Mohan Meakin (K) Limited v Attorney General (Civil Appeal 209 of 2020) [2024] KECA 1674 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1674 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 209 OF 2020

F TUIYOTT, JW LESSIT & GWN MACHARIA, JJA

NOVEMBER 22, 2024

BETWEEN

MOHAN MEAKIN (K) LIMITED ..... APPELLANT

AND

HON. ATTORNEY GENERAL ..... RESPONDENT

(Being an appeal from the entire Ruling/decision of the High Court of Kenya at Nairobi –Milimani (R.K. Limo, J) dated 30th January 2020 in H.C. C.C. No. 79 of 2016)

JUDGMENT

1. Prior to its repeal, The *Restrictive Trade Practices, Monopolies and Price Control Act* (*Act No. 14 of 1988)* (hereinafter the Act) provided for the control of restrictive trade practices, collusive tendering, monopolies and concentrations of economic power and for the control of mergers and takeovers. These proceedings arise from a short-lived exemption of Kenya Wine Agency Limited (KWAL) from the provisions of that Act granted on 30th July 1990 by the then Vice-President and Minister for Finance.

2. Mohan Meakin Kenya Limited (Mohan Meakin or the appellant) carries out the business of distillery of spirits and owns a glass plant for the Kenyan market and at the High Court, contended that its major competitor was KWAL. Further, that both KWAL and itself were subject to the provisions of the Act. The complaint by Mohan Meakin was that the impugned exemption was unlawful as the minister did not have legal power to grant it. During the period of exemption Mohan Meakin alleged to have suffered serious financial and marketability problems as it was not free to sell its products in the market without the express permission or consent of KWAL technically, giving KWAL a monopoly in the business.

3. In proceedings commenced in the High Court on 15th August 1991 through a plaint of even date, Mohan Meakin complained that notwithstanding admitting that the exemption was illegal, the

minister had failed to revoke the exemption. In the plaint in which the Attorney General was named as defendant, Mohan Meakin sought a declaration that the exemption was ultra-vires the minister's powers and therefore null and void. It also sought general damages and costs of the suit.

4. In a short defence dated 21st February 1992, the Attorney General asserted that the minister had powers under section 5(b) of the Act to grant the exemption it did.

5. In a twist of events, the parties on 6th May 1992, recorded the following consent before Walekhwa, J (as she then was):

> " ORDER by consent the exemption given to Kenya Wine Agencies by The Vice President and Minister for Finance as per prayer No. A on the plaint is null and void.
>
> 2. Prayer (b) is to proceed to hearing."

6. The formal proof of the damages took a long time coming and not before some major developments to the proceedings.

7. In an application dated 20th June 2003, Mohan Meakin sought leave of court to amend its plaint essentially to introduce a prayer of special damages in the huge sum of Kshs.1,464,837,167.00. The Attorney General failed to attend court to oppose the application and Aluoch, J. (as she then was) allowed it and the plaint was amended. In response, the Attorney General filed an amended defence in which in answer to the claim for special damages raised a defence that it was statutory time barred for being pleaded 12 years after the filing of the suit.

8. The amended defence was to face a challenge when, on 13th August 2003, the appellant applied to have the amended defence struck out as being an abuse of court process as the issue of liability raised therein was res judicata. An application which was declined by Visram, J. (as he then was) triggering Nairobi Civil Appeal No. 31 of 2007, Mohan Meakin (K) Limited vs. The Honourable Attorney General. In dismissing the appeal, the Court of Appeal observed:

> " The issue of the respondent's liability for the special damages claim was therefore not res judicata and the respondent is entitled to defend it as he deems fit."

9. Mohan Meakin's claim was to eventually come up for formal proof before Limo, J. who, in a judgment dated 30th January 2020, found the suit unsustainable for the following reasons:

> "
>
> " i. This suit is incompetent and bad in law as the Minister of Finance was protected and/or immunized against such action by dint of Section 72(1) of the Act.
>
> ii. The claim of general damages is unavailable because it is barred by operation of Section 72(2) of the Act.
>
> ii. The claim on special damages is statutory time barred by dint of Section 4 of *Limitation of Actions Act*.
>
> Alternatively, there has also not been proved to the required standard and besides that Section 13 A of *Government Proceedings Act* renders the claim incompetent as the statutory notice to sue did not reveal the claim."

10. In the appeal before us, the grievances raised by Mohan Meakin can be clustered under five headlines. It is contended that the learned trial Judge erred in law and fact by: -

    i. dismissing the consent order in the absence of any ground warranting its dismissal and without a formal application.

    ii. rendering his decision on the basis of irrelevant issues and those not pleaded.

    iii. imposing a higher standard of proof than on a balance of probabilities applicable in civil cases.

    iv. interpreting the provisions of section 72(1) of The Act in a restrictive and rigid manner and in a way that shielded the minister from liability.

    v. finding that the claim was statutory time barred.

