



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 81 of 2004

ELIJAH KIPNGENO ARAP BII APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED..... RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Ringera, J.) dated 27th March 2003

in

HCCC No. 324 of 2000)

JUDGMENT OF THE COURT

The High Court (Ringera, J, *as he then was*), in a ruling delivered on 27th March 2003 dismissed with costs the appellant's chamber summons for leave to amend the plaint. Being aggrieved the appellant has brought this appeal challenging the dismissal on five grounds which we have condensed as follows:-

- 1. That the holding by the learned judge that the proposed amendments were not necessary was erroneous.**
- 2. That the learned judge failed to consider the grounds for seeking amendments and the submissions.**
- 3. That the learned judge erroneously found that the matters sought to be introduced in the amendment were in the nature of evidence.**

These grounds formed the arguments by learned counsel for the appellant before us. For his part, learned counsel for the respondent urged us to dismiss the appeal as, according to him, the learned judge properly and judiciously exercised his discretion in dismissing the application.

The appellant's claim in the original plaint against the respondent is for general and special damages amounting to Kshs. 409,003,135/= for wrongful dismissal from the respondent's employment. The appellant also seeks aggravated damages, a declaration that his dismissal was unlawful and wrongful and an order of injunction against the respondent in respect of certain properties mortgaged to the respondent.

In the proposed amendment, running to 46 paragraphs from 35 paragraphs in the original plaint and

16 pages from the original 6 pages, the appellant has sought to explain, in a rather unusual fashion, the whole history in minute detail, of his employment with and eventual dismissal by the respondent. We are, with respect, in agreement with the learned judge in his observation that the manner of the proposed amendment “.....**would pass for evidence and submissions of a legal nature both of which have no place in a pleading.**”

The appellant further seeks in the proposed amendment several declaratory orders, an order directing the respondent to recalculate the appellant's indebtedness to it with regard to his mortgage, damages in the sum of Kshs. 837,663,137, an order of injunction to restrain the respondent from selling several properties in Nairobi, Kericho, Nakuru, a tractor and a car, and an order directing the respondent to publish an apology to the appellant for the embarrassment, humiliation and ridicule caused to him.

The learned judge in dismissing the application held that the proposed amendments were not necessary or relevant as they only elaborate in greater detail the role of the Government, its officers and the Board of the respondent company in dismissing the appellant and that that did not add value to the original pleading. In addition, the learned judge found that the proposed amendment seeking to introduce 'quantified' general damages, was not useful and not available in a case of breach of a contract of employment as the claim is in the nature of general damages which cannot be quantified. On this point, both counsel before us were in agreement that that amendment was misplaced and the judge was right in his finding.

The law on amendment of pleading in terms of **section 100** of the Civil Procedure Act and **Order VIA rule 3** of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from **Bullen and Leake & Jacob's Precedents of Pleading** - 12th Edition, in the case of **Joseph Ochieng & 2 others vs. First National Bank of Chicago**, Civil Appeal No. 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that 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 so amend can be exercised by the court at any stage of the 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 the proposed amendment must not be immaterial or useless or merely technical; that 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; that 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 Acts.”

The learned judge in rejecting the application for amendment was no doubt exercising a judicial discretion which must be exercised rationally. We have ourselves looked at the proposed amendment and while we agree that most of it is more like a presentation of evidence or submissions and further that it introduces a third party, the Government, it is in our view not useless or immaterial as there are several new averments which flow from the original cause. Of significance, the amendments seek to introduce declaratory reliefs not sought in the original plaint. From paragraphs 10 to 16 of the proposed amended plaint, the appellant seeks to explain, in very many words, how his services were, according to him, unlawfully terminated. Thirdly, the rejection of the entire paragraph 25 of the proposed amended plaint was erroneous as the claim for special damages amounting to Kshs. 3,360,000.00/= in respect of leave and director's allowances was properly pleaded.

Finally, with regard to the injunctive relief, the amendment seeks injunctive orders to restrain the respondent in respect of additional properties not included in the original claim.

In our view, therefore, the learned trial judge failed to consider that the amendment sought was intended to determine with finality the dispute arising from the appellant's dismissal. We believe that the amendment has not been sought in bad faith. In any case, the respondent does not stand to suffer

prejudice if the amendment is allowed.

Accordingly, we allow this appeal and set aside the ruling delivered on 27th March 2003 in High Court Civil Case No. 324 of 2000.

Costs to the respondent.

Dated and delivered at Nairobi this 12th day of April 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

/mgkm