



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 438 OF 2011

GITHUNGURI DAIRY FARMERS CO-OPERATIVE SOCIETY.....APPELLANT

VERSUS

PETER NG'ANG'A WAWERU & 22 OTHERS.....RESPONDENTS

(Being an appeal against the Ruling and Order of the Co-operative Tribunal (Mrs A.N. Ongeri)

delivered on 30th August 2011 in the Co-operative Tribunal Case No 271 of 2010)

JUDGMENT

1. In its Record of Appeal, the Appellant indicated that it was appealing against the Ruling and Order of the Co-operative Tribunal (Mrs A.N. Ongeri) delivered on 30th August 2011 in **Co-operative Tribunal Case No 271 of 2010**. In Paragraph (1) of its Written Submissions dated and filed on 6th May 2018, it stated that the decision it was appealing against was on pp 1556-1563 of Volume 4 of the Record of Appeal.
2. On pp 1556-1559 of the Record of Appeal Volume 4 was a Ruling of A.J. Kariuki Esq- Deputy Chairman of the Co-operative Tribunal that was delivered on 6th December 2010. An order that was given by Chairman, Co-operative Tribunal on 21st December 2010 was on pp 1560- 1563 of the Record of Appeal Volume 4. There was therefore no record of the Ruling and Order of the Co-operative Tribunal delivered by the Learned Tribunal on 30th August 2011 on pp 1556-1563 as the Appellant had contended. It appeared to have been an error on its part.
3. Be that as it may, a perusal of the index in the Record of Appeal Volume 1 showed that the decision of the Learned Tribunal on pg 1758-1760 of the Record of Appeal Volume 4. In the said Ruling, the Learned Tribunal allowed the Respondents' application dated 14th June 2011 in which they had sought to amend their Statement of Claim. The Learned Tribunal directed that the Amended Statement of Claim be served upon the Appellant herein within fourteen (14) days of the date of her Ruling and that the Appellant herein be at liberty to file a Reply within fourteen (14)days of service of the Amended Statement of Claim.
4. Being aggrieved by the said decision, the Appellant lodged its Memorandum of Appeal dated 10th September 2011 on 14th September 2011. It relied on eight (8) grounds of appeal. The grounds of appeal centred on the fact that the Learned Tribunal erred in having allowed the said amendment because the same conferred jurisdiction to the Co-operative Tribunal to hear and determine issues that were clearly outside its jurisdiction to hear and determine.
5. The Appellant explained in great detail how the Respondents had acted *ultra vires* the Constitution of Kenya, 2010 and the Co-operative Societies Act, 1997 causing it to suffer damage to property and it was therefore claiming Kshs 196,796/= from them.
6. The Appellant submitted at length on the law relating to amendment of pleadings and placed reliance on several cases amongst them **AAT Holdings Limited vs Diamond Shields International Limited [2014] eKLR** where the common thread was that ordinarily, amendments should be freely allowed for purposes of determining the real question or issue in controversy, that there should be no delay in making the application for amendment, that the amendment should not be seeking to introduce a new cause of action and that the amendment should not occasion the opposing party prejudice and/or injustice that cannot be compensated by way of costs.
7. It was its contention that the said amendments were intended to propagate the cause of one Hon Njoroge Baiya to fight its management committee with a view to having the members removed from its leadership and to remove matters that were currently before the High Court in a suit that was filed in April 2010 pursuant to a decision of the executive arm of government and vest jurisdiction to the Co-operative Tribunal to hear matters of constitutional rights and fundamental freedoms.

8. It was emphatic that the amendments that were made by the Respondents were not to determine the real question in controversy between them but rather they were aimed at defeating the efficient determination of the suit. It added that the disputes between it and the Respondents were political in nature and not disputes that were envisaged in Section 76(2) of the Co-operatives Societies Act.

9. It therefore termed the said amendment as frivolous, scandalous and an abuse of the court process and urged this court to uphold its Appeal herein.

10. On their part, the Respondents submitted that the Appellant had argued the appeal herein in a manner that was calculated at obfuscating the true and relevant facts of the case. They argued that they were entitled under Article 27(1) read together with Article 50 (1) of the Constitution of Kenya to place pertinent issues before the Co-operative Tribunal in exercise of its jurisdiction under Section 76 of the Co-operative Societies Act. It was their submission that a pleader was required to plead particulars of claim and in particular, malice. They averred that they amended their Statement of Claim so that the Appellant could fully understand their claim but that it appeared to have misconstrued the purpose of the said amendment.

11. They referred to the Appellant's assertions relating to the aforesaid Hon Njoroge Baiya but pointed out that they would not respond to the same terming them non-issues and red herrings aimed at frustrating and delaying the hearing of their claim.

12. It was their submission that the court has unfettered discretion to allow applications for leave to amend pleadings for the purpose of determining the real question in controversy between the parties and thus urged this court to dismiss the Appeal herein.

13. This court carefully considered the detailed submissions that were made by each party and noted that just as the Learned Tribunal had observed, the issues that were raised by the Appellant were issues of fact that could only be determined during trial. The only concern at this appellate stage was to determine whether or not the Learned Tribunal exercised its discretion judiciously in allowing the amendment of the Respondents' Statement of Claim. There was a real danger of this court delving into the merits or otherwise of the dispute before the Co-operative Societies Act if it analysed the factual issues that had been raised by the Appellant herein.

14. Notably, all parties were in agreement on the factors to be considered by a court when exercising its discretion on whether or not to allow an amendment to pleadings. This court did not therefore need to rehash the well settled principles in this regard save to state that Order 8 Rule 3 (1), (3) and (5) of the Civil Procedure Rules, 2010 provides as follows:-

1. Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

3. An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

5. An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action 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 suit by the party applying for leave to make the amendment..."

15. It is clear from the aforesaid provision that:-

1. A party may amend his pleadings at any stage of the proceedings;

2. The application for amendment may be allowed on such terms as the court would deem fit to impose;

3. The application can be allowed if it is one where an opposing party can be compensated by way of costs.

4. An application for amendment may be allowed even if the effect is to substitute a new party.

5. The application can be allowed irrespective of whether its effect will be to add or substitute the cause of action if the cause of action arises substantially from the same facts as a cause of action in respect of which the relief has already been claimed in the filed suit.

6. The mistake sought to be corrected must be genuine and not misleading or to cause reasonable doubt as to the person intended to be sued.

16. It is trite law that any amendment should ordinarily and/or freely be allowed if it is necessary for the determination of the real matter in dispute and if the opposing party can be compensated by way of costs or on such terms as the court would deem fit to impose.

17. In the instant case, the court was satisfied that the amendments that were sought by the Respondents were necessary for the determination of the real question in controversy between them and the Appellant herein. The issues they had raised were matters of fact to support their case and could only be determined during trial. The Appellant filed an Amended Defence and Counter-Claim on 26th September 2011 to controvert the contentions of the Respondents' Amended Statement of Claim and could not therefore be said to have been prejudiced.

18. It was premature for the Appellant to controvert the Respondent's case at this interlocutory stage. It was best that parties be given the full opportunity to present their cases in the way each knows best. Indeed, if a party was dissatisfied with the outcome after trial, it would be at liberty to approach this appellate court to hear and determine the appeal.

19. Accordingly, having considered the elaborate Written Submissions and the case law that was relied upon by both parties, this court came to the firm conclusion that the Appellant failed to demonstrate that the Learned Tribunal failed to exercise its discretion judiciously and that it arrived at a wrong determination as it had contended. In fact, this court found and held that it was very much alive to the principles of allowing an amendment as it aptly observed that it would not serve the ends of justice to decline the Respondents' application to amend their Statement of Claim.

DISPOSITION

20. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 10th September 2017 and filed on 14th September 2017 was not merited and the same is hereby dismissed with costs to the Respondents herein.

21. It is so ordered.

DATED and DELIVERED at NAIROBI this 10th day of March 2020

B.T. JADEN

JUDGE

J. KAMAU

JUDGE