**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 2 OF 2002**

**JAMES OCHIENG' ODUOL T/A OCHIENG ODUOL & CO. ADVOCATES.....APPELLANT**

**AND**

**RICHARD KULOBA …….....……. RESPONDENT**

***(Appeal from a ruling & order of the High Court of Kenya at Nairobi (Visram, J.) dated 27th day of November, 2001***

**in**

**H.C.C.C. NO. 1 OF 2000)**

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**JUDGMENT OF THE COURT**

By a plaint filed in the superior court at Nairobi, ***Richard Kuloba***, the respondent in this appeal, impleaded ***James Ochieng Oduol, Trading as Ochieng Oduol & Company Advocates***, the appellant, for damages for libel. The alleged libel was contained in an affidavit which the appellant, an advocate of the High Court of Kenya, drafted in support of a Notice of Motion he filed in court on behalf of his client in ***High Court Civil Case No. 418 of 1998***. At the material time the respondent was serving as a Judge of the High Court of Kenya. It was alleged in that affidavit that the respondent had received a bribe of *Kshs.5 million* from one, ***Kamlesh Mansukhlal Damji Pattni*** as an inducement to decide the case favourably to the opposite party in the case. The affidavit was drafted on *5th January, 1999*.

In ***paragraph 5*** of the plaint, the respondent averred as follows:-

***"5. The plaintiff has published and the fact is that at 8.09 a.m. on the said date prior to the filing of the said affidavit in court, the defendant published the said affidavit to the media with the sole and dominant motive of giving the publication the widest possible coverage and causing maximum damage to the plaintiff."***

After he was served with the plaint and summons to enter appearance, the appellant appeared, filed a written statement of defence and filed and served a request for particulars of the aforequoted paragraph pursuant to the provisions of ***Order VI rule 8*** of the Civil Procedure Rules, among them, the form of the alleged publications, the medium of the publication, the place of the publication, the media to which it was made and the person or persons in each of the media to whom the publication was made. The

particulars were duly furnished.

It would appear to us that the request for particulars provoked the respondent to move the superior court by chamber summons pursuant to the provisions of ***Order VI A rules 3, 5*** and ***8*** of the *Civil Procedure Rules*, for leave to amend the plaint to plead re-publication. The application which was dated *5th April, 2001* was heard by Visram, J. who, in a reserved ruling, granted the leave sought. He ruled that the court's jurisdiction to grant leave is wide, and even if the amendment sought introduces a new cause of action which is outside the limitation period, the amendment was in his view permissible under ***Order VIA rule 3*** of the Civil Procedure Rules. He did not think the amendment would cause any prejudice to the appellant which would not be compensated by costs. The appellant was aggrieved by the said ruling and hence this appeal.

Mr. Thangei argued the appeal on behalf of the appellant. His submission was as follows. The plaint as originally drawn and filed did not disclose a cause of action known at law against the appellant. It omitted an essential element of republication.

***Paragraph 5(b)*** of the amended plaint introduces a new cause of action as it introduces the element of republication without which no cause of action would be established. At the time the issue was introduced, the limitation period for instituting a libel action had expired. Unless the suit is good at the time of filing no amendment may be allowed. In his view the provisions of the subsidiary legislation to wit ***Order VIA rule 5***, cannot override the statutory provision, to wit, ***Section 4(2)*** of the Limitation Act, ***Cap 22*** of the Laws of Kenya. For these reasons, Visram, J. compromised the appellant's legal rights.

Mr. Satish Gautama, appeared for the respondent in the court below and before us. In his submissions before us, he expressed the view that both the Indian and English rules of practice do not apply to Kenya, as those two countries do not have the equivalent of ***Order VI rule 5***. Further, since particulars were requested for and were supplied, they formed part of the pleadings. Besides, he said the facts introduced were not new. They arose at the same time with those pleaded in the plaint. He expressed the view that the ruling by Visram, J. was impeccable and sets out correctly, the principles on amendment of pleadings.

There are ***22 grounds*** of appeal. That notwithstanding the main issue canvassed before us is whether the amendment requested fell within the exceptions provided under ***Order VIA rule 5(1)*** of the Civil Procedure Rules. That rule provides as follows:-

***"5(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and or such terms as to costs or otherwise as are just."***

It was common ground that the power of the court to order amendment is discretionary. The discretion though wide is circumscribed by the rule itself and by the general principles on amendments. The power may be exercised to substitute a party, to correct the names of parties or to allow the capacity of suing. ***(See rule 3)***. The relevant rule merely sets out the general power donated to the court to order an amendment to the pleadings.

The power of the court being discretionary, it then means that the general principles stated in ***Mbogo & Another vs. Shah [1968] E A 93*** apply. An appellate court has no jurisdiction to interfere with exercise of such discretion unless the court has acted on wrong principles, has misapprehended the law or has acted on no evidence or that he is plainly wrong. ***Newbold P*** rendered himself thus, in the matter:-

***"We come to the second matter which arises in this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial Judge, where his discretion as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected***

***himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

It is quite clear from decided cases that a trial court has power to allow amendments of a plaint disclosing no cause of action (See ***MOTOKOV V. AUTO GARAGE LTD. AND ANOTHER [1971] EA. 353***. In special circumstances amendment of a plaint may be allowed, notwithstanding that the effect will be to defeat a defence of limitation ***(BARCLAYS BANK D.C.O. VS. SHAMSUDIN [1973] E.A. 451)***. However, such amendments can only be allowed where peculiar circumstances are present.

What are the circumstances in this case? We earlier reproduced ***paragraph 5*** of the plaint. It said nothing about republication of the alleged defamatory words. It was not until a defence was filed alleging that no action lies and further denying publication, that the respondent moved the trial court for leave to amend the plaint. The facts which were introduced in the amended plaint were not new. The respondent was all along aware of them but failed to plead them in the plaint. The amendment appears to have been allowed in effect to aid a negligent pleader. The provisions of ***Order VIA rule 5(1)*** of the Civil Procedure Rules are not intended to aid a negligent pleader, more so where its effect will be to defeat an accrued defence. A careful reading of ***Order VIA rule 3*** of the Civil Procedure Rules clearly shows that amendments to defeat an accrued defence may only be allowed in exceptional and peculiar circumstances, which in our view are lacking here. We appreciate that particulars were requested for and furnished; and that by dint of the provisions of ***Order VI rule 8(b)***, the particulars now form part of the pleadings. However, in a case as this one where a plaintiff is reacting to a defence raised, the court should be slow in allowing amendments to the plaint which prima facie have the effect of defeating that defence. In exercising his discretion in this matter, Visram, J. failed to appreciate this fact and for that reason we think that he erred. Consequently we allow the appeal, set aside the order allowing the amendment of the plaint and substitute therefor an order dismissing the respondent's application for leave to amend the plaint, dated *4th January, 2000* with costs both of this appeal and the application to abide the outcome of the respondent's suit in the High Court.

***Dated and delivered at Nairobi this 21st day of November, 2008.***

***S.E.O. BOSIRE***

**…….....……**

***JUDGE OF APPEAL***

***E.O. O'KUBASU***

**…….....……..**

***JUDGE OF APPEAL***

***J. ALUOCH***

**…….....…..**

***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original.*

***DEPUTY REGISTRAR***