11. Mohan Meakin submits that the consent recorded was on liability and the only prayers in the Plaint that were to be determined by the trial court are prayers (b) and (c) being prayers for general damages and costs with interests, and therefore, the learned judge ought to have remedied the injury occasioned by an award of damages instead of dismissing the suit in its entirety. Mohan Meakin contends that by dismissing the suit, and the parties having already agreed in the consent that an injury existed for which the defendant accepted responsibility, the learned judge dismissed the consent order absent any ground warranting the dismissal and in absence of a formal application by any of the parties contrary to the holding of this Court in *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR.

12. Mohan Meakin asserts that the alleged doubt of its evidence does not necessitate the complete disregard to its claims especially of general damages, whose award is not based on any specific loss pleaded but on the loss as a result of the decision of the then Minister for Finance. The learned judge instead considered issues of jurisdiction which were not pleaded by the parties and which had been fully determined by the trial court on 19th May 1992 by Walekhwa J. (as she then was) and on 8th October 1999 by Okubasu, J. (as he then was). The learned judge was therefore sitting on appeal on two decisions of the trial court absent any proper appeal or application for review.

13. Mohan Meakin contends that the learned judge interpreted the provisions of Section 72(1) of the Act in a restrictive manner and in a way that shielded the Minister from liability despite that the consent agreed on liability between the parties. That the trial court in finding that the claim was time barred by limitations of actions was an error in the face of fact and law as the bringing of a new action is what is time barred under Section 4 of the Limitations of Actions Act, and not an application to amend the Plaint. Cited is the case of Charles Kipkoech Leting vs Express (K) Ltd & another [2018] eKLR. It was argued, therefore, that the trial judge did not make any estimate as to the damages to be awarded but failed to award any despite the appellant providing an assessment report before the court to assist the court in coming up with an estimate. Mohan Meakin also submits that the consent paved way for the appellant to amend its Plaint in respect of damages as per the draft that was presented to the court and therefore the respondent extinguished its right to plead limitation as regards the claim for special damages and was estopped from pleading a defence of limitation to that claim.

14. Further, that the learned judge considered irrelevant issues such as its tax credibility and issues of limitation of time which issues were not pleaded by the parties and which prejudiced the right of the appellant to fair hearing. The learned judge also assailed for allegedly disregarding evidence put forth by Mohan Meakin despite the fact that the respondent did not avail any evidence. It is contended that the documentary evidence produced by Mohan Meakin tilted the balance to the respondent. Cited is the case of Kenneth Nyaga Mwige vs Austin Kiguta & 2 others [2015] eKLR where the court determined

the position of unopposed documentary evidence. In this regard, the learned judge is faulted for failing to uphold justice to the appellant.

15. In response, the respondent submits that the suit was defective and incompetent in law as the Act barred any person from instituting a suit against the Minister or Commissioner or any person authorised by the Minister or the Commissioner by virtue of Section 72. That the only way would be to, first seek for a declaration that the impugned section is unconstitutional for whatever reason and seek for the removal of immunity and then seek redress. As there was no challenge to the applicability of Section 72(1), the trial court would not have overlooked the clear provision of the law in rendering its judgment. The respondent agrees with the learned judge that Mohan Meakin has no cause of action against it because a claim for special damages ought to have been included in the notice of intention to institute civil proceedings against the Government under Section 13A of the *Government Proceedings Act*. That although the said section was declared unconstitutional in 2008, the declaration cannot be applied retrospectively. The Supreme Court case of *Samuel Kamau Macharia and Another vs Kenya Commercial Bank Ltd and 2 Others*, SCK Application No. 2 of 2011 [2012] eKLR is cited in that respect.

16. The respondent further contends that the claim for special damages was statute barred by dint of Section 4(2) of the Limitations of Actions Act and a claim on special damages ought to have been included in the Notice of Intention to Institute Civil Proceedings against Government. That a claim for special damages need not only be pleaded but specifically proved, which the appellant failed to do. That the amended Plaint of 20th June 2003 introduced a prayer on special damages of Kshs. 1,464,837,167. The respondent points to this Court that the exemption notice issued by the then Vice President dated 30th July 1990 was operational between 1st August 1990 to 25th March 1992 which was when the cause of action arose. Therefore, the claim for special damages introduced in the amended Plaint was brought to court 13 years after the cause of action had arisen. Although the court on 5th June 2003 granted leave to Mohan Meakin to amend its plaint, at no time did the trial court grant leave to file a fresh suit out of time. Further, the respondent agrees with the learned judge's finding that Section 13A of the *Government Proceedings Act* renders the claim by Mohan Meakin incompetent as the statutory notice did not reveal that the claimant would be seeking the relief of special damages.

