REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 110 OF 2012

GIANLUIGI CERNUSCHI.....PLAINTIFF

VERSUS

MERRY BEACH LIMITED.....DEFENDANT

Coram: Hon. Justice R. Nyakundi

Mr. Kibe for the plaintiff

Mr. Kinyua for the defendant

RULING

The Notice of Motion dated 4th June 2019 was brought in terms of Order 8 Rules 3 & 5 and Order 51 Rule 1 of the Civil Procedure Rules and Section 1A and 1B of the Civil Procedure Act. The Plaintiff is seeking leave to amend the Plaint and the costs of the application. The Application is based on the annexed supporting affidavit of **Gianluigi Cernuschi** filed on 4th June, 2019.

It is indicated that there are various matters of fact and law which are now in his knowledge and possession relating to the claim and matters in dispute in respect of the instant suit. Further that the legal opinion that the Plaintiff sought on the whole claim has necessitated the amendments sought to be done relating to the initial transactions concerning the Plaintiff's claim and therefore the amendments sought are necessary to enable the real issues between the parties to be canvassed in this matter.

It is the Applicant's view that the amendments sought will assist this court to arrive at a just conclusion, will not prejudice the Defendant who can be compensated by an order of costs and that allowing the same will serve the interests of justice and fairness. The intended amendments, to the plaint, have been underlined in red in an Amended Plaint produced hereto as an exhibit marked GC1.

The Respondents filed an affidavit in reply opposing the application to amend the Plaint. The Respondents oppose the Notice of Motion on the basis that the signature appended on the affidavit in support of the motion does not resemble the one on the earlier affidavits the recent one is a forgery. Further that the intended amendment is based on falsehood and allowing the same would be giving the applicant an opportunity to further mislead the Court.

Further that the proposed amendments to the Plaint are time barred as the cause of action arose in 2009. It is the Defendant's view that it would be severely prejudiced if it is required to defend claims that are time barred. Further that the Application for leave to amend is res judicata because similar application was filed in September 2015 which was subsequently argued and determined on 16/6/2016.

The Law

Order 8 rule 3 (5) provides as follows: -

> ***"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 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."***

It is trite law that amendments sought before hearing should be freely allowed if they can be made without injustice to the other side and no injustice is caused to the other side if he can be compensated for in costs. (See ***Tildesley v Harper*** *[1878] 10 Ch D 393;* ***Clarapede v Commercial Union Association*** *[1883] 32 WR 262).* In ***Eastern Bakery v. Castelino, (1958) E.A.461 (U.) at p.462:*** it was observed that:

> ***"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.

The same was later buttressed by ***Bramwell, LJ in Tildesley v Harper (1878), 10 Ch.D. at p.296*** stated as under:

> ***"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise."***

In ***Budding v. Murdoch (1875) 1 Ch.D at p.42***, it was stated that the court will not refuse to allow an amendment simply because it introduces a new issue or case; in ***Ma Shwe Mya v. Maung Po Hnaung (1921), 48 I.A. 214, 48 Cal.832*** the court said that the is no power to enable one distinct cause of action to be substituted with another, nor to change by means of amendment, the subject matter of the suit; in ***Raleigh v. Goschen, (1898) 1 Ch.73*** it was also postulated that the court would refuse to grant leave to amend where the amendment would change the action into one of substantially different character. In ***Weldon v. Neal (1887). 19 Q.B. D, 394*** and ***Hilton v Sutton Steam Laundry, (1946) K.B, 65; (1945) 2 ALL E.R. 425***, *(Crawshaw, J.A, Forbes. V.P and Gould, J.A unanimously agreed)*; it was also asserted that where the amendment would prejudice the rights of the opposite party existing at the date of the proposing amendment, for instance by depriving his of a defence of limitation accrued since the issue of the writ.

The learned authors of ***Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1)*** at ***paragraph 76,*** give some insights on the amendments of pleadings:-

> ***"…The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. ….The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side…".***

A wider perspective on this 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 and amendment notwithstanding the expiry of current period of limitation.**

In the persuasive case of **Laguro v Toku [1992] 2 NWLR** the court then affirmed the decision on the discretion and test to guide leave for grant on amendment of pleadings. Thus:

> ***a). The consideration of the justice of the case and the rights of the parties before it.***
>
> ***b). The need to determine the real question or questions in controversy between the parties.***
>
> ***c). The duty of a judge to see the everything is done to facilitate the hearing of any action pending before him and wherever it is possible to cure and correct an honest and unintended blunder or mistake in the circumstances of the case and the amendment will help to expedite the hearing of the action without injustice to the other party.***
>
> ***d). If the court is an appellate court, the need to amend the record of the trial court, so as to comply with the facts before the trial court and decision given by it in order to prevent the occurrence of substantial injustice.***
>
> ***e). Amendments are more easily granted whenever the grant does not necessitate the calling of additional evidence or the changing of the character of the case and in that aspect no prejudice or injustice can be said to result from the amendment.***

The court is endowed with a very wide berth as far as granting leave to amend is concerned and therefore the above laid down parameters are not exhaustive. Another factor that is also taken into consideration is that the court should not consider the merits of the proposed amendment in allowing or rejecting an amendment. This is because the merits are to be determined at the hearing of the suit. ***Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1)*** at ***paragraph 76***, state:-

> ***"On an interlocutory application for leave to amend, the court should rarely seek to evaluate the strength of the case sought to***

be argued, as to do so would anticipate the trial of the issues."

I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law of the subject of amendments, I take the following view of the matter. The Applicant seeks leave to amend the plaint mainly on the basis of wanting to incorporate into their claim what they referred as various matters of fact and law which are now in his knowledge and possession relating to the dispute at hand. In rebuttal, the Defendant seems to not have focused on proving that the proposed amendments purport to convert the plaint into a suit of another and substantially different character to the existing one. It sought to prove that the matters contained in the amended plaint are not merited. To my mind, these are issues which ought to be dealt with during the hearing of the main suit.

Further, it is the Defendant's contention that the proposed amendments are based on false statements and that the motion is supported by an affidavit whose signature was forged as it does not correspond with other signatures appended to affidavits which were earlier produced by the Appellant. In my view, these are matters which ought to be looked into upon the hearing of the main suit. Whether or not a statement was falsely made is a matter this court may not be able to determine at this stage. It is only when parties have ventilated the issues surrounding their views of the matter that this court may be able to make a determination on the same.

The Defendant herein has not successfully demonstrated that the intended amendment it will suffer prejudice and if its injustice were to be caused, it is not demonstrated that the same could not be compensated for in costs. It has also not demonstrated that the same will introduce a distinct cause of action or change the subject matter of the suit. The amendment is not in any manner substantially different in character with the existing main suit as it merely buttresses and add more information to the already existing cause of action.

The plaintiff is entitled to seek 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. Lord Denning as he then was put it this way 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."

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 deprive him or her the opportunity to be heard on a key issue before final judgement.

It is my view that the Respondent will not be prejudiced in any manner as it will be given an opportunity to challenge all the issues raised in the amended claim at the hearing main the suit. That alone drastically reduces the probability of prejudice on the part of the respondent and by the same token allow parties to be on equal arms so that their case can be heard on merits rather than letting the same be decided by procedural technicalities. The drafters and framers of the constitution in Article 159 (2) (d) of the Constitution stated that:

"in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities."

In the **case of Republic vs. District Land Registrar, Uasin-Gishu & Anor (2014) eKLR where Justice Ochieng held that:**

".. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities."

This power, envisaged in the provisions of **Order 18 rule 10** of the ***Rules*** and **section 146** of the ***Evidence Act,*** is intended to ensure that each party is afforded a fair trial guaranteed under **Article 50 (1)** of the Constitution. But a fair trial does not exist in a vacuum, it is governed by rules which by themselves ensure that each party is given the opportunity to present or defend his case fairly. That is the purpose of a trial court. It must make sure that the parties are given ample opportunity to ventilate the issues arising from their case. What the said rules must not do is to become an end in themselves and impede a fair trial and that is why **Article 159(2) (b)** of the Constitution provides that justice shall be administered without undue regard to technicalities. When a case is decided in accordance with substantial justice as depicted under the above-mentioned article, justice will not only be done but also seen to have been done.

I have carefully considered the defendants counsel submissions and affidavits none has attempted to answer these questions to convince me to come to a contrary conclusion that the amendment sought lacks merit. I do not think decisions of the court exist in a vacuum the relevant facts of each specific case underpins the legal principles.

The upshot of this matter is that in the greater interest of Justice I intend to allow the amendment so that the suit can be heard on merits. I'm satisfied that the application was made bona fide and could cause no prejudice to the respondent hence there is no good reason to refuse the Applicant leave to amend its plaint. The same argument transcends the Defendant's objection.

Orders

My final orders; in the circumstances of this case and by way of disposal are as follows:

a) The Notice of Motion Application dated 4th June, 2019 and the amendment of the Plaint is hereby allowed. The draft plaint be deemed as duly filed. The same be served upon the defendant forthwith. A reply to defence of the amended claim be filed by the plaintiff simultaneously upon being served with the defence on the amendment.

b) In the interest of justice and pursuant to the Constitutional dictates and any relevant laws in respect of the principles of fair trial, I'm of the conceded view that the Defendant's objection to the amendment lacks merit and is hereby dismissed.

c) The Defendant to file a defence in respect of the Amended Plaint within ten (10) days from today's date.

d) The cost of this motion to abide the outcome of the main suit.

It is so ordered.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 15TH OCTOBER, 2019.

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R. NYAKUNDI

JUDGE