



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.1133 OF 2003

GRACE WANGUI MBURU.....1ST PLAINTIFF

PETER MUGUTI KAHUNYA.....2ND PLAINTIFF

-VERSUS-

PETER MBURU NGUGI.....1ST DEFENDANT

GEORGE NG'ANG'A NYOIKE.....2ND DEFENDANT

HOSEA MUTHAMA MWIKA.....3RD DEFENDANT

KARAGITA SELF-HELP GROUP.....4TH DEFENDANT

JOSEPH NG'ANG'A KANYUKII

T/A EXCELLENT AUCTIONEERS.....5TH DEFENDANT

RULING

1) The subject matter of this ruling is the motion dated 29th October 2020 and taken out by the plaintiffs/applicants whereof they seek for the following orders:

- a) THAT the plaintiff/applicant be granted leave to amend the re-amended plaint dated 25th November 2004.***
- b) THAT this honourable court be pleased to recognize the economic changes that have taken place since the filing of this matter 16 years ago.***
- c) THAT this honourable court be pleased to recognize that some claims which merited being included in the pleadings were left out by the former advocates and it is therefore in the interest of justice to include the same.***
- d) THAT the costs for this application be provided for.***

2) The applicants filed the supporting and further affidavits sworn by Peter Muguti Kahunya in support of the motion. The defendants/respondents filed the replying affidavit sworn by Godfrey Ng'ang'a Nyoike to oppose the motion.

3) When the motion came up for interpartes hearing learned counsels appearing in this matter recorded a consent order to have the same disposed of by written submissions. At the time of writing this ruling, the plaintiffs were the only parties who had filed their submissions.

4) I have considered the grounds stated on the face of the motion dated 29.10.2020 plus the facts deponed in the affidavits filed in support and against the application. I have further taken into account the written submissions filed by the plaintiffs.

5) In the aforesaid motion the plaintiffs are seeking for leave to have their re-amended plaint dated 25.11.2012 amended. It is the plaintiffs' submission that there is need to review the claim for special damages in light of the inflation rate and in consideration of the fact that the last valuation was carried out on 24th June 2004.

- 6) It is argued that the plaintiffs' former advocate omitted to include a claim for damages for mental anguish or based on breach of contract and for loss of earning by the plaintiffs due to demolition of their rental houses and shops.
- 7) The plaintiff further argued that the proposed amendments will only be capturing a previously left out fact and the current value of items as per the inflation rate. They also pointed out that the proposed amendments were timeously sought and in good faith. The plaintiffs further averred that the amendment should be allowed in the interest of justice and fairness.
- 8) The defendants solely relied on the replying affidavit of the 2nd defendant to resist the plaintiffs' application.
- 9) It is the averment of the defendants that the motion is frivolous, vexatious, bad in law, defective, without merit and amounts to an abuse of the court process. It is pointed out that the plaintiffs have previously made two amendments since 2003. The defendants further averred that for over 15 years the plaintiffs have been aware of the nature and prayers sought in the pleadings hence they have come too late to seek for amendments.
- 10) It is also pointed out that the suit has already been certified as ready for hearing on many occasions and during those occasions the plaintiffs failed to seek orders to amend their re-amended plaint. It is the submissions of the defendants that the plaintiffs' application was filed as an afterthought and is meant to add new causes of action which ordinarily be barred the Limitations of Actions Act.
- 11) The plaintiffs were also accused for failing to provide evidence to have the court determine the application for amendment. The defendants further accused the plaintiffs for being indolent for over 15 years therefore equity cannot come to their aid. It is the averment of the defendants that if the plaintiffs are granted the orders the defendants will be greatly prejudiced in that they will be dragged in court for over 17 years to further delay the conclusion of the matter.
- 12) The principles to be considered in determining an application for amendment of a pleading are varied. Under Order 8 of the Civil Procedure Rules **first** the court is given a wide discretion to grant leave to a party to freely amend pleadings even after the lapse of the period of limitation so long as the court thinks it is just to do so.
- 13) **Secondly**, an order to amend a pleading can also be granted notwithstanding that its effect will be to add or substitute a new cause of action so long as the new cause of action arises out of the same facts or substantially the same cause of action as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.
- 14) The general rule is that the court has the discretion of allowing amendments of pleadings at any stage in the proceedings of a suit before judgment.
- 15) In the case of **St. Patrick's High School Ltd vs= Bank of Africa (K) Ltd (2018) eKLR** the Court of appeal restated the principles to be considered in determining an application for amendment inter alia as follows:
- i. The power of the court to allow amendments is intended to determine the true substantive merits of the case.*
 - ii. The amendments should be timeously applied for.*
 - iii. Power to amend can be exercised by the advocate at any stage of the proceedings.*
 - iv. That as a general rule however late the amendments is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.*
 - v. The plaintiff will not be allowed to reframe his case of his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of the current period of limitation. It is not in dispute that this matter was filed in 2003, more than 17 years ago.*
- 16) In both the supporting and further affidavits, the plaintiffs did not explain the reason for the delay on their part to file the application for amendment despite acknowledging the fact that there was a considerable delay. There is an attempt by the plaintiffs to offer an explanation for the delay through their written submissions. It is alleged that the court file went missing. There is therefore no credible evidence to explain the delay which is apparently inordinate.
- 17) I think the plaintiffs are guilty of laches. Equity cannot come to the aid of an indolent party. With respect, I agree with the averments made by the defendants vide the replying affidavit sworn by Godfrey Ng'ang'a Nyoike that if the amendment is allowed they shall be greatly prejudiced in that there will be a further delay in concluding the matter since the process of pre-trial may start afresh.
- 18) It is apparent from the nature of the orders sought in the motion is for special damages to reflect the current value. With respect, I do not think the plaintiffs are entitled to the amendment. A cursory look at the re-amended plaint will reveal that the plaintiffs claimed special damages plus interest. The payer for interest in my humble view will cater for the inflationary trends and the increasing value of the property. The amendment of the claim is therefore not justified.
- 19) I have already enumerated the amendments the plaintiffs are seeking to make. The question which the plaintiffs need to answer is whether they were aware of the sort of prayers in their plaint? The defendants specifically averred in the replying affidavit that the plaintiffs for over 15 years were aware of the nature and prayers sought in the pleadings but never sought for any amendment. The plaintiffs did not respond to this specific averment which is made in the further affidavit. I am therefore convinced that the plaintiffs were aware all along that

there was need to amend their re-amended plaint but they chose to ignore only for them to approach this court too late in the day.

20) In the end, I find no merit in the plaintiffs' motion dated 29.10.2020. The same is dismissed with costs being awarded to the defendants.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant