



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MARAGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 31 OF 2007

BETWEEN

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

AND

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

(Appeal from the Order of the High Court at Nairobi (Hon. Mr. Justice Visram) dated 25th September, 2006

in

H.C.C.C. NO. 4267 OF 1991)

JUDGMENT OF THE COURT

1. The appellant carries on the business of distillery of spirits and glass plant in Kenya. It claims it has been doing so since 1986. One of its competitor's in that business is Kenya Wines Agency Limited (the Company) and at the material time both of them were subject to the provisions of the repealed **Restrictive Trade Practice Monopolies and Price Control Act No. 14 of 1988 [Cap. 504 of the Laws of Kenya]** (the Act).

2. On or about 30th July 1990, the then Vice-President and Minister for Finance (the Finance Minister) purporting to act under **Section 5(b)** of the Act, exempted the Company from the provisions of the Act. The appellant claims that that gave the Company monopoly for the wines business with the result that the appellant could not market its products without express authority from the Company. According to the appellant, that restriction caused it to suffer massive financial losses.

3. On 15th August 1991, the appellant filed Nairobi HCCC No. 4267 of 1991 against the Attorney General and claimed a declaration that the Finance Minister's exemption of the Company from the provisions of the Act was *ultra-vires* and therefore null and void; general damages; costs and interest at court rates.

4. Contemporaneous with the filing of the suit, the appellant filed a chamber summons under the then **Order XXXIX Rules 2 and 9** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Rules** and sought the same declaration as the one sought in the plaint and an order that “*the defendant do pay to the plaintiff damages for the period that the exception ... [had] been in force*” as well as the costs of that application.

5. The Attorney General filed a defence on 21st February 1992 asserting that the Finance Minister had the powers to grant the exemption and denied that the appellant had suffered the alleged loss or at all. On the same day, the Attorney General’s representative orally applied to have the matter referred to the Restrictive Trade Tribunal but that application was dismissed and directions were given that the matter was to proceed to hearing on a date to be given. Thereafter the matter came up for hearing several times but it was adjourned for one reason or another.

6. When the case came up for hearing before Walekhwa J (as she then was) on 6th May 1992, the parties recorded a consent that the exemption given to Company by the Finance Minister as per prayer No. “a” of the plaint was null and void and that prayer “b” of the plaint, which related to the appellant’s prayer for general damages, was to proceed to hearing.

7. On 20th June 2003, the appellant applied to amend the plaint. Upon the Attorney General’s failure to attend court to oppose that application, Aluoch J (as she then was) allowed it and the appellant’s amended plaint was thereafter filed. In the amended plaint, in addition to the prayers for general damages and costs, the appellant claimed special damages of over Kshs.1 billion. In response the Attorney General filed an amended defence and raised several issues the main one being that the claim for special damages was barred under the **Limitation of Actions Act**.

8. On 13th August 2003, the appellant applied to strike out that amended defence mainly on the ground that, given the consent that the parties had recorded on 6th May 1992, the amended defence was an abuse of the court process as the issue of liability raised therein was *res judicata*. After hearing that application, Visram J (as he then was) dismissed it with costs thus provoking this appeal.

9. The main issue raised in the appellant’s 23 grounds of appeal is that the learned Judge failed to appreciate that besides the consent order recorded before Walekhwa J on 6th May 1992, two or three other court orders settled the issue of liability and left the assessment of damages as the only outstanding issue. The learned Judge therefore erred in refusing to strike out the paragraphs of the amended defence that once again raised the issue of liability, so that the suit could proceed to hearing on the assessment of damages.

10. In their written and oral submissions before us, counsel for the appellant argued that, after recording the consent order of 6th May 1992, the Attorney General, who is the respondent in this appeal, had unsuccessfully sought to resurrect issue of liability. Enumerating the instances of that attempt, they argued that on 19th May 1992 the respondent’s application of 6th May 1992 which sought to refer the matter to the Restrictive Trade Tribunal was dismissed by Nambuye J (as she then was); on 3rd December 1992 the late Mango J dismissed the respondent’s application to amend the defence holding that allowing the proposed amendment would be tantamount to setting aside the consent order by a side wind; on 22nd February 1999 the respondent filed a notice of preliminary objection challenging the court’s jurisdiction to entertain the claim in view of **Section 20** of the **Act** but O’Kubasu J (as he then was) overruled that objection observing that the respondent had in a separate suit attempted to set aside the consent order but that suit was dismissed; and on 4th November 1992 the respondent applied to amend his defence to raise the issue of liability but that application was also dismissed.

11. Having failed on all those instances, counsel further argued, on 5th June 2003, the respondent conceded to an adjournment to enable the appellant apply for amendment of the plant “in respect of damages claimed.” After that the appellant applied to amend its plaint and claim a total of Kshs.1,464,837,167/=. That application was granted without contest. In counsel’s view therefore, given

the antecedents of the case, that amendment did not warrant a defence on the issue of liability being raised as the amended plaint related back to the date of filing of the original plaint. Counsel cited the cases of *Epainto v. Uganda Commercial Bank [1971] EA 185* and *Owners & Maters of Joey v. Owners & Maters of Barbara & 'Steve B' [2008] 1 EA 367* in support of the relation back principle. They therefore urged us to allow this appeal, strike out the paragraphs of the respondent's amended defence relating to the issue of liability and thus allow the appellants to formally prove his claim for damages. They also prayed for the costs of this appeal.

12. In response, counsel for the respondents argued, in their written and oral submissions, that the respondent's attempts to set aside the consent order of 6th May 1992 makes it clear that the state counsel who consented to that order had no authority to do so. Be that as it may, counsel further submitted, the consent order did not finally settle the issue of liability. If it did at all, then that related to liability for general damages and not special damages which had not been claimed at that time. He said that reading the consent to cover special damages would give an unfair advantage to the appellant and cause grave injustice to the respondent. Counsel cited the case of **Eastern Bakery v. Castellino [1958] EA 461 (CA)** in support of this argument.

13. Counsel contended that besides the fact that the claim for special damages coming in 2003 was an afterthought, the same having not been before court at the time of the consent, the amended defence challenging it cannot be *res judicata*. He said that the late Justice Mango's holding that to allow the respondent to amend his defence would amount to "setting aside the consent order and allowing the defendant to deny liability" should apply to the appellant. Striking out the respondent's defence denying liability for special damages would equally amount to setting aside the consent illegally. Moreover, at the time the late Justice Mango made that order, the claim for special damages had not been raised and was therefore not before court.

14. Finally, counsel submitted, the respondent was entitled to defend the new claim for special damages brought by the amended plaint and the defence of limitation is directed only to those special damages. He urged us to dismiss this appeal with costs.

15. We have considered these rival submissions. To start with we wish to point out that we are not sitting on appeal against the late Justice Mango's order denying the respondent leave to amend his defence and raise the issue of liability or indeed the decree in HCCC No. 5892 of 1993 dismissing the suit in which the respondent had challenged the consent order of 6th May 1992. We are also not sitting on appeal against Aluoch J's order granting the appellant leave to amend. That application, as we have stated, was heard *ex-parte* and leave to amend was granted. The respondent did not apply to set aside that leave to amend. What he did instead was to challenge, in his amended defence, the claim for special damages which the appellant raised in the amended plaint. We are in this appeal concerned with Visram J's order dismissing the appellant's application which had sought the striking out of the respondent's amended defence. So we cannot therefore entertain counsel for the respondent's contention that the State Counsel who conceded to the consent order of 6th May 1992 had no authority to do so.

16. As we have pointed out, the main issue raised in this appeal is whether or not, in light of the consent order of 6th May 1992 and the subsequent court decisions dismissing the respondent's pleas to amend his defence and challenge that consent order, the issue of the respondents liability for even the special damages raised in the amended plaint filed over ten years later was finally settled and therefore *res judicata*. To determine this issue, we need to look at that consent order, and the subsequent rulings in the light of the issues before the court as well as the principle of relation back in amended pleadings. We will start with the latter.

17. The appellant argued before us that on the relation back principle in amended pleadings, the amendment of the plaint relates back to or speaks from the date on which the suit was filed. That is to say that the special damages claim raised in the amended appellant's plaint should be deemed to have been incorporated in the original plaint. Does the principle of relation back in amended pleadings apply to this case?

18. As Russell Ag. J. observed in **Epaito v. Uganda Commercial Bank**, [1971] EA 185, an authority relied upon by counsel for the appellant, the principle of relation back in amended pleadings is a rule of practice not founded on any statutory provision. The principle is that an amendment to a pleading relates back to the date that pleading was originally filed. This is clear from the English Court of appeal decision in **Sneade v. Wotherton Baryes and Lead Mining Company**, [1901] 1 K.B. 295 where Collins M.R. stated at page 297 that upon an amendment being allowed, “*the writ as amended becomes the origin of the action, and the claim thereon indorsed is substituted for the claim originally indorsed.*”

19. In East Africa, the principle appears to have first arisen in the case of **Eastern Radio v. Patel**, [1962] EA 818 where Gould, J.A., relying on the above English decisions, held that an amendment to a pleading related back to the date it was filed. Newbold, JA (as he then was) held a contrary view while Sir Ronald Sinclair preferred to leave the issue open. Newbold JA’s view was that “[l]ogic and common sense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed.”

20. The application of the principle again arose before the predecessor of this Court in the case of **South British Insurance Co. Ltd v. Samiullah**, [1967] EA 659 in which Law, JA expressed no definite opinion on it but observed that “*even if an amended plaint does relate back to the date of the original plaint, for some purposes, such relation back cannot in my view 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.*” The other two Judges of Appeal in that case concurred without any comment.

21. In subsequent cases notably **Motokov v. Auto Garage Ltd & Others** [No. 2] [1971] EA 353, a decision of Biron J of Ugandan High Court, and this Court’s decision in **Owners and Masters of the Motor Vessel “Joey” v. Owners and Masters of the Motor Tugs “Barbara” and “Steve B”** [2008] 1 EA 367 (CAK), the courts in this jurisdiction have, without giving any rationale for it, simply held that the principle of relation back in amended pleadings applies.

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*.

26. **Section 7** of the **Civil Procedure Act** provides in effect that an issue between the same parties or those claiming through them, which has been determined by a court of competent jurisdiction, cannot be raised in a subsequent suit. Subsequent suit in that section can in this appeal be read to cover raising the same issue in the same suit but at a subsequent time.

27. It is not in dispute that the order of 6th May 1992 was by consent of the parties. What is in dispute is the issue it related to or settled. Counsel for the appellant contended that that consent order conclusively determined the issue of the respondent's liability to the appellant for damages for the Finance Minister's unlawful act of granting the company exemption under the Act. Counsel for the respondent contended otherwise raising two aspects of the issue in his submissions. He first argued that the consent order did not conclusively settle the issue of liability. His second argument was that even if it did, the consent did not cover the issue of special damages.

28. The record shows that as of 6th May 1992 the appellant's claim was for a declaration that the exemption granted by the Finance Minister to the company, which had caused the appellant to suffer loss and damage, was unlawful. Consequently upon that unlawful act, the appellant claimed general damages, costs and interest at court rates. On 13th March 1992, a representative of counsel for the appellant went to the High Court registry and fixed the case ex-parte for hearing on 6th May 1992. Come that date counsel for the parties informed Walekhwa J (as she then was) that the parties had reached a consent, which they wished to have recorded. As would be expected, the learned Judge obliged them and recorded the following consent:

“By consent the exemption given to Kenya Wine Agency Limited by the Vice President and Minister for Home Affairs as per prayer No. A on (sic) the plaint is null and void. 2. Prayer b to be proceed to hearing.”

29. It is not in dispute that what was sought in “prayer No. A” was the said declaration that the exemption granted by the Finance Minister to the Company was illegal and what was sought in “prayer b” was an award of general damages.

30. After recording that consent, instead of going on with the hearing on the assessment of the general damages sought in prayer b, counsel for the respondent orally applied to have that issue referred to the Restrictive Trade Tribunal for assessment of general damages. The record shows that the court reserved its ruling to 12th May 1992 but delivered it on 22nd May 1992 and dismissed that application.

31. As we have said the hearing on the assessment of damages was, for one reason or the other, adjourned several times. In the interim, the respondent obtained an adjournment on 14th October 1992 and later applied to amend his defence and challenge the consent but, as we have again said, the late Justice Mango dismissed that application.

32. When the matter eventually came up for hearing before O’Kubasu J (as he then was) on 4th October 1999, counsel for the respondent raised a preliminary objection, written notice of which she had been given on February 1999, contending that under **Section 72(2)** of the Act no compensation was payable to the appellant. In a reserved ruling, the learned Judge overruled that preliminary objection on 8th October 1999 and directed that the matter was to proceed to formal proof on general damages as earlier on ordered. This is one of the orders, counsel for the appellant said, that dismissed the respondent's pleas.

33. The other order referred to, though not dismissing any of the respondent's pleas, was made by Mbitio J

on 5th June 2003. On that date, the case was listed for assessment of general damages but counsel for the appellant obtained an adjournment to apply to amend the plaint. Mbito J directed that

“any application to amend the plaint in respect of damages claimed” was to be filed by 20th June 2003 and “any amended defence relating to such amended plaint concerning damages claimed” was to be filed by 5th July 2003. The parties were also directed to file by 14th July 2003 any documents they wished to rely on.

34. Up to that stage, there was no mention of special damages. The appellant’s claim was restricted to general damages. The claim for special damages sprung up in the application for amendment of the plaint which was filed on 20th June 2003 and not on 5th June 2003 as Mbito J had directed. As already stated that application was nonetheless heard ex-parte and granted by Aluoch J (as she then was) on 27th June 2003. In the circumstances we agree with counsel for the respondent and indeed Visram J (as he then was) that the claim for special damages having not been raised until 20th June 2003, it was not covered by the consent order of 6th May 1992 or the subsequent court orders dismissing the respondent’s pleas to challenge that consent. In our respectful view, the respondent cannot be said to have conceded to liability for a claim that was not before court at the time of that concession. To do so would in effect be tantamount to amending the consent order illegally. It therefore follows that Justice Visram’s decision cannot be faulted. 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.

For these reasons, we find no merit in this appeal and we accordingly dismiss it with costs.

DATED and delivered this 3rd day of October, 2014

W. KARANJA

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

