



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO 9 OF 2019

PETER BOGONKO ONCHONGA.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT/RESPONDENT

MUGANDA WASULWA T/A

KEYSIAN AUCTIONEERS..... 2ND DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated 23rd February 2021 seeks the following orders;

1. THAT the plaintiff/applicant be granted leave to amend the plaint to include the relief of damages, Costs and Interests as per the annexed Draft Amended Plaint.

2. According to the supporting affidavit deposed by Kennedy Bosire Gichana, he averred that he has realized that there was an oversight on his part in the manner in which he crafted the plaint as he failed to include damages, costs and interests in the prayers. He explained that he had included the said prayers in his initial draft and had asked his secretary to include the said page before filing the plaint. He averred that all along he was under the impression that the plaint had the said reliefs which were in his initial draft, but only came to realize of their omission on 18th February 2021 while preparing the submissions. He advanced that it would be fair and just that the plaintiff is allowed to amend the plaint to include the reliefs of damages, costs and interests.

3. In response to the application James Osewe, the regional collections manager at the 1st respondent, filed a replying affidavit 22nd March 2021. He averred that the proposed amendments ought not to be allowed as they are immaterial for the determination of the real controversies of the suit. He urged the court not to allow the amendments proposed by the applicants arguing that the said amendments only relate to the reliefs allegedly claimed by the applicants but the factual basis of the plaintiff's suit remained unchanged and as such the proposed amendments were immaterial. He further claimed that the amendments ought not to be allowed as they introduce new and inconsistent cause of action which deviates from the applicant's claim. It was advanced that although this court has wide and unfettered power and discretion to allow the amendment of pleadings, various factors must be considered before an amendment is allowed. He averred that all the proposed amendments ought not to be allowed as the same have been occasioned by undue and inexplicable delay and further have been overtaken by events. He averred that on 21st January 2021 the parties by consent agreed that the remainder of the issues which were identified as damages, costs and interest should be addressed and canvassed in the parties' respective written submissions. James Osewe averred that the said consent has not been varied, set aside or otherwise discharged.

4. He also advanced that in any event; the parties are at an advanced stage of the prosecuting the suit as at the parties are at the submissions stage. He further averred that the respondents will be prejudiced by any further delay in the disposal of this suit as the applicants are still in default and have not settled loan facilities advanced to him by the 1st defendant which continue to accrue interest.

5. I have considered the pleadings of both parties and the only issue before me is whether the applicant should be allowed to amend his pleadings at this stage of the suit.

6. Although the respondents contend that the parties filed consent to have the case settled through the filing of written submissions and without consideration of viva voce evidence, I find that the consent does not exit.

7. From the record I note that on 2nd December 2020 upon counsel for the Defendant applying to have the suit disposed of by written submissions, this court directed the parties to file consent on the disposal of the matter by way of written submissions and isolate issues for determination. On 21st January 2021 this court directed that the parties to file submissions on damages and costs.

8. However before either party could file their respective submissions, the applicant moved the court with this instant application seeking for amendment of his plaint. In this regard the issue on varying or setting aside of the ‘consent’ does not arise since there was no consent recorded.

9. The guiding principles in an application to *amend pleadings were summarized* in **St. Patrick’s Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR** as follows;

*“21. A wider footage on the same issue was given in a more recent 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.”

10. Applying the principles laid down above to the circumstances of this case, I do not find that the amendments sought will cause any injustice to the respondent. The parties herein elected to have the case heard by way of written submissions and the applicant’s application having been made before the filing of submissions essentially means that their application was made before hearing of the case. In **Eastern Bakery v. Castelino, (1958) E.A.461 (U.) at p.462:**

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.

11. In my view the application was made timeously and is not prejudicial to the respondent. The plaint having been filed on 30th September 2019 contemporaneously with an application seeking temporary injunction which application has already been determined, in my view the application having been filed on 26th February 2021 was made timeously.

12. The amendments proposed by the Applicants are on reliefs (they seek to include ‘damages including exemplary and aggravated damages, cost and interest) as well as the applicant’s address for service. The said amendments in my view do not introduce novel issues or a new cause of action.

13. In any event the respondent can also seek to file an amended defence if need be and address the issues surrounding the relief sought in their submissions.

14. For the above reasons, I find that the application in the following terms:

a) The plaintiff/applicant is granted leave to amend its plaint.

b) The amended plaint to be filed and served within 7 days from the date of this ruling.

c) The defendants/respondents are granted corresponding leave to amend file and serve an amended defence within 14 days from the date of service with the amended plaint.

d) The costs of the application shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED AT KISII THIS 6TH DAY OF JULY 2021.

A.K. NDUNG’U

JUDGE