



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, WAKI & KIAGE, JJ.A)

CIVIL APPEAL NO. 129 OF 2014

BETWEEN

DAMCO LOGISTICS KENYA LIMITED.....APPELLANT

AND

BASH HAULIERS LIMITED.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (Kimondo, J.) dated 16th April, 2013

in

H.C.C.C. No. 311 of 2011)

JUDGMENT OF THE COURT

During the pendency of a suit filed at the High Court by the respondent against the appellant seeking some Kshs. 9,333,720 being the alleged balance of freight and transportation charges, the latter filed a notice of motion dated 20th December 2012 seeking leave of that court to amend its filed defence dated 13th April 2011 in terms of the draft amended defence, set-off and counterclaim that the appellant exhibited. The application was supported by an affidavit sworn by its legal officer one **Terry Nguire** explaining the need for the sought amendments, thus;

“6. THAT upon reconciling the plaintiff’s account with the defendant including applying the right of set off under the contract on account of the loss and damage incurred from the aforesaid accidents, it has emerged that the plaintiff is indebted to the defendant in the sum of Kshs. 729, 245.”

The appellant contended that the amendments sought to be introduced were necessary in order to enable the court to effectually and completely adjudicate upon and settle all issues in controversy between the parties; result in the efficient, timely and economical disposal of the case; avoid the possibility of a multiplicity of suits; occasion no prejudice whatsoever to the respondent incapable of compensation by way costs and would serve the interests of justice.

The respondent opposed the motion by filing grounds of opposition stating that it was misconceived and bad in law; the amendments would cause the respondent prejudice and injustice; were coming too late in the day after pre-trial preparations; and would completely change the appellants defence to the respondent's prejudice and injustices. No replying affidavit was filed.

After hearing the parties on that application, Kimondo J delivered a ruling on 16th April 2013 with which the appellant is aggrieved. Its memorandum of appeal states that the learned Judge erred in law and fact by;

- *Exercising his discretion unfairly and injudiciously and departing from well settled principle that amendments sought before hearing should be freely allowed.*
- *Failing to find that the respondent could be compensated by an award for costs.*
- *Failing to take into account the reason, apparent from the face of the record, for the alleged delay in bringing the application for amendment thus wrongly concluding that the delaying was unexplained.*
- *Finding that the proposed amendment would necessitate joinder of parties such as Maersk Kenya Limited, whereas they would not.*
- *Finding that the applicant failed to plead the proposed amendment yet the appellant had questioned the court's jurisdiction.*
- *Failing to do justice in regard to the application.*

It therefore prayed that the ruling and order of dismissal be set aside and substituted by one allowing the motion.

In his address **Mr. Mbaluto**, learned counsel for the appellant, submitted that the law on amendment of pleadings is settled: they should be freely allowed if sought without injustice to the other side. He cited the old case of *EASTERN BAKERY vs. CASTELINO* [1958] EA 461. Relying on this Court's decision of *CENTRAL KENYA LTD vs. TRUST BANK LTD* [2000] 2 EA 365 he urged that the amendments were necessary for the determining the real issue in controversy and the length of or mere delay do not suffice to deny a party leave to amend. He pointed out that the application before the learned Judge was made before the hearing and that an adjournment was in fact sought and obtained to enable the appellant to make a formal application for amendment.

Counsel contended that the proposed amendments went to the very root of the dispute between the parties and involved an amplification of the defence that had been raised by providing necessary details but not introducing any new or inconsistent pleading. He criticized the learned Judge for concluding that the amendments sought would cause the respondent injustice yet none had been demonstrated as the respondent had not even filed any replying affidavit. Pressing that prejudice could not be inferred,

Mr. Mbaluto stated that there was no basis for the learned Judge to find it, considering that the respondent would be afforded opportunity to respond to the set-off and counterclaim by way of appropriate pleadings and evidence. On the issue of delay he faulted the learned Judge for failing to note that the 1 year and 3 months between the filing of the defence and the application had been occasioned by, among others, the disposal of the preliminary issue of jurisdiction the ruling on which was delivered in January of 2012. Counsel also thought that the learned Judge went off on a tangent in holding that allowing the amendments would lead to the joinder of other parties such as Maersk Ltd yet it was clearly pleaded that the said company and the appellant were one and the same and there would definitely be no joinder required. At any rate, he submitted, the possibility of joinder of parties is no reason for the preclusion of amendment to pleadings. He concluded by asserting that the learned Judge exercised his discretion erroneously entitling this Court to interfere.

For the respondent, learned counsel **Mr. Taib** started by submitting that the real issue before this Court is not the test for grant of leave to amend pleadings, but rather whether there does exist a basis for this Court to interfere with the learned Judge's exercise of discretion in that regard. This we can only do, and counsel is undoubtedly right, if the learned Judge misdirected himself in law or misapprehended the law, or took into account matters he sought not to have or failed to take into account those he ought to have or his decision is plainly wrong. He contended, again correctly, that we would not be entitled to interfere merely because were we to exercise that discretion ourselves we would arrive at a different decision. **Mr. Taib** was all praise for the learned Judge who, in counsel's view, properly and thoroughly considered the law and the authorities on amendment of pleadings and was right to find that there was unexplained delay in bringing the application for leave to amend the defence. He submitted that nothing prevented the appellant from filing its own suit and its proposed amendments were "a ruse to beat the statute of limitation." Any amendment would, moreover, lead to the introduction of a multiplicity of parties who have nothing to do with the suit at the High Court. He dismissed the appeal as merely a plea to our sympathy and urged us to dismiss it.