17. The respondent contends that Mohan Meakin failed to establish the source of its projected sales and failed to substantiate the alleged actual sales in its report. Furthermore, in 1991 when the exemption was in force, sales by Mohan Meakin was over Kshs. 26 million which was higher than its sales in 1988 and 1989 when the exemption had not been introduced. On the claim that it would have a surplus of Kshs. 8,510,439 which would have been interest on the 91 days Treasury Bills for the period 1st August 1990 to 31st December 2002, Mohan Meakin failed to establish the source of the table on the Treasury Bills that it had filed. The respondent further argues that on the issue that Mohan Meakin faced financial stress and had to dispose 16 plots in Athi River below their market value and in turn suffered a loss of Kshs.199,412,307, Mohan Meakin failed to substantiate and establish the same.

18. Responding to the claim for general damages, the respondent argues that the hands of the court are tied by dint of the provisions of Section 72(2) of the Act.

19. Finally, the respondent submits that the consent entered on liability before the superior court on 6th May 1992 does not contain signatures of either the consenting parties to show that they consented to the contents of the document arguing that the same was not binding and that there was no such consent as purported by Mohan Meakin.

20. This is a first appeal which is in the nature of a rehearing. We are expected the reevaluate the evidence led before the trial court with a view to drawing our own conclusions bearing in mind that, unlike the trial Court, we do not have the advantage of seeing and hearing the witnesses testify.

21. Having considered the grounds of appeal and the submissions made before us, we think that this appeal is disposed by resolving three main issues:

    i. Whether the consent order of 6th May 1992 could be defeated by section 72 of the Act.

    ii. Whether the appellant's claim for special damages was time barred.

    iii. Should the answers to (i) and (ii) be in the negative, whether there was any justification in holding that appellant had not proved the claim for special damages to be standard required by law.

22. Section 72(1) of the repealed statute reads:

> " No legal proceedings shall be instituted in any court against the Minister or Commissioner or any person authorized by the Minister or Commissioner for anything done or intended to be done in good faith under this Act."

23. The trial judge found that the Minister of Finance was protected and/or immunized against the action by dint of section 72(1) of the Act. The effect of that finding was to render the consent otiose and ineffective. The answer to whether those provisions guaranteed absolute immunity is in the language of the short provision. It is apparent to us that the protection is only in respect to anything done, or intended to be done in good faith. Anything done in bad faith, maliciously or recklessly, is not to be protected. The consent entered between the parties had two limbs. The first was that the parties agreed that the exemption granted by the Minister was null and void. Second, that Mohan Meakin was at liberty to prove its claim for damages. The upshot of those two facets of the consent was that the Minister's conduct was not permitted by law and so he was liable for any loss suffered by Mohan Meakin as a result of that conduct. It must be presumed that the Minister and counsel representing him had reflected on the circumstances under which the exemption was granted and concluded that it was not done within the parameters of conduct protected by section 72. In a word, it was not done in good faith. By his own concession, the respondent had taken a position that the Minister was not protected from legal proceedings in respect to the impugned exemption.

24. The next issue is around the statute of limitation. In finding the claim for special damages to be time barred, the learned judge reasoned thus: -

> " As I have noted above the exemption notice was dated 30th July 1990 and it was in operation between 1st August 1990 to 25th March 1992. The cause of action therefore arose in between that period. The plaintiff amended its plaint on 30th June 2003 introducing special damages in paragraph c and interests on special damages in paragraph d thereof. The plaintiff's new claim therefore was brought to court 13 years after the cause of action had arisen and to that extent, I find that the claim of special damages as particularized under paragraph 5A, 5B and 5C of the amended plaint is statute barred. The claim is based on tort as I have observed and the law (*Limitation of Actions Act*) provides that such claims must be brought before the end of 3 years from the date on which the cause of action occurred."

25. This important issue had caught the attention of this Court (differently constituted) when it determined Civil Appeal No. 31 of 2007, an interlocutory appeal earlier alluded to early in this decision

to be arising from the proceedings before the High Court from the decision of Visram, J. (as he then was). In upholding the decision of the learned Judge that rejected Mohan Meakin's application to strike out the respondent's amended defence, this Court, most crucially, held that the respondent was entitled to defend the claim for special damages notwithstanding the consent order of 6th May 1992 because '...the respondent cannot be said to have conceded to liability for a claim that was not before court at the time of that concession.'

26. In reaching that decision, the Court made a far-reaching finding regarding whether Mohan Meakin could benefit from the principle of relation back in amendment of pleadings in respect to the claim for special damages. The principle, which is one of practice, is that an amendment to a pleading will, in certain circumstances, relate back to the date the pleading was originally filed. So that in this case, from Mohan Meakin's vantage point, the huge claim for special damages will be taken to have been pleaded, not at the date it was introduced through an amendment to the plaint, but on 15th August 1991 when the original plaint was filed. The consequence would be that the plea of limitation would not be available to the respondent.

27. After an extensive discussion of the availability of the principle of relation back in amended pleadings in the country and when it can apply, this Court held regarding the matter at hand:

> " 22. The principle of relation back in amended pleadings is no doubt a sound one and there is no reason why it should not apply in our jurisdiction in appropriate cases. We endorse Hodson, L.J.'s statement in Warner v. Sampson [1959] 2 W.L.R. 109 at page 123-124 that "[o]nce pleadings are amended, what stood before the amendment is no longer material before the court." After amendment, the case is determined on the basis of the amended pleadings. In our view, however, the principle should not be applied generally to all amended pleadings. Each case should be considered on its merits. As Newbold JA stated in Eastern Radio v. Patel, [1962] EA 818, "[l]ogic and common sense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed." In this regard, we also concur with Law, JA's observation, though obiter, in South British Insurance Co. Ltd v. Samiullah, [1967] EA 659 that "even if an amended plaint does relate back to the date of the original plaint, for some purposes, such relation back cannot ... operate so as to preclude a judge from taking notice of the date of the amendment, if such date is material to the issue for decision, as it undoubtedly was in this case." [Emphasis supplied].
>
> 23. In this case, even though, as we have already pointed out, we are not sitting on appeal over Aluoch, J.'s decision allowing the appellant to amend its plaint, in considering the principle of relation back in amended pleadings, which is one of the issues raised before us in this appeal, we have to consider the circumstances of the case leading to the amendment of the plaint, the date of amendment if it is material and the ramifications that the application of the relation back principle will portend to the parties' respective claims. This is important because, as was decided in the case of Eastern Bakery v. Castelino [1958] EA 461, amendments to pleadings should not be allowed if they will cause injustice to the other side which will not be remedied by an award of costs.

24. In this case we are dealing with a huge claim for special damages of about Kshs.1.5 billion raised by the amendment to the plaint which was effected over 10 years after the original plaint had been filed. That together with interest thereon also relating back to 15th August 1991 when the original plaint was filed, will certainly be a colossal sum if the claim succeeds, which will no doubt cause great prejudice to the respondent that cannot be remedied by an award of damages.

25. The appellant knew of its loss of about Kshs.

1. 5 billion even before it filed its case. No explanation has been given as to why it was left out in the original plaint only to be raised over ten years later. In the circumstances, we find no justification for the application of the principle of relation back in amended pleadings to this case. That brings us to the issue of res judicata."

28. We are in complete agreement with this reasoning and outcome, and need not say more. The consequence is that the claim for special damages of about Kshs.1.5 billion by Mohan Meakin which was introduced into the proceedings by the amended pleadings on 30th June 2003 does not relate back to the date when the proceedings were first filed. The result, further, is that the special damages which is premised on a tortious cause of action which accrued on various dates between 30th July 1990 when the faulted exemption as granted and 5th March 1992 when it was lifted, was hopelessly outside the twelve-month period prescribed by section 3 of the *Public Authorities Limitation Act*. And, while the trial court erroneously cited the provisions of the Limitations of Actions Act, the end result is the same. The claim for special damages was statutory time-barred.

29. Being of that view, we need not consider whether Mohan Meakin proved the claim for special damages as required by law. We must however add that in our own assessment of the evidence placed before the trial court, we would have in all possibility reached a decision that there was no reason to fault the learned trial Judge's conclusion that the evidence fell short of establishing the special damages with specificity on a balance of probabilities.

30. We turn our attention to the prayer for general damages. In the amended plaint Mohan Meakin does not specify the nature of general damages sought. However, in the closing submissions made at trial, Mohan Meakin argued that it is entitled to, over and above the special damages, damages for "the frustration, pain and suffering incurred by the Plaintiff for a period of (2) years as a result of the Defendant's actions; and the need to discourage the egregious conduct of the Defendant". Notwithstanding that contention, Mohan Meakin did not propose what a suitable quantum would be. On our part we do not perceive the general damages to be deserved because no evidence was led on the "frustration, pain and suffering" suffered by Mohan Meakin that could not be properly and adequately compensated by the financial loss sought to be encapsulated in the special damages pleaded on its behalf. Regarding the need to discourage the egregious conduct of the Minister, this was certainly a call for an award for exemplary damages which would not be available as it was not pleaded.

31. In the end, the appeal is devoid of merit and is for dismissal. It is hereby dismissed with costs

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR