



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)**

**CIVIL APPEAL NO. 277 OF 2014**

**BETWEEN**

**PRINTING INDUSTRIES LIMITED .....1<sup>ST</sup> APPELLANT**

**MULTIPLE INDUSTRIES LIMITED .....2<sup>ND</sup> APPELLANT**

**AND**

**BANK OF BARODA .....RESPONDENT**

*(Being an appeal from the Ruling and Order of High Court of Kenya at Nairobi Milimani (Havelock, J)  
dated 30<sup>th</sup> January, 2013*

*in*

*(H.C.C.C. No.335 of 2008)*

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**JUDGMENT OF THE COURT**

The dispute regarding some financial facilities amounting to Kshs.49,132,286.25 advanced to the appellants by the respondent on the security of **LR 209/6857**(the property), culminated in the former instituting an action in the High Court for, among other prayers, a declaration that the debt had been fully settled, an injunction against the respondent to restrain it from disposing of the property, mandatory injunction to compel the respondent to release to the appellants the title documents to the property; and an order for the respondent to refund to the appellant Kshs.20,052,557.63, the amount they claim to have been overcharged. In its defence the respondent indicated that the appellants were truly indebted to it in the sum of Kshs.49,132,286.25. While the suit was still pending, the respondent applied and was granted leave to introduce minor amendments to the defence. In the course of the hearing and after three witnesses had testified on behalf of the appellant, the respondent once more sought to re-amend the defence to counterclaim the aforesaid Kshs.49,132,286.25 and Kshs.3,293,108, being receivership charges paid by the respondent. The respondent urged the court to allow the amendment because it was necessary to resolve with finality the real issues in controversy between the parties; and that the amendment would not prejudice the appellants.

The application was resisted by the appellants who argued that the application was not brought in good faith, as it had taken the respondent two years to bring after the first amendment was allowed; that the

parties had complied with all the requirements under **Order 11** in respect of discovery, exchanged documents and filed agreed issues. The appellants further argued that the proposed amendment was prejudicial to them; that the respondent had not offered any reason for the inexcusable and inordinate delay in presenting the application; that the proposed amendment introduced a new cause of action, which if allowed, would lead to further delay and disruption of judicial administration; and that the application was an abuse of the court process.

After considering those arguments and bearing in mind the fact that the application was being brought four years after the suit was instituted and after the court had earlier on granted leave to the respondent to amend its defence, the learned Judge, relying on this Court's decision in **Joseph Ochieng T/A Aquiline Agencies versus First National Bank of Chicago Civil Appeal No. 149 of 1991**, was nonetheless of the view that the application was merited; that the amendment arose out of the same facts as the main action; and that the appellant did not stand to suffer any real prejudice if the amendment was allowed. The Judge, instead was of the view that the proposed amendment would save the court and parties time and money as the issues it raised would be decided with finality without having to bring a fresh separate suit. Consequently he granted the application and awarded costs to the appellant as compensation for any inconvenience.

The appellant did not think the respondent deserved the order to amend the defence twice and has challenged the decision of the learned Judge in this appeal. In particular the appellant has complained that the learned Judge erred in allowing the defence to be amended at an advanced stage of the trial without the respondent justifying the delay; that the re-amendment introduced a new cause of action in the form of an unpleaded claim of Kshs.52,425,394.25, which the learned Judge failed to see; and that the principles to be considered in determining an application for amendment contained in the authorities cited by the appellant were ignored by the learned Judge.

The respondent, on the other hand supported the decision of the learned Judge and submitted that the discretion was properly exercised; that the amendment flowed from the pleadings and did not constitute a new cause of action.

Since the appeal arises from an interlocutory order we shall avoid making any definitive determinations on any matter of either fact or law regarding the main dispute. We shall, however re-evaluate the material presented before the learned Judge upon which he based his decision.

**Order 8** of the Civil Procedure Rules, upon which the respondent premised its application for amendment draws its force from the expression of **Section 100** of the Civil Procedure Act that;

***“100. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.*** (Emphasis).

**Order 8 rules 3 to 5** stipulate that, where leave is required before amendment of pleadings, it may be granted in the following pertinent circumstances;

***“(1) .... at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct***

....

***(2) .....***

***(3) .....***

***(4) .....***

**(5) 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 or substantially 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**".(Emphasis).

As we bear in mind these considerations we shall be asking ourselves whether the learned Judge properly exercised his discretion in favour of the respondent. Subject to the requirement that discretionary power must be exercised judiciously, this Court will be slow to interfere with the exercise of discretion by a judge of the High Court. In **United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd** [1985] E.A 898 **Madan J.A** (as he then was) explained the principle as follows:

***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

This caution must be exercised because the exercise of discretion is always by the trial court and not the appellate court. An appellate court cannot substitute that discretion with its own discretion.

For the reason that in an adversarial system, parties are bound by their pleadings and can only rely on their cases as formulated and presented in court, it must follow that they should be free at any stage before judgment to amend them whenever necessity arises, of course subject to the relevant rules. The general object of amending pleadings as expressed both by **section 100** of the Civil Procedure Act and **rule 8** of the Civil Procedure Rules is to ensure that litigation between parties is conducted openly, honestly and unequivocally with the intention of finally settling the real issues in controversy between them. Each party thus knows in advance the case it faces and is not taken by surprise at the trial. The court is itself equally bound by the pleadings as presented by the parties.

In allowing the amendments in question, the learned Judge relied on an extract from the judgment of this Court in **Joseph Ochieng**(supra), which we think summarises and represents the law on amendment of pleadings. Writing for the Court and quoting extensively a passage from ***Bullen and Leake & Jacob's Precedents of Pleading*** 12th Edition, **Shah, JA**, said;

***"The ratio that emerges out of what was gleaned from the said book is that the 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 allow amendments can be exercised by the court at any stage of 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 the proposed amendments 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 unsupportable 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 they 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 if his claim is 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 the 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.”(our emphasis).*

Having set out the requirements of the law and how they have been construed, we return to apply those requirements to the appeal, the question remaining, whether the learned Judge exercised his discretion judicially.

The learned Judge considered that although the suit had been pending for four years, the law does not bar a party from applying for an amendment, at any stage before the final decision was rendered, so long as it is done in good faith and if the proposed amendment is substantially related to pending action. He also considered that both time and finance would be saved by allowing the amendment; and that the appellants would be compensated by an award of costs for the delay and inconvenience.

Although, there was obviously some delay before the last amendment was sought, with respect we agree that the appellants did not demonstrate the prejudice they would suffer as the amendment was sought in the course of a trial and before judgment. In any case the learned Judge awarded the appellants costs for their troubles and inconvenience.

We are also satisfied that the amendment did not introduce a new cause of action. From the time the defence was filed on 10<sup>th</sup> July, 2008 the respondent left no doubt that the appellants owed it Kshs.49,929,151. The amount was demanded from the appellants who even denied owing it in their plaint, only insisting that it was an illegal and exorbitant interest and penalties. The respondent in no less than three paragraphs of the original defence made reference to this sum, concluding with the statement that

***“18. The plaintiffs are still indebted to the defendant in the sum of Kshs.49,929,151/=”***

The application also sought to amend that figure to read Kshs.49,132,286.25. In addition the respondent intended to claim Kshs.3,293,108.00 together with interest, being a refund of receivership charges incurred by it on behalf of the appellants, hence the total sum of Kshs.52,425,394.25. In both the plaint and the chamber summons brought simultaneously with it, it is acknowledged by the appellants that the respondent had appointed **Azim Verjee** as the receiver on 19<sup>th</sup> June 2008 under the debentures executed with the appellants. That being the case we do not see how the respondent was expected to claim these sums except by amending the defence to plead them as a counterclaim.

From our own consideration and assessment of the re-amended defence, it is not true that the effect of the amendments was to introduce a new ground of defence. It was incapable of changing the original defence into one that was substantially of different character as to require the filing of a fresh action, as the facts that necessitated the amendments arose out of the cause of action brought by the appellant and the defence filed by the appellant.

We find no fault at all in the manner the learned Judge exercised his discretion in this matter. Consequently there is no merit in any of the grounds proffered in this appeal. It is accordingly dismissed with costs.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of March, 2017**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**