IN THE COURT OF APPEAL

AT NAIROBI

(Coram:A.B. SHAH)

CIVIL APPEAL 149 OF 1991

BETWEEN

JOSEPHOCHIENG

PHILIPKAFUANDE

HENRY HEGGA

(Trading as AQUILINE AGENCIES)…....................APPELLANTS

VERSUS

FIRST NATIONAL BANK OF CHICAGO................. RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Mr. Justice J.F. Shields) dated 4th December, 1990

In

H.C.C.C. NO. 3818 of 1985)

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JUDGMENT OF SHAH. J.A.

On 20th March, 1989 the late Mr. Justice Rauf struck out the plaint in the superior court whilst holding that the plaint did not set out important averments relating to alleged inducing of breach of contract.

This court on 8th June, 1990 allowed the appeal against the decision of Rauf J., recalled the plaint and exercising its powers under section 3(2) of Appellate Jurisdiction Act (Cap 9) ordered amendment thereof. Whilst the proposed or suggested amendments were not formulated, this court did say that the plaint as it stood then was deficient in the absence of any allegation that the respondent (hereinafter referred to as "the defendant") acted maliciously and in the absence of particulars.

This was in Civil Appeal No.54 of 1989.

The appellants (hereinafter referred to as the plaintiffs)then filed an amended plaint in the superior court setting out(inter alia) particulars of malice with reference to alleged inducement of breach of contract by the defendant. Theplaintiffs still claimed general damages injunction and costs. But they did

not claim any special damages. The defendant filed an elaborate amended defence to the amended plaint. When the suit came up for hearing before Shields J. on 6th

November, 1990 Mr. Lakha (as he then was) appearing with Mr. Dhanji took a preliminary point to the effect (as far as can be made out from the notes made by the learned judge) that there can be no claim for general damages for inducing a breach of contract and that special damages must be pleaded. The learned judge has used word "specific" - I presume for "special".

The learned judge in a ruling given immediately after the close of arguments stated that he saw no point in adding to the scores of authorities on special damages and the necessity of pleading them. He (the learned judge) concluded that if the plaintiffs were to succeed in the action they ought to have pleaded special damages suffered by them for the alleged inducement of breach of contract. No such damages having been pleaded the learned judge proceeded to give time to the plaintiffs to apply to amend the plaint as he thought there was a possibility that the defect in the cause of action pleaded may be cured by embodying an amendment.

Following upon what the learned judge had ruled the plaintiffs applied for amendment of the plaint to include a special damage claim in the sum of shs.9,052,438/= of which sum shs.400.000/= was in respect of damage allegedly suffered by one of the plaintiffs when the defendant sold by public auction a house on plot Nairobi/Block/82/320 which was charged to the defendant for a sum of shs.300,000/=

The plaintiffs' application for further amendment of the plaint was filed on 27th November, 1990 and came up for hearing before the same judge on 4th December, 1990. The application for amendment was opposed on grounds that there was lack of good faith that the proposed amendments were useless; that omission to quantify earlier was not curable; that limitation had set in. that is, no amendment to include special damages for tort can be made after 3 years from the date the cause of action arose.

The learned judge ruled that the application for amendment was made in bad faith and that it was not shown how the amount of special damages was calculated. He further held that the figure of

such special damages cannot be plucked out from the air but that it must be shown how the loss was sustained. He termed the amendments useless. That as the plaintiffs had failed to set out in the plaint what they had to prove they could not prove it. He ruled that Order VI A rule *3{5)* does not permit an amendment to be made to cure a defective cause of action when the statute of Limitations would have barred the claim.

The learned judge having dismissed the application for amendment the striking out of plaint became a "fait accompli" in view of orders made by him on 7th November, 1990.

It is against the learned judge's refusal to allow the amendments proposed that this appeal was filed.

The appeal filed against the ruling of the learned judge ordering dismissal of the suit but deferring such dismissal until the application for amendment was heard has already been struck out as that appeal was filed without a certified copy of the orders appealed against having been included in the record of appeal. So the issue of general damages for the tort of inducing a breach of the contract does not fall to be decided any more.

The point for decision in this appeal is whether the learned judge was right in refusing to exercise his discretion to allow the amendments sought. I must bear in mind that I cannot interfere with the exercise of the discretion of the learned judge in the superior court unless the judge has misdirected himself in some matter and as a result arrived at a wrong *decision*, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been mis justice. See Mbogo & Another vs. Shah [1968] E.A. 93, 96 G M.

The application for amendment was based on the affidavit of first plaintiff who simply deponed to what transpired before the learned judge on 6th and 7th November, 1990 and stated that in consequence of

such order and as a result of earlier omission to plead special damages he was seeking leave to further amend the plaint to include a claim for special damages flowing out of the alleged inducement to breach the contract between plaintiffs and Print-Pak (Tanzania) Limited.

Mr.Regeru quoted extensively from Bullen and Leake & Jacob's Precedents of Pleading 12th Edition to support his arguments in justification of the learned judge's order. 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 exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff's claim as originally framed is unsupportab1e an amendment which would leave the claim equally unsupportable will not be allowed ; 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 Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation: that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a 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.

These are of course the principles upon which the courts act in allowing or disallowing any proposed amendments and our order VI A rule 3 sets out all such principles which have been gone into on many previous occasions.

Mr. Regeru relied on the decisions in Savannah Development Company Limited vs Posts & Telecommunications Corporation & Another Civil Appeal No. 160 of 1991, (unreported), Charles Sande vs Kenva Co-operative Creameries Limited Civil Appeal No. 154 of 1992, (unreported) to argue that unless special damages are pleaded the same cannot be proved. I agree with him.

This court in Kenya Bus Services vs Mavende (1991) 2 KAR 232 said so (per Omolo Ag. J.A.) at page 235.

But the issue before the learned judge was not one of no damages being allowed in the absence of specific pleading to that effect. The issue was whether the plaintiffs were entitled at that late stage to add a claim for special damages. If the plaintiffs had not pleaded special damages they would not have been allowed to call any evidence in that respect. The learned judge had appreciated that matter and hence of his own motion had arrested the ruling whereby he was minded to dismiss the suit.

In Charles Sande case (supra) this court went to the extent of saying that in the absence of specific pleading of special damages such claim cannot be allowed even if not objected to by the other side. This court said:

> "In this connection it was the duty of the appellant to put before the judge through his pleadings the claim for shs.14, 151,650/70; though the appellant had an opportunity to amend his plaint before leading evidence on that issue he chose not to do so."

It is therefore clear that only after an amendment the plaintiff could have proceeded to prove his special damages in Charles Sande case (supra)'.

Again in a similar vein this court said in the case of Coast Bus Service Ltd. vs Sisco & Murunga Danii

& 3 Others Civil Appeal No. 192 of 1992 (unreported;

> "We would restate the position special damages must be pleaded with as much particularity as circumstances pemit and in this connection, it is not enough to simply aver in the plaint as was done in this case that the particulars of special damage were'to be supplied at the the time of the trial if at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only where the particulars of the special damage are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars . "

The ratio that emerges out of these cases is that in appropriate instances or in proper cases but only subject to amendment, proof of special damages may be allowed. As already pointed out the learned judge had appreciated the situation and had hence suggested an amendment application before he proceeded to dismiss the suit. Mr. Regeru also relied on the case of Hyams vs Stuart King (a firm) [1908] 2KB 696 to argue that it is the plaintiff's duty which ought to be enforced by the judge, when he asks for an amendment, to formulate and state in writing the exact amendment that he asks, in justice to the defendant. That is a correct statement of relevant principle no doubt.

The plaintiffs were in fact seeking to plead the amendments

they were seeking but without setting out exactly how the loss of shs.8,652,438/00 occurred. That could be a matter, in my view, of seeking of particulars later, provided the amendments were sought bona fide and not as the suit proceeded.

One of the cases relied upon by the defendant in the superior court at the stage when objection was taken to the amended plaint (as it stood after incorporation of amendments ordered by this Court on 8th June, 1990) was Perestrello vs United Paint Company Limited [1969] 3 All E.R. 479.

Lord Donovan delivering the judgment of court in Perestre1lo case (supra) said at page 486 G:

> "What amounts to a sufficient averment for this purpose will depend upon the facts of the particular case, but a mere statement that the plaintiffs claim "damages" is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendants are entitled to fair warning"

He (lord Donovan) continues further:

> "Not only there was no mention at all of loss of profits in the statement of claim in the present case but, as has been pointed out, the case pleaded was inconsistent with such a claim. I agree with the view of the trial judge that the plaintiffs were not entitled without amendment (emphasis mine) to lead evidence of this loss."

The position, in my view, is that if a suit is capable of being breathed life into it ought to be done provided the defendant's legal rights are not unduly compromised. The defendant's complaint is that it was left all too late and hence the plaintiffs should not be allowed to amend.

For this I have to go into the history of this case. The suit in the High Court was filed in November, 1985. Defence was filed on 14th March, 1986.

When the suit came up for hearing proper for the first time the defendant took a preliminary point (objection in limine) that plaint did not disclose a cause of action. On 20th February, 1989 late Rauf J. struck out the plaint.

The plaintiffs appealed against that striking out order. This court on 8th June, 1990 recalled the plaint and ordered amendments.

The amended plaint was filed on or about 20th June, 1990.

Amended defence thereto was filed on or about 5th July, 1990.

The suit came up for hearing before Shields J. on 6th November, 1990 when yet again an objection in limine was taken as already pointed out by me.

The history of the suit thereafter has already been set out by me. The learned judge (Shields J.) held that the plaintiffs must show how the loss pleaded (per proposed amendment) was sustained.

The plaint as proposed to be amended only set out the averment

that the plaintiffs suffered special damage in the exact sum of shs.8.652,438/=.

The plaint does not *go* any further. As the learned judge pointed out it is not shown how the loss was sustained. The rules of pleading are clear. Exact amendment sought must be set out so as to put the other side on guard.

The cause of action arose in 1984, more than 11 years ago.

Damages in the sum (exact) of shs.8, 652,438/= must have been suffered at the time the suit was filed, as the plaintiffs state in the original plaint) that contract was rescinded in May 1984. The plaintiffs could not have taken until 1990 to calculate that damage.

In my judgment if I were to allow at this late stage the proposed amendments, the defendant would be deprived of its undoubted right to plead limitation. It is to be noted that it is for the very first time that the plaintiffs applied for addition of claim of shs.8,652,438/= some six years after the accrual of the cause of action. There are two aspects I am concerned with here. The first one is if the amendments were to be allowed would the doctrine of relation back come into effect, effectively depriving the defendants of defence of limitation? The other one is will any useful purpose be served by allowing such an amendment when the defendant could well plead defence of limitation to that claim?

I would myself adopt as sound reasoning what Lord Griffthssaid in the case of Ketteman____ vs____ Hansel Properties Limited (1988) 1 ALL ER 3S at page 62:

> "Furthermore whatever may have been the rule of conducts a hundred years ago to-day it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of trial even on terms that an adjournment is granted and that the defendant pays all costs thrown away these is a clear difference between allowing amendment to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.

There can be no doubt that what Lord Griffths said stands in Kenya to-day.

I also agree with what Lord Griffths said in the Ketteman Case (supra) at page 62:

> "Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in balance the strain the litigation imposes on the litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues one way or the other. Further, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence."

The learned judge exercised his discretion in not allowing

the amendment. Whilst exercising such discretion he said he was not satisfied as to the bona fides of the plaintiffs. I think he was right. The plaintiffs could have and must have or at least ought to have known the exact measure of their damages at the time they filed suit. Why did they not tell their counsel of the loss? Is it because they wanted to avoid paying court fees on the sum of shs.8,652,438/= as the learned judge has himself asked during the course of the arguments before him?

The learned judge was also, in his discretion, entitled to refuse the amendments when it was not shown precisely how the sum of shs.8,652,438/= was arrived at and when such damage was suffered? It was the plaintiffs' duty to make a full disclosure of reasons for their failure to earlier plead the special damages rather than go on seeking amendments as and when they were hit by the force of defendant's arguments on their want or lack of proper pleadings.

The learned judge was, in my view right when he said that the plaintiffs had to show how the amount of special damages was calculated either in 'amended' plaint or affidavit.

As the learned judge pointed out, it is no use simply plucking the figure from the air and then throwing figures at the defendant at the trial. In the circumstances the learned judge was right in stating that the proposed amendments were useless.

The learned judge was right in saying that Order VI rule 3(5) does not permit an amendment to be made to complete a defective cause of action where the statute of limitation would have barred the claim.

Again the learned judge was correct, in my view, in saying that paragraphs 12 to 14 of the proposed amended plaint do not show a proper cause of action. Paragraph 12 of the said proposed amended plaint is not in dispute but paragraph 14 thereof does not show any breach of duty on the part of defendant. It is not enough to say that one suffered so much damage unless that damage was caused by the party in some breach which breach must be a11eged.

All in all the conduct of plaintiffs' case has been so slovenly that it would be impossible now to have a fair trial if the proposed amendments were allowed and I would add that this court has adopted with approval a passage in the speech of Lord Griffths in the case of Ketteman (supra) in Ransley and Another vs K.N.C.C. Ltd Civil Application No. NAI 116 of 1988 (Unreported) and I reproduce the said passage:

> "Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. I can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of proceedings."

I would add that allowing an amendment to include a fresh claim of approximately 9 million shillings plus interest from 1984 would cause injustice not only to an individual but also to a banking institution which institution has moneys belonging to the ordinary people of this country. Even such institutions have to make provision for such claims and to ask them to make such a provisions some more than 6 years after the alleged event would be doing injustice to such institutions.

Justice works both ways. The defendant is entitled to as much protection by the court as the plaintiffs.

I also note that the plaintiffs sought some amendments beyond the scope of the appropriate ruling of the learned judge.

I would decline to interfere with the discretion of the learned judge with the result therefore that I would dismiss this appeal with costs.

Dated and delivered at Nairobi this 20th day of September 1995.

A.B. SHAH

JUDGE OF APPEAL