In his rejoinder **Mr. Mbaluto** submitted that the learned Judge could not possibly have properly exercised his discretion if he applied the wrong principles, as is the appellant's case. He charged that the learned Judge merely quoted the correct principles but did not actually apply them thus merely paying lip service to them. He also misapprehended the facts such as by his assuming that the amendments proposed would lead to the necessary joinder of Maersk Ltd and that it would lead to a multiplicity of suits, which is not the case.

The matter of leave for party to amend its pleadings lies in the discretion of a judge. It is a wide discretion but it is always a judicial one, exercisable on the basis of settled principles. Because it is a discretionary power, an appellate court is slow to interfere with it and pays due deference to the judge's decision unless it has been exercised in a manner that is contrary to principle, is plainly wrong, or has led to misjustice. The parameters for our interference were aptly set out by this Court in **UNITED INDIA CO. LTD & 2 OTHERS vs. EAST AFRICAN UNDERWRITERS KENYA LTD** [1985] KLR 898;

"2. The Court of Appeal will interfere with a discretionary decision of a judge appealed from, where it is established that the judge;

a. Misdirected himself in law;

b. Misapprehended the facts;

c. Took account of considerations of which he should not have taken account;

d. Failed to take account of considerations of which he should have taken account;

e. His decision, albeit a discretionary one, is plainly wrong."

The complaint before us, as we understand it, is that the learned Judge fell into error in the manner in which he apprehended and applied the principles for giving leave for amendment of pleadings. As we have already observed, the general rule, which both parties agree to, is that amendments should be freely allowed before the hearing of a suit unless injustice or prejudice would be caused to the other side and there is no injustice if the other side can be compensated by an order of costs. The predecessor of this Court so held nearly seventy years ago in **EASTERN BAKERY vs. CASTELINO** (supra) and that has been the law ever since. It has to be so, considering that the purpose of amendments of pleadings is to enable the parties to bring before the court the true or real issues in controversy for the court's determination or to avoid a multiplicity of suits. This is acknowledged and codified in Order 8 of the Civil Procedure Rules, 2010.

The learned Judge was certainly alive to that general principle but he seems to have placed undue weight on what he perceived as the appellant's dilatoriness in bringing the application for leave, which he put as **"over one year and 3 months"** after filing the defence which he viewed as **"too lengthy [and]**

“fundamentally, unexplained.” With respect, we think the learned Judge overstated the delay, if delay it may be called, viewed from the general principle enunciated on the authorities that amendments should be freely allowed before the hearing, and in fact can be made, in proper cases, even after hearing but before judgment. The tag of **“delay”** was not an entirely accurate one in the circumstances. What is more, it was clear from the record, and also explained to the learned Judge, that the appellant had previously questioned the High Court’s jurisdiction to hear the dispute and it is only after that matter was ventilated and ruled on that the amendment was sought. We take the view that the learned Judge misapprehended the issue before him and moreover placed more weight than was called for on the alleged delay thereby clouding his judgment in the exercise of his discretion.

The learned Judge also quite clearly misunderstood the import and effect of the amendment sought. According to him, to allow the amendment would **“introduce a new party and claim so late in the day by amendment as opposed to joinder under Order 1”** The learned Judge came to that conclusion from the averment in the supporting affidavit that the appellant “was known as Maersk Logistics Kenya Limited but by a series of change of names changed its name to Damco Logistics Kenya Limited.” The transport agreement was between the said Maersk Ltd and the respondent. Nowhere in the motion or in the supporting affidavit was it ever suggested that Maersk Ltd was intended to be enjoined in the proceedings. It would seem the appellant was simply giving a historical background to the transactions and dispute between the parties or, at the very most, asserting that it was the successor in title to the said Maersk Ltd. The learned Judge therefore got it all wrong on that score and in consequence wrongly exercised his discretion in rejecting the proposed amendments.

The final point of error on the part of the learned Judge concerns this finding that the amendments sought would “prejudice the [respondent] and alter the character of the suit.” With respect, we are unable to discern the basis of the learned Judge’s said conclusion. As we have already noted, the respondent never challenged nor controverted the factual basis of the appellant’s application for amendment. It swore no affidavit in reply, being content, as it was entitled to, with the grounds of opposition filed on its behalf. That means that there was no averment made and no evidence tendered on what prejudice, harm or injustice would be occasioned by the amendments if allowed. Absent such averments, it was merely speculative of the learned Judge to hold that prejudice would be occasioned. And even if there would have been such prejudice, it behoved the learned Judge to interrogate whether it was of a character so great or grave as to be incapable of redress by an award of damages. We think that on the material on record and on the authorities, there was no such prejudice and the finding by the learned Judge was unsupportable.

We have said enough to show that this appeal is for allowing. We reiterate that amendments should be allowed freely if sought before trial to enable parties to lay all of the matters in controversy before the court for the sake of their efficient, expeditious, complete and cost-effective determination. Justice is best served by allowing parties to bring forth all their legitimate and genuine claims and defences rather than shutting them out on grounds of delay or such unless there is obvious mischief and a real likelihood of injustice or prejudice that cannot be compensated by an order of costs.

The learned Judge ought to have borne in mind the guidance of this Court given in **CENTRAL KENY LTD vs. TRUST BANK LTD** (supra) at 369-70;

“Mere length of proposed amendments is not a ground for declining leave to amend. The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

We allow the appeal and set aside the order of the learned Judge. We substitute therefor an order allowing the motion dated 20th December 2012, the costs whereof shall be in the cause. The appellant shall file and serve its amended defence, set off and counterclaim within fourteen days.

The appellant shall have the costs of this appeal.

Dated and delivered at Nairobi this 12th day of May, 2017.

E. M. GITHINJI

.....

JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR