and/or discretion to grant leave sought.

b. The order granting leave was prejudicial to the appellant and the application and order was made in bad faith.

c. Costs.

The appellant submitted that the respondent filed its defence on 28/4/2015 and admitted jurisdiction of the trial court; that the suit was set down for hearing on 29/3/2016 and 7/6/2016. On 7/6/2016, counsel for the respondent raised the issue for limitation. The appellant further submitted that the suit was set down for hearing on diverse dates between 22/3/2017 and 27/3/2018 a period of about 2 years.

Further to the foregoing, the appellant submitted that on 27/3/2018 when the suit came up for hearing, Counsel for the respondent sought an adjournment and leave to amend its defence which was granted. The court directed the same be done by 24/4/2018. The same was not complied with and Counsel was granted leave on two more occasions resting on 4/7/2018 to comply within a month. Having not complied on the said date, parties proceeded with the trial and the appellant closed his case.

When the suit came up for defence hearing on 30/1/2019, the respondent instead filed an application seeking to amend its defence to include a plea of limitation of time. The appellant opposed the application and by a ruling dated and delivered on 4/9/2019, the trial Magistrate allowed the respondent's application as prayed.

The appellant argued that the application was a nonstarter and offends the provisions of **Order 8 Rule 6 of the Civil Procedure Rules 2010**. The trial court had no jurisdiction to entertain such an application.

The appellant further argued that in allowing the respondent's application, it amounted to injustice and greatly prejudiced the appellant; that the appellant had already acquired procedural and substantive rights that could not be altered, abrogated or changed. The appellant relied on the case of **John Mulwa Kangaatu vs Pan African Insurance Co. Ltd HCCC No. 331 of 2002**.

The appellant submitted that since the respondent actively abandoned the issue of amendment, the application was filed as an afterthought. The material that the respondent alleged was now in their possession was not exhibited by way of affidavit or pursuant to **Order 12 of the Civil Procedure Rules (supra)**. This amounted to bad faith and urged the court to be persuaded by the findings in **Labelle International Limited & Another vs Fidelity Commercial Bank Limited HCCC No. 786 of 2002** and **Rubina Ahmed & Others vs Guardian Bank Ltd Civil Appeal No. 203 of 2013**.

In conclusion, the appellant prayed that the court do allow the appeal and set aside the order of the trial Magistrate dated 4/9/2019. The appellant abandoned and did not wish to argue ground 3 of his appeal.

The respondent through the firm of **Okong'o Wandago & Company Advocates** opposed the appeal through its submissions dated 31/3/2021 and filed in court on 7/4/2021. Further, the respondent adopted and relied on its application dated 30/1/2019 and supporting affidavit sworn by its Legal Service Manager dated 29/1/2019.

In urging the court to uphold the decision of the trial court, the respondent submitted that the essence of the amendment was to include a specific plea of limitation of the suit and to ensure all deductions which any award to the appellant would be subject to were on record. Further, the respondent relied on the case of **Coffee Board of Kenya vs Thika Coffee Mills Limited & 2 Others (2014) eKLR** which decision outlined conditions to be met when making amendments to pleadings.

The respondent further relied on the cases of **Joseph Ochieng & 2 Others v First National Bank of Chicago Civil Appeal No. 149 of 1991** where the Court of Appeal held that amendment of pleadings can be done at any stage; that the issue of limitation is a jurisdictional issue and a fundamental point of law, and such an amendment should be allowed freely; that there is no prejudice to be suffered by the appellant if the amendments remain.

I have carefully considered the memorandum of appeal, the record of appeal, and the respective parties submissions.

It is not in dispute that Counsel for the respondent on diverse dates resting with 4/7/2018 sought for adjournment to enable it to amend its defence. The respondent was granted one (1) month to file its amendment, but it failed to do so.

It is also not in dispute that on 30/1/2019 when the suit came up for hearing of the respondent's case, the respondent instead filed an application dated 30/1/2019 and filed evenly seeking leave to amend and file the amended defence in terms of the draft annexed to its application contrary to the time period granted to it within thirty (30) days as directed on 4/7/2018.

By a ruling and order delivered by the trial Magistrate on 4/9/2019, he allowed the application as prayed with costs to the appellant.

Amendment of pleadings is codified under **Order 8 of the Civil Procedure Rules (supra)**. **Order 8 Rule 6** provides for failure to amend pleadings within the stipulated time after an order has been issued as follows: -

“Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.” (emphasis)

I have carefully considered the reasons the respondent gave for its failure to comply with the court orders on time. In the Supporting Affidavit sworn by Maurice Omondi Ng'ayo paragraphs 5 and 6, he deponed as follows: -

“The Defendant was granted leave to amend, earlier on, but the Defendant could not amend as she had not obtained all the material with which the defence of limitation could be proven.

The Defendant is now in possession of the material, inclusive of job completion certificates and debit advice courts, with which the defence of limitation can be pleaded and then proven.”

I have also considered the draft amended defence. Aside from the specifically pleaded deductions at paragraph 16A is a plea of limitation of actions and lack of this court's jurisdiction.

The law as regards amendment of pleadings is well settled. The general rule is that an amendment should not create injustice to the other party which cannot be compensated by way of costs. In the same vein, amendments are necessary so as to enable the court to determine the real question in controversy.

I take cue from the principles under which the court may grant leave to amend pleadings as was held by A.B. Shah JA: set out in the case of **Joseph Ochieng & 2 Others v First National Bank of Chicago (supra)**

- 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 (including appeals stage);
- 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 but subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
- f) that the Court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.”

The above parameters are not exhaustive and the court depending on the circumstances of each case, has a wide berth to exercise its jurisdiction. Order 8 Rule 6 as quoted above, does not limit the time in which the court can grant orders for amendment of pleadings.

The bottom line is that an amendment can be done any time before delivery of judgement. As regards a fundamental issue such as jurisdiction, if discovered even on appeal stage, the same can be raised and determined on its merits; See the holding of the **Court of Appeal in Kenya Ports Authority vs Modern Holdings (E.A) Limited (2017) eKLR** the court held: -

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:

...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself

- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”

Having considered the explanation given by the respondent that the supporting documents to be used in support of its case were not accessible at the time of filing its defence, I do not see how their application was made in bad faith, I find that they did not deliberately fail to comply.

The purpose of a trial court is to create an even playing ground for parties to ventilate their issues. **Article 50 (1) of the Constitution, 2010** provides for a fair trial. Each party should be given a chance to present and defend its case fairly. Courts and the rules governing them should not be geared towards impeding fair trial but should be enablers of fair trial. I am inclined to restate the words of Apaloo, JA in the case of **Philip Chemowolo & Another v Augustine Kubende, (1986) eKLR** that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

In the case of **Rover International Ltd v Cannon Film Sales Ltd (1986)3 All ER 772 at page 780 - 781**, cited in **Lochab Bros Limited V Peter Kaluma T/A Lumumba Mumma & Kaluma Advocates & 2 Others (2013) eKLR**, the Court held that;

“A fundamental principle is that the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to be wrong.”

I do note from the court proceedings that the appellant closed his case on 18/9/2018 and I do sympathise with the trouble of having to respond to the allegations now raised in the amended defence. However, the appellant still has the chance to be recalled as a witness by the court if need be. I am duly guided by the provisions set out under **Order 18 Rule 10 of the Civil Procedure Rules (supra)**

‘The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.’

I must emphasise that there is no error or fault that cannot be compensated by way of costs. The delay on the part of the respondent since first asking for leave to amend their pleadings to the close of the appellants case was a time lapse of almost three (3) years. No serious prejudice will be suffered by the appellant as the same should be compensated by way of reasonable costs.

From the foregoing, I find that the appeal by the appellant is devoid of merit and it is hereby dismissed. I make the following orders:-

- a. That the ruling and order delivered on 4/9/2019 by Hon. C.M. Kamau (SRM) be and is hereby upheld;**
- b. That the leave is hereby granted for the respondent to file and serve its amended defence as annexed to its application dated 30/1/2019 within seven (7) days hereof upon payment of the requisite fees;**
- c. That the appellant be at liberty to file and serve his reply to the amended defence within fourteen (14) days of service if need be;**
- d. That the suit be set down for hearing and disposed of on a priority basis.**
- e. That the respondent shall pay the appellant thrown away costs of Kshs. 20,000/= within twenty - one (21) days hereof;**
- f. In default of compliance with the aforementioned orders, the suit proceed as was filed before;**
- g. Each party shall bear the costs of this appeal.**

DATED, DELIVERED AND SIGNED AT MIGORI THIS 7TH DAY OF JULY, 2021.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Oduk for the Appellant.

Mr. Odero for the Respondent.

Nyauke Court Assistant.