



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO 531 OF 2011

JULIUS MIGOS OGAMBA.....1ST PLAINTIFF

RONALD GITOBU MWORIA.....2ND PLAINTIFF

TEMPLE POINT ILLAS LTD.....3RD PLAINTIFF

VERSUS

HANS JORGEN LANGER..... DEFENDANT

RULING

1. This matter was heard and concluded with parties being directed to file and exchange written submission to be highlighted on the 18.10.2019. On the date set, none of the parties attended court and no submissions had been filed by either side. Such submissions came to be filed on the 13.01.2020 by the defendant and on the 20.03.2020 by the plaintiff.

2. What comes out as noteworthy is the fact that on the same day the plaintiff filed written submissions, it equally filed a notice of motion dated the 19.03.2020 in which it sought leave of the court to amend the plaint in terms of a draft amended plaint annexed to the affidavit in support of the application and marked 'RGM2'.

3. In the said affidavit of support, the plaintiff avers and contends that they had all along sought to forestall the alienation of the suit property and were not aware that indeed the same had been alienated only coming to learn of such facts when the defendant gave evidence in court on the 11.09.2019. Based on such evidence, the plaintiff discovered that they had suffered a new injury thus necessitating amendment of the claim and introduction of new prayers and remedies. As a consequence, there was introduced in the draft amended plaint a prayer for declaration of illegality in the alienation and transfer of the suit property and the restoration of its registration in favour of the 3rd plaintiff.

4. The application was opposed by the defendant on the basis of the replying affidavit whose gist was that the application was unmerited.

5. I have studied the papers filed and the submissions offered and without setting out what each says, I have taken some into account in coming up with the determination.

6. Being an application for amendment, the principles are crystallised that the same should be granted freely and at any stage of the proceedings for the *purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings on such terms as to costs or otherwise as are just. The purpose is to do justice and therefore any conduct that would visit a prejudice on the opposite party must be guarded against. It would thus be unjust to grant leave to amend when the intended amendment introduces a new a wholly new cause of action, where the amendment is purposed to defeat an accrued defense [1] grounded upon limitation of actions or where there has been an inordinate delay that make it difficult for the opposite party to effectively defend the claim [2]*

7. In **Central Kenya Limited v Trust Bank Limited (2000)2 EA 365 the Court of Appeal held and stated that;**

"..... a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side."

8. In the instant matter, the applicants say they only came to know about the alienation when the defendant testified in court and therefore the proceedings would be rendered moot unless I do grant leave to amend. As said before, the grant of leave to amend should be made freely

and at any stage of the proceedings provided there be no demonstrated intent to delay or steal a march upon the respondent. I have read the application in its entirety as well as the response thereto and I have not been convinced that there is a design to delay or obstruct the expeditious disposal of the dispute. Even though the application should have been brought with more urgency within a month or two rather than taking some six months after discovery of the act of transfer, which surely ought to have been discovered much earlier, I do not consider that delay to be in the nature that outweighs the need to allow a party place all it can place before the court to have a dispute resolved effectively and finally and without duplication of suits. It would be different if the plaintiff was seeking to reopen the matter and start afresh.

9. It is for that reason that I take guidance from the decision of the court of appeal in **Eastern Bakery v Castelino [1958] EA 462 (CAU)** where it was held at page 462 that: -

“The court will not refuse to allow an amendment simply because it introduces a new case... The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character ..., or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defense of limitation accrued since the issue of the writ”

10. In this matter I find that the cause of action and the character thereof is yet to change and will not change with the proposed amendment. I also see no prospects of there being a prejudice upon the respondent that cannot be compensated by an award of costs.

11. For the foregoing reasons, I do allow the application on terms that the amendment be filed and served within 7 days from the date of this ruling. I direct that the costs of the application be costs to the defendant in any event.

Dated, signed and delivered by **MS TEAMS** this 15th day of December 2020

Patrick J.O Otieno

Judge

[1] Elijah Kipