IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 225 OF 2014

BETWEEN

TRISHCON CONSTRUCTION COMPANY ……...…… APPELLANT

AND

LANDMARK HOLDINGS LTD …… RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kimondo, J.) delivered on the 30th day of June, 2014

in

H.C.C.C. NO. 179 OF 2012)

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JUDGMENT OF THE COURT

For the reason that this is an appeal on an interlocutory decision of the High Court (Kimondo, J) rejecting the appellant's application to further amend the plaint, our consideration shall be restricted to the question whether the learned Judge properly exercised his discretion in arriving at that decision.

On 20th March, 2012 the appellant instituted an action by filing a plaint against the respondent, claiming that the latter had breached a contract in which the former had been engaged, in a subcontract in the construction of the headquarters of the Ministry of Energy in South B, Nairobi at a cost of Kshs. 512,862,685; and that when the appellant submitted its final account to the respondent, it was rejected and subsequently the contract terminated. The appellant was thereafter barred from the site. The appellant prayed for judgment in that sum and an order of injunction restraining the respondent from interfering with the machinery and equipment at the construction site until their collection by the appellant.

In response to the plaint the respondent filed a statement of defence and denied the allegations but clarified that the appellant was only engaged as a sub-contractor of wet works, labour, material and supervision at the aforesaid site at a cost of Kshs. 512,862,685; that the appellant submitted an account in the sum of Kshs. 8,527,940.40 which, according to the respondent was grossly overstated; that the appellant failed to perform the works in accordance with the terms of the sub-contract as the works were behind schedule; that by mutual agreement, parties agreed on terms, to terminate the sub-contract; that in violation to that agreement, the appellant submitted an inflated final account. The respondent maintained

that the correct final account was Kshs. 146,992,248 and not Kshs. 205,592,468.20, claimed by the appellant. The respondent intimated that the appellant was overpaid by Kshs. 52,760,582.06, which the respondent stated would be sought in the counter-claim. However, the counter-claim that was subsequently filed claimed reflected as an overpayment, only Kshs. 33,450.038.

On 9th September, 2013 the appellant filed a motion on notice to amend the plaint in order to introduce certain terms of the contract that allowed it to provide some of the equipment and machinery for the works, the nature of works it was required to execute, the scope of variation of the works and the terms of payment. It also sought to give particulars of breach of contract, and the fact that the appellant's agents were arrested on allegation of fraud when they went to the site. The amendment was also intended to specify the amount claimed, that is, Kshs.25,901,881.00, pray for an order that the respondent be compelled by an injunction to return the equipment and machinery or alternatively, to pay the value at Kshs.19,580,462.00, to claim for loss of user of the equipment and machinery due to their unlawful detention by the respondent, loss of profit due to unlawful termination of the contract and damages for breach of contract. The application for amendment was allowed by consent.

On 17th February 2014, the appellant took out yet another motion on notice under **order 8 rules 3, 5 & 8** of the Civil Procedure Rules for leave of the court to further amend the amended plaint to include a claim for loss of user of the equipment and machinery that were detained by the respondent.

According to the draft further amended plaint annexed to the application, the main amendments sought relate to an addition to paragraph 33 of the amended plaint, providing the description by listing of all the equipment and machinery purchased by the appellant in the course of the contract and an addition to paragraph 38 to include a list of equipment and machinery detained by the respondent from 13th January to 12th July 2012, a period of 180 days, translating to a loss of Kshs.11,149,200. Then there was a proposed amendment in relation to equipment and machinery detained from 13th January, 2012 to the date of the second application for amendment translating to 730 days, for which damages for loss of user in the sum of Kshs. 82,968,880.00 was claimed. The prayers in the amended plaint were also sought to be amended further to make a total claim in the sum of Kshs. 94,118,080.00 for loss of user.

The respondent opposed the application by filing grounds of opposition in which it maintained that the application was incurably defective; that the proposed amendments introduced an entirely new cause of action by seeking to include substantial claim not in the original and the amended plaints; that the application was an abuse of the court process as matters sought to be included ought to have been incorporated in the previous amendment; that the proposed amendments offended the provisions of **order 8 rule 7** of the Civil Procedure Rules.

The High Court (Kimondo, J.) heard the arguments but found no substance in the application, and relying on the decisions in **Leroka V Middle Africa Finance Company Ltd** (1990) KLR 549, **Eastern Bakery V Castelino (1958)** KLR 1, among others, observed that, although applications for amendment of pleadings should liberally be allowed at any stage before judgment, that discretion is a two way street where the court considers, before reaching the destination, whether the opposite party will suffer any injustice if the amendments are allowed; and whether the amendments sought amount to an abuse of the court process, or are sought merely to cause further delay in the fair determination of the dispute, among other considerations.

Applying these principles, the learned Judge concluded that the application lacked merit and dismissed it with costs, for the reason that the appellant was all along aware that its equipment and machinery, whose details and particulars were within its knowledge, were being detained by the respondent. In March, 2012, it sued the respondent and brought the first application to amend the plaint one and half (1½) years later, in October, 2013; that the details and particulars sought to be incorporated in the proposed amendments should have conveniently been made part of the first amendment; that the delay in bringing the application was not explained; that if the application was allowed the respondent would be prejudiced by the delay that was likely to follow; and that the proposed amendments did not affect the final figures claimed as special damages.

The appellant was aggrieved by the dismissal with costs of the application and now seeks in this appeal that that decision be set aside so that it may go ahead to make further amendments to the amended plaint. According to the appellant, the learned Judge erred in holding that there was delay in bringing the application for amendment; and that if allowed, the amendments would reopen pleadings and delay the determination of the dispute. These grounds were canvassed before us by Ms Kamau and Mr. Nyaanga, learned counsel, respectively for the appellant and the respondent.

Ms Kamau unlike Mr. Nyaanga supported her submissions with authorities to persuade us that there were sufficient grounds to warrant us to interfere with the exercise of the learned Judge's discretion. Mr Nyaanga, for his part, urged us to find that there is no substance in the appeal and dismiss it with costs.

The principles upon which an application for amendment of pleadings is to be considered, according to the authorities cited to us by learned counsel for the appellant, and according to **section 100** of the Civil Procedure Act and order 8 of the Civil Procedure Rules, are too well-known but may nonetheless be summarized as follows;

i. generally, an appellate court will not interfere with the exercise of discretion by a judge in allowing or disallowing an application for amendment of pleadings, unless it appears to the appellate court that in reaching the decision the judge proceeded upon a wrong principle;

ii. amendments sought before the hearing should be freely allowed if they can be made without occasioning injustice to the other side;

iii. the purpose for amendment of pleadings is to ensure that the real matters in controversy between litigating parties are determined together in order to avoid multiplicity of suits;

iv. amendments should be timeously applied for;

v. power to amend can be exercised by the court at any stage of the proceedings (including appeal stages);

vi. as a general rule, however late the amendment is sought to be made, it should be allowed if made in good faith and provided costs can compensate the other side;

vii. the exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court;

viii. if the court is not satisfied as to the truth and substantiality of the proposed amendment, it ought to be disallowed;

ix. the proposed amendment must not be immaterial or useless or merely technical;

x. where the plaintiff's claim, as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed;

xi. 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;

xii.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 of Actions Act but subject however to the power of the court to still allow such an amendment notwithstanding the expiry of current period of limitation;

xiii.the court has power 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 amendment.

These principles were adumbrated in the following and other several decisions. **Eastern Bakery vs. Castelino** (1958) 1 EA 461 (CAK)**, Motokov vs. Auto Garage Ltd and Others** (1971) EA 358**, Rose Kandie & Ano. vs. Esther Jepkemboi Kiplagat,** Civil Appeal No. 16 of 2012, and **Joseph Ochieng & 2 others vs. First National Bank of Chicago** Civil Appeal No. 149 of 1991.

In the original plaint the appellant, apart from making a claim for the balance on the final account amounting to Kshs. 67,559,034.24 also prayed that the appellant or its servants or agents be restrained from interfering with the equipment and machinery left behind at the site.

Over one year later when the plaint was amended with the consent of the respondent, the original plaint had metamorphosed from a two-page, eight paragraph document to a fifteen-page forty-two paragraph amended plaint. The concern as this stage is not even the length but the content. For the first time the amended plaint gave the details of the equipment and machinery that were allegedly purchased by the appellant and delivered at the site, and which were said to have been unlawfully detained at the site by the respondent. The appellant also made an additional prayer to those in the original plaint for damages for loss of user, loss of profit and damages for breach of contract.

In the proposed further amended plaint, the appellant sought to expand the list and particulars of the retained equipment and machinery, compute the period of their detention and the loss in terms of damages to constitute the claim for loss of user.

It appears to us that each time the appellant engages an advocate the first assignment is to apply to amend the plaint. For instance, the original plaint was filed by the firm of **Nyandoro & Company Advocates**, the amended plaint by **Muriithi Kireria & Associates** while the proposed further amended plaint was brought by **Wandabwa Advocates.**

We have observed that the only new aspect of the claim in the proposed further amended plaint is the enlarged list of equipment and machinery and the amount claimed in damages for loss of user. Having specifically pleaded loss of user in the amended plaint in such detail, it was, in our view, superfluous to seek to add more details, such as additional equipment, the number of days they remained in the possession of the respondent and the amount, all of which are infact matters of evidence.

It is elementary learning that every pleading in civil proceedings must only contain such information as to the circumstances in which it is alleged that the liability has arisen. **Order 2 rule 3 (1)** of the Civil Procedure Rules emphasizes that;

> **"3. (1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits."**

(our emphasis)

All that is required in a claim such as the one the appellant brought against the respondent is to state, in summary, only relevant facts upon which the claim is predicated and not, as we have witnessed in this matter, a prolix, repetitive and overly verbose statements and lengthy paragraphs, which may only serve to obscure the real issues in controversy. It is not the place or the stage, as the appellant sought, to present evidence. To prove that it suffered damages for loss of user, the appellant was required to only plead that loss and at the trial, to prove with evidence the extent of that loss, hence the traditional requirement in proof of special damages, that they be specifically **pleaded** and strictly **proved**.

Amendments must be timeously applied for. The proposed further amendment of the plaint was being sought two years after the institution of the original suit. We think, that alone would disentitle the appellant of court's discretion, as it would be prejudicial to the respondent.

If made in good faith, amendments should be allowed. The piecemeal amendments employed by the appellant and the nature of the amends leads us to think it was not in good faith. From 2012 when the contract was allegedly breached, it is pleaded by the appellant in the original plaint that there were equipment and machinery detained at the site, which it had sought to preserve by an injunctive order pending their collection. In the amended plaint, we have already observed, the great detail adopted to plead this fact, making it abundantly clear to us that no useful purpose was intended to be served by the proposed further amended plaint.

We, like the learned Judge are not satisfied as to the substantiality of the proposed amendment. It is immaterial and does not add any value to the appellant's case. The learned Judge, properly directed himself on the law, correctly applied it to the facts and judicially exercised his discretion. No material was presented to us to warrant our interference with the exercise of that discretion.

For these reasons, the appeal must fail. It is accordingly dismissed with

costs.

Dated and delivered at Nairobi this 4th day of November, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

……..…

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