



**Evergreen Marine (Singapore) PTE Limited & another v Petra Development Services Limited  
(Civil Appeal E006 of 2020) [2023] KECA 1282 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1282 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E006 OF 2020  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
OCTOBER 27, 2023**

**BETWEEN**

**EVERGREEN MARINE (SINGAPORE) PTE LIMITED ..... 1<sup>ST</sup> APPELLANT**

**GULF BADR GROUP (KENYA) LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PETRA DEVELOPMENT SERVICES LIMITED ..... RESPONDENT**

*(An appeal from the ruling and order of the High Court of Kenya,  
Commercial and Admiralty Division at Mombasa (Chepkwony, J.)  
delivered on 24th July 2019 in High Court Civil Case No. 65 of 2014)*

**JUDGMENT**

1. This appeal arises from a ruling delivered on 24<sup>th</sup> July 2019 in HCCC No. 65 of 2014 by which the High Court (Chepkwony, J.) allowed the respondent's application dated 7<sup>th</sup> May 2019 for amendment of its plaint. The appellant complains that in allowing the amendment at the stage at which the proceedings had reached, the learned Judge wrongly exercised her judicial discretion; that the amendment is prejudicial to it and violates its right to fair hearing; and that this Court should therefore interfere with the judge's exercise of discretion and allow the appeal.
2. When this appeal initially came up for hearing on 5<sup>th</sup> December 2022, counsel indicated that judgment in HCCC No. 65 of 2014 from which this interlocutory appeal arises, had since been delivered and that there was an appeal from that judgment pending before this Court, being Civil Appeal No. E086 of 2021. Ideally this appeal, being interlocutory, should have been heard together with that appeal but that was not to be.
3. Back to the matter at hand, in its plaint dated 12<sup>th</sup> May 2014 the respondent, in addition to seeking numerous injunctive reliefs against the appellant, sought judgment for US\$3,750,000.00 being the value of a contract of sale of 250 containers that the respondent had entered with a third party, Rai



- Kripal Lumbar Limited (the purchaser). It was pleaded that the containers were to be shipped from Kenya to India, and that the appellant defaulting in releasing pertinent original Bills of Lading thereby inducing a breach of contract between the respondent and the purchaser with the result that the purchaser terminated that contract.
4. The respondent averred that the appellant had, without any justification wrongfully and unlawfully, in breach of the provisions of Section 3 of the *Carriage of Goods by sea Act* (Cap 224, Laws of Kenya), refused to release to the respondent the original signed Bills of Lading in respect of the shipment of the containers thereby inducing a breach of contract between the respondent and the purchaser.
  5. The appellant entered appearance in the suit and subsequently applied to strike out the suit on grounds that the High Court lacked jurisdiction over the matter. That application was unsuccessful. Meanwhile, in the absence of a statement of defence, the respondent successfully applied for and obtained interlocutory judgment. Subsequently, the appellant applied to set aside the interlocutory judgment. That application was declined. The appellant appealed to this Court, in Civil Appeal No. 91 of 2015, against the decision refusing to set aside the interlocutory judgment. That appeal failed and was dismissed.
  6. Back to the trial court, and with the interlocutory judgment intact, the matter proceeded by way of formal proof whereupon the respondent's witness, Rami Fakhouri, a director, and shareholder of the respondent testified and was extensively cross examined. Prior to commencement of re-examination, counsel for the respondent orally indicated that the respondent wished to amend its plaint. Thereafter the said witness was re-examined. Directions were then given by the trial court for the respondent to make a formal application for amendment and on 10<sup>th</sup> May 2019, the respondent presented its formal application for amendment of the plaint dated 7<sup>th</sup> May 2019.
  7. In the application, the respondent sought leave to amend the particulars of special damages by substituting its claim for US\$ 3,750,000.00 (being the value of the contract entered into between it and the purchaser) with three separate heads of claims of special damages relating to demurrage and penalties US\$ 18,640.00; value of the 6 containers US\$90,000.00; and US\$ 2,367,971.20 for loss sustained on account of loss arising from termination of contract by the purchaser.
  8. In his affidavit in support of that application, Rami Fakhouri deposed that he testified on, and was extensively cross examined on the question of the claim for damages; that at the time of filing the suit, the amount claimed was US\$ 3,750,000.00 being the total value of the contract between the respondent and the purchaser but, "however, as is evident from my evidence tendered before this Honourable Court and upon which I have been extensively cross-examined, the loss actually suffered by the [respondent] was US\$, 2,449,501.00" based on the Company's audited accounts for the years 2014 and 2015; that those accounts were not available at the inception; and that given the matters raised in court as well as the fact that the appellant's counsel "has extensively cross examined me on my evidence" on the loss sustained by the respondent, it was necessary to make the proposed amendments.
  9. The appellant opposed the application on grounds set out in its grounds of opposition and a replying affidavit sworn by A.M.R. Abdelsalam, a representative of the 2<sup>nd</sup> appellant namely that the application was in bad faith, was made after unreasonable delay; was made after close of the respondent's case and was prejudicial to the appellant's case contrary to the appellant's right to fair hearing under Article 50 of the *Constitution*.
  10. After considering the application, the learned Judge, in allowing the application expressed that the respondent had established that the amendment was necessary for determining the real question in controversy and to avoid a multiplicity of suits having taken into account that no defence was ever



filed by the appellants and that default interlocutory judgment had been entered on 22<sup>nd</sup> August 2014 and never set aside; that it was the duty of the court to ensure a party is given ample opportunity to ventilate the issues arising from its case and that it was in the greater interest of justice to allow the amendment. Accordingly, the Judge directed that the draft amended plaint is deemed as duly filed subject to payment of court fees and that “the case having proceeded ex parte, the defence pleadings were closed” and that the main suit be fixed for hearing on a priority basis.

11. The appellant has challenged that decision on grounds that the Judge erred in allowing the application for amendment when the same was filed after undue delay after a full hearing of the respondent’s case without regard to the injustice to the appellants; that the amendment substantively altered or changed the nature and character of the claim and the Judge erred in denying the appellants the right to respond or file a defence to the amended plaint thereby violating the appellant’s right to a fair hearing; and that the exercise of discretion by the Judge in allowing the application for amendment was arbitrary.
12. Urging the appeal before us, learned counsel for the appellant Mr. Wafula in his written and oral submissions urged that the appellant’s constitutional right to fair hearing under Article 50 of the *Constitution* was violated as the application for amendment was made after the respondent’s witness had testified and cross examined on the claim as originally filed; that there was undue delay in presenting the application with the consequence that injustice was occasioned to the appellant; and that Article 50 of the *Constitution* envisages that a defendant in a suit should be served with the claim well in advance in order to prepare and answer the claim. In support, counsel cited the judgment of the Supreme Court decision in *Shollei v Judicial Service Commission & another* (Petition 34 of 2014) [2022] KESC 5 (KLR).
13. It was submitted that the application for amendment should not have been allowed, having been made after hearing of the respondent’s case; and that the Judge erred in allowing the amendment at that late stage of the proceedings after the trial had proceeded on the basis of the original plaint; that the effect of the amendment was to substitute the particulars of the special damages which had not been brought to the attention of the appellant; that it is comparable to amending a charge sheet in a criminal case after a hearing.
14. Counsel submitted that following the amendment, the appellant had the right to respond to the new claim and should have been granted an opportunity. The case of *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others* [2014] eKLR was cited in support of the argument that the effect of the amendment was to set aside the interlocutory judgment which could not possibly apply to the new claim.
15. Opposing the appeal, learned counsel for the respondent Mr. Khagram submitted that there is no basis for interfering with the exercise of discretion by the learned judge; that circumstances that would warrant interference with the judges exercise of discretion as set out in *Printing Industries Limited & another v Bank of Baroda* [2017] eKLR do not exist in this case; that amendments of pleadings are freely allowed and can be entertained at any stage of the proceedings; that the amendment did not constitute a new cause of action as contended by the appellants. In that regard reference was made to the case of *William Muinde Kilundo v Peter K. Wambua & 3 others* [2018] eKLR.
16. It was submitted that the amendment relates to special damages following extensive cross examination of the respondent’s witness by counsel for the appellants over a period of one and half days and that the amendment was necessary to reflect what was in the evidence; that in any event the amendment resulted in a reduction of the claim and the appellants are not prejudiced; that in any event, there was already interlocutory judgment against the appellants who have no defence.



17. It was urged that the amendment did not, as contended by the appellants, set aside the interlocutory judgment; that on the strength of the decision in the case of *William Muinde Kilundo v Peter K. Wambua & 3 others* [2018] eKLR, the amendment related back to the original plaint; that sending back the parties to the beginning would be prejudicial to the respondent; that where, as here, there was no defence, the question of filing an amended defence could not arise as there was no defence in existence in the first place to amend; that the appellants are effectively seeking a back door entry to defending the suit where numerous previous attempts to set aside the interlocutory judgment was declined.
18. It was submitted that the appellants having delayed and frustrated the progress of the claim, they should not be permitted to take advantage of their own default or wrong and there cannot be any unfairness in disallowing the appellants from filing a defence given their previous dilatory conduct. The case of *Muriithi M'Mbui & another v Housing Finance Company of Kenya Limited* [2006] eKLR was cited.
19. We have considered the appeal and the submissions. The application for amendment of the plaint involved the exercise of judicial discretion by the learned Judge and, generally, amendments to pleadings should be freely allowed if they can be made without injustice to the other side. See *Eastern Bakery v Castelino* [1958] EA 461 and *Central Kenya Limited v Trust Bank Limited* [2006] 2 EA 365. It is also established that the power to allow amendments can be exercised at any stage of the proceedings. See *Printing Industries Limited & another v Bank of Baroda* (above).
20. The circumstances in which an appellate court may interfere with the exercise of judicial discretion by a judge are limited. In *Mbogo & another v Shab* [1968] EA 93 Sir Charles Newbold P. expressed that:

“...a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter 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 in the exercise of his discretion and that as a result there has been misjustice.....”
21. The issue for determination therefore is whether permitting the amendment of the respondent’s plaint by the learned Judge in this case constituted an erroneous exercise of discretion. In other words, the question is whether the learned Judge misdirected herself in law or misapprehended the facts or took into account of considerations of which she should not have taken account, or failed to take account of considerations of which she should have taken account or her decision, albeit a discretionary one, is plainly wrong. See *United India Insurance Co. Ltd; Kenindia Insurance Co. Ltd; and Oriental General and Fire Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR.
22. We have already set out above the circumstances leading to the application for amendment by the respondent. It was precipitated by the extensive cross examination of the respondent’s witness. As already stated the amendments that were sought and granted involved deletion of the claim for special damages of US\$ 3,750,000.00 based on the value of purchase between the respondent and the purchaser which was substituted with three separate and distinct heads of claims of special damages of US\$ 18,640.00 made up of demurrage and penalties the respondent was required to pay in relation to 6 containers at destination in India; US\$ 90,000.00 being value of 6 containers said to have been rendered obsolete and contents destroyed; and US\$ 2,367,971.20 being the amount claimed in respect of alleged loss sustained by the respondent as a result of the appellants’ conduct arising from the termination of the contract between the respondent and the purchaser.
23. Apart from the fact that the amendments would appear to have been aimed at plugging holes in the respondent’s case because of the cross examination of the respondent’s witness that preceded,



the stage at which they were introduced deprived the appellants an opportunity to interrogate them. The purpose of pleadings is not only for the court to know the matters for adjudication, but equally important, pleadings serve the important function of informing the parties the matters in controversy upon which they can prepare and present their respective cases. In *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* [2015] eKLR this Court adopted with approval a passage from Bullen and Leake and Jacob's *Precedents of Pleadings*, 12<sup>th</sup> Edition, London, Sweet & Maxwell (The Common Law Library No.5) that:

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.

Sir Jack Jacob in an article entitled “*The Present Importance of Pleadings*” published in [1960] Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in *Malawi Railways Limited v Nyasulu* [1998] MWSC 3 states of the importance of pleadings:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.” [Emphasis added]

24. Although there was already in force an interlocutory judgment in favour of the respondent, the appellants were nonetheless entitled to participate in the proceedings during the formal proof and to that end should have known the nature of the claim for special damages it had to meet. By permitting the respondent to substantively amend its claim for special damages post cross examination of the respondent's key witness without granting the appellant's an opportunity to interrogate the new claim, in our view, occasioned prejudice to the appellants. Given that there was already an interlocutory judgment in place in favour of the respondent and the door for filing a defence by the appellants had been closed, such opportunity would have entailed a recalling of the respondent's witness for cross examination on the amended claim.
25. On that ground alone, and although the appellant had raised other grievances with the exercise of the Judge's, discretion which are unnecessary to get into, this appeal succeeds. We allow the appeal and set aside the ruling and orders of the High Court given on 24<sup>th</sup> July 2019 and substitute therefor an order dismissing, with costs, the respondent's application dated 7<sup>th</sup> May 2019 and presented to the High Court on 10<sup>th</sup> May 2019. The appellants will have the costs of this appeal.

**DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2023.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. LESIIT**



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**JUDGE OF APPEAL**

**G.V. ODUNGA**

.....  
**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

