REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 97 OF 2010

SPRINGBOX KENYA LTD……..APPELLANT

VERSUS

DANIEL KULANGA NTHUSA ……RESPONDENT

JUDGMENT

This appeal arises from the ruling of and Order of the Honourable Principal Magistrate Mr Okato, In Nairobi Milimani CM C.C. NO. 1434 OF 2009 (Daniel K. Nthusa vs Springbox Kenya Ltd) delivered on 22nd February 2009.

The background to the matter is that vide an application dated 20th January 2010 the defendant in the lower court who is the appellant herein Springbox Kenya Ltd sought leave of court to amend its defence to include an averment that it paid the plaintiff/respondent herein a sum of kshs 319,827 under the Workmen's Compensation Act, a payment that would have a bearing in the final award, in the event that the plaintiff's claim for compensation succeeded. The application by the appellant/defendant for leave to amend the defence was dismissed with costs, and that is the order that provoked this appeal.

The appellant's Memorandum of Appeal as amended on 31st May 2010 sets out 6 grounds of appeal namely:

1. That the Learned magistrate erred in law and in fact in denying the appellant an opportunity to amend its defence to reflect the true state of affairs.
2. That the Learned magistrate misdirected himself in suggesting that the appellant was required to adduce evidence in an application to amend the defence.
3. That the learned magistrate misdirected himself in imposing upon the appellant, a burden of proof at a premature stage in proceedings.
4. That the Learned magistrate erred in law and in fact in rejecting the appellant's application to amend its defence despite extensive jurisprudence on the freedom so to do at any stage in the proceedings .
5. That the Learned magistrate misdirected himself in awarding costs to the respondent.
6. That the decision was arrived at on consideration, to the extent that this was done, of wrong principles of law.

The appellant therefore urged this court to allow this appeal by setting aside the ruling in the lower court and order the respondent to pay costs of this appeal.

The primary suit in the lower court was instituted on 12th March 2009 by the respondent herein claiming for general and special damages arising from an industrial accident wherein the respondent was allegedly operating a machine when he was injured which injury involved amputation of the left hand.

On 22nd April 2009 the defendant /appellant herein filed a defence denying the plaintiff's claim and contending in the alternative that if at all the respondent was employed by the appellant and or injured while engaged upon his duties in the appellant's employment and in the course of his duties then the accident and injury complained of was due to the respondent's own negligence as particularized in paragraph 8 of the defence dated 22nd April 2009.

On 4th May 2009 the respondent's counsels filed reply to defence joining issues with the appellant's defence and reiterating contents of plaint, while denying any contributory negligence to the alleged accident.

On 22nd January 2014 vide an application brought under the old Order 6A Rule 3 of the Civil Procedure Rules, the appellant sought leave of court to amend its defence to include an averment in paragraph 9A that should the court find it liable to the plaintiff in negligence then the amount payable to the plaintiff should be reduced by the sum of Kshs 319,827 paid as Workmen's Compensation on or about 30th January 2008.

The respondent filed a replying affidavit on 4th February 2010 opposing the appellant's application for leave to amend the defence and vehemently denying that he or at all was paid any money under the Workmen's Compensation Act and contending that the appellant had perjured itself by making false allegations of payment to the plaintiff under the Workmen's Compensation Act.

In a brief ruling delivered on 22nd February 2010 the learned trial magistrate having considered the application and objection thereto, and the decision in **Macharia v Guardian Bank Ltd (2003) KLR 271** cited by the appellant's counsel held that:

> ***"It is trite law that he who asserts proves. The defendant asserted that the plaintiff was paid kshs 319,827/- but there is no evidence to support the said assertion. The amendment sought in my considered view is not necessary and I therefore find the application lacks merit and I dismiss it with costs to the plaintiff/respondent."***

The appeal herein was admitted to hearing on 29th May 2014 and directions were given on 31st November 2014. Parties for the parties agreed to have the appeal herein disposed of by way of written submissions despite the initial directions that the matter be canvassed orally. The appellant's counsel filed their submission on 27th March 2015 whereas the respondent's counsel filed his submissions on 17th April 2015 and this court is now called upon to determine this appeal on the basis of those submissions and decided cases annexed on the respective party's submissions.

In their submissions, the appellant's counsel reiterated the ground of appeal and maintained that the Civil procedure Act and Rules especially Section 100 and Order 6A Rule 3 (now Order 8 Rule 3) of the cited law settles the position in legal jurisprudence concerning applications to amend pleadings that amendments sought before trial should be freely granted if they are necessary to put the facts in dispute between the parties before the court for a proper adjudication of the issues.

In their view, the amendment sought was necessary and material to the fair adjudication of the dispute and therefore the same should have been freely allowed as there was no evidence that such amendment would in any way cause any prejudice to the respondent herein. The appellant relied on the case of **Manjat Singh Sethi & 2 Others vs Paramount Universal Bank Ltd & 2 Others (2013)** where the court, citing with approval the principles enunciated in **Eastern Bakery vs Costelino (1958) EA 46** stated:

“

1. ***Amendments sought before hearing should be freely allowed if they can be made without any injustice to the other side;***
2. ***There can be no injustice to other side if it can be compensated with costs;***
3. ***The courts will not refuse an amendment simply because it introduces a new case;***
4. ***There is no power to enable one distinct cause of action to be substituted for another or to change, by means of amendment, the subject of the suit;***
5. ***The court will refuse leave to amend where the amendment would change the cause of action into one substantially different character or where the amendment would prejudice the right of the opposite party existing at the date of the proposed amendment e.g by deputing him of a defence of limitation.***
6. ***The principles applicable to amendments of plaints are equally applicable to amendments of written statements of defence.***
7. ***A judge has discretion to allow amendments to the statement of defence to introduce a counterclaim provided that such an amendment does not transgress any of the aforesaid principles.”***

The appellant also relied on the case of **Equip Agencies Ltd vs Muhoroni Sugar Co. Ltd (in receivership) (2015) e KLR** where the court heavily relied on the case of **Central Bank of Kenya vs Trust Bank Ltd (2000) EA 365** and stated that a party should be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy.

In the appellant’s view, the trial magistrate in dismissing the appellant’s application for leave to amend its defence did not consider the applicable principles in the cases cited herein and in the case of **Macharia v Guardian Bank Ltd(2003) KLR 271**. The appellant further submitted that the trial magistrate misapprehended the purpose of pleadings by stating that the appellant in seeking to amend the defence did not adduce any evidence to support its assertion that it had paid the respondent Kshs 319,827 under the Workmen’s Compensation Act and in doing so denied the appellant an opportunity to present its evidence. It was therefore submitted on behalf of the appellant that this appeal should succeed if a miscarriage of justice is to be averted.

The respondent on the other hand filed his written submissions dated 17th April 2015 instant opposing the appeal and supporting the ruling and order of the learned trial magistrate, urging this court to dismiss the appeal herein with costs.

The respondent contended that indeed the appellant sought leave to amend the defence to implead payments allegedly made to the respondent under the Workmen’s Compensation Act, but that they did not annex any evidence to the affidavit to demonstrate that they had paid any money to the respondent. In the respondent’s view, the appellant did not discharge the burden of proving that they were entitled to the orders sought as required under Section 107 to 109 of the Evidence Act.

The respondent also contended that no document was annexed to the submissions or to this appeal to demonstrate that any money was paid to the respondent hence it would be a waste of court’s precious time. He relied on Section112 of the Evidence Act that “ In Civil proceedings when fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.” The respondent also relied on **Eldoret HCCA 85/2002 Eastern produce (K) Ltd v James Kipketer Ngetich (2205) e KLR and Nairobi Industrial cause No. 2012/2012- Gerald Owino Oyubo v Vision Africa – Give a Child a Future** where it was held that he who alleges must prove.

In the respondent’s view, this appeal is a sham calculated to prejudice, embarrass or delay the fair trial of the original suit and is otherwise an abuse of the court process hence it should be dismissed with costs as to allow the appeal without proof of documentary evidence that the respondent was paid any money would be to issue orders in vain

I have carefully considered the record before me, and considered the grounds of appeal and submissions

made by counsels for the parties, the applicable law and the decided cases.

I am mindful of the fact that this is a first appeal and my duty is grounded on Section 78 of the Civil Procedure Act to evaluate an consider the evidence and the law and exercise as nearly as possible the powers and duties of the court of original jurisdiction and come to my own independent conclusion. This is a principle espoused in the **Selle v Associated Motor Boat Co. Ltd (1968) EA 123) KPS vs Kuston (K) Ltd (2009) 2 EA .212.**

I am however cautious that in so doing, I should be slow in interfering with the lower court's decision in a matter where it exercised its discretion unless such discretion was founded on wrong principles of fact and or law as was held by the Court of Appeal in the case of **Nkube v Nyamuro(1983)KLR 403** that:

> ***"A Court of appeal will not normally interfere with the finding of the fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."***

Similarly, In **Ndiritu v Ropkoi & Another** the Court of Appeal held that the appellate court should be slow to differ with the trial court and should only do so with caution and only in cases where the findings of fact are based on no evidence, or a misapprehension of evidence, or where it is shown that the trial court acted on wrong principles of law in arriving at the findings he did. See also in **Shah vs Mbogo (1968) EA 93** where it was held that:

> ***" The Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision , or unless it is manifest from the case as a whole that the judge has been clearly wrong on the exercise of this discretion and that as a result there has been misjustice."***

In **Smith v Middleton (1972) SC 30** it was held that:

> ***"A discretionary power should be exercised judicially and not in a selective and discriminatory manner, not arbitrarily and idiosyncratically."***

The power to order for an amendment to any pleadings is a discretionary power which must be exercised judiciously. In my view, t**he issues for determination in this appeal are:**

i. Whether the trial magistrate erred in law and fact and or applied wrong principles in refusing to allow the proposes amendment to the defence.
ii. Whether the respondent would in any way be prejudiced by the proposed amendments to the appellant's defence.

The substantive provisions for amendments to pleadings are Section 100 of the Civil Procedure Act and the old Order 6A Rule 3 of the Civil Procedure Rules, now Order 8 Rule 3 of the same Rules.

The above provision of the law and Rules provide a broad criteria or framework which should guide the court in the exercise of the discretion that: ***the amendment to pleadings should be necessary for purposes of determining the real issues or question which has been raised by the parties; and that it is just to do so***.

Case law has then interpreted the above provisions and defined the principles of law which circumscribe the exercise of judicial discretion in an application for amendment of pleadings. The principles which are binding on this court, depending on the circumstances of each case were set out in the Court of Appeal decision of **CENTRAL KENYA LTD V TRUST BANK LTD CA 22/1998 (2000) 2 EA 365** that:

i. The amendment must be necessary for determining the real question in controversy.
ii. To avoid multiplicity of suits provided there has been no undue delay.
iii. Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
iv. That no vested interest or accrued legal rights is affected; and
v. So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated in costs.

From the decided cases relied on by the appellant, it is clear that the discretion of a trial court to allow amendments of a defence or plaint is wide and unfettered except that it should be exercised judiciously upon the foregoing defined principles. It is for that reason that the court has power to allow amendments to pleadings or a defence that discloses no reasonable defence or a plaint that discloses no reasonable cause of action and to inject such an otherwise sham pleading with a new lease of life.

Applying the above clear principles to the present case, the appellant /defendant sought to amend the defence to plead that should the court find that the respondent /plaintiff was the appellant's employee and or that he was injured while engaged upon his employment with the appellant thereby sustaining amputation of the left hand, and that the appellant is liable to pay him damages, then out of such damages should be deducted the amount already paid out to the respondent under the Workmen's Compensation Act.

The appellant nonetheless did not annex any payment voucher to the affidavit in support of an application for amendment and that ***'failure to adduce evidence'*** and prove payment is what informed the decision of the trial magistrate to dismiss the application for leave to amend the defence.

The law is clear that a plaint or defence should not contain evidence but should plead only facts. Under Order (old 6 Rule 3 of the Civil Procedure Rules which were applicable to this matter then:

> ***" subject to the provisions of this Rule and Rules 6,7 and 8 every pleading shall contain and contain only, statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits."***

Albeit the respondent contends that in the absence of the evidence of any payment to him under the Workmen's Compensation Act, the amendments sought are a sham, it was nonetheless not demonstrated that the amendment sought was immaterial or useless or merely technical.

It is not in dispute that the plaintiff/respondent in his plaint sought for general damages both under the statute-factories Act for breach of duty of care of the employer to its employee while engaged upon the work and under common law. It is also not in dispute that where there is an award made under the statute, any amounts paid under the Workmen's Compensation Act would be deductible and unless it is pleaded by the defendant/appellant, it may not be allowed to adduce evidence to prove an unpleaded fact since it is trite law that parties are bound by their pleadings. In addition, the Civil Procedure Rules have since 2010 changed in the sense that whether a matter before the subordinate court or in the superior court , at the trial court, Order 11 of the Civil Procedure Rules which require full discovery and exchange of all the documents that parties intend to rely on at the hearing of a suit must be complied with fully before a certificate can issue for the hearing of a suit can commence.

It therefore follows that whether or not the appellant annexed a copy of payment voucher to the affidavit in support of its application for amendment of the defence, it would nonetheless be required to file and serve upon the respondent such documents that it would wish to rely on in defence as part of the pre-trial requirements.

The suit in my view would be caught up by the 2010 amendments to the Civil Procedure Rules that introduced Order 11 which mandate that pretrial directions must be given after the court is satisfied that all the pretrial requirements are complied with.

The appellant would still be required at the trial, whether or not the trial extended into the new 2010 Civil Procedure Rules, to adduce evidence to prove their allegations. They did not have to adduce evidence at the time of seeking for leave to amend the defence and such failure cannot be interpreted to mean that they had no evidence to prove the allegation.

In my view, the trial magistrate therefore acted on wrong principles when he exercised the discretion to deny the appellant the proposed amendment since at that stage, the appellant was not necessarily required to adduce evidence to satisfy the court that it had paid to the respondent any compensation pursuant to the Workmen's Compensation Act.

In my view, to require evidence at that stage would be engaging in a mini-trial without according parties an opportunity to gather sufficient evidence to support their respective positions, and thereby exercising discretion to oust the appellant from the judgment seat.

This appeal landed in the new constitutional dispensation where Access to justice is now a fundamental right guaranteed under the Constitution and espoused in Article 48 of the constitution of Kenya, 2010. This right ties up with the right to a hearing and fair trial under Article 50(1) of the Constitution, which right cannot be limited as contemplated in Article 25 of the Constitution.

It is for the above reasons that I hold, just like courts have held over time and repeatedly that the power to amend pleadings can be exercised by the court at any stage of the proceedings (including appeal stages); and that as a general rule, however late, the amendment if sought should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendments must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new cause of action 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 (see Court of Appeal decision in **Elijah Kipngeno Arap Bill v KCB Ltd (2013) e LKR** in which the Court of Appeal upheld its earlier decision **Joseph Ochieng & 2 Others v First National Bank of Chicago, Civil appeal 149/1991,** citing with approval **Bullen & Leaks & Jacobs precedents of pleading, 12th Edition).**

As to whether the application was belatedly brought, I note that the defence was filed on 22nd April 2009 and a reply to defence filed on 4th April 2009 and on 22nd January 2010 the application for leave to amend filed by which time the pleadings had closed up but the respondent had not taken any steps to set down the suit for hearing. It cannot, in my view, therefore be correct for the respondent to contend that the application and hence this appeal is intended to delay the just and expeditious disposal of the suit in the court below. In my view, had that application to amend the defence been allowed, with an order for costs to compensate the respondent, the suit would have been determined by now. The respondent has had to wait for over 5 years while this appeal was pending.

This court has also not seen any prejudice or injustice that would have been occasioned to the respondent had the proposed amendments been allowed as it has not been shown that there would have been any such prejudice.

I am enjoined by the Court of appeal decision in **Eastern Bakery v Castellino (1958) EA 461** where Sir Kenneth O'connor President of the Court of Appeal stated:

> ***" It will be sufficient to say that amendments to pleadings sought before the hearing 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."***

In the instant case, it is my view that if leave is granted to the appellant to amend their defence, the respondent would also be entitled to file an amended plaint or further reply to the amended defence. The cases of **Eastern Produce (K) Ltd (supra) and Gerlad Owino Ojubo (supra**) relied on by the

respondent are irrelevant to the circumstances of this case as the main issue is whether or not to exercise the discretion to allow an amendment to pleadings (defence) and not on proof which will come much later at the time of a full trial.

The circumstances of this case are such that if the amendment sought is disallowed, then the appellant can only cross examine the respondent on the issue of payments under Workmen's Compensation and not adduce evidence of any such payments since parties are bound by their pleadings and answers in cross examination cannot form a basis for one's defence or case.

In addition the appellant would be estopped by the doctrine of res judicata, from bringing a new separate cause of action to claim for reimbursement of any monies that may have been paid to the respondent under the Workmen's Compensation Act.

I also find that the amendment sought is necessary and not immaterial or useless or merely technical.

There has been no undue delay in making the application as the suit had been dormant for over 7 months when that application for leave to amend the defence resuscitated the suit.

The amendment sought, in my view, does not introduce a new or inconsistent cause of action which would change the action into one of a substantially character which can only be more conveniently made the subject of a fresh action; I do not see any vested interest or accrued legal rights which will be affected; and the amendment does not occasion prejudice or injustice to the respondent which cannot be properly compensated in costs.

It is for those reasons that I allow this appeal, set aside the order dismissing the appellant's application for leave to amend the defence in the court below made on 22nd February 2010 and substitute it with an order allowing the amendment sought vide the application dated 20th January 2010 for purposes of determining the real question or issue in controversy; which is what adjudication of cases and effective dispensation of substantive justice to parties under Sections 1A and 1B and Article 159 of the Constitution is all about.

I award costs of that application in the court below to the respondent.

The costs of this appeal shall abide by the outcome of the main suit in any event, to the successful party.

Dated, signed and delivered in open court at Nairobi this 15th day of July 2015.

R.E. ABURILI

JUDGE

15/7/2015

Coram: R.E Aburili J

C.A: Samuel

Mr Wageri holding brief for Ms Kagucia for the appellant

Mr Cohen holding brief for Nzavi for the respondent

COURT - Judgment read and delivered in open court as scheduled.

R.E. ABURILI

JUDGE

15/7/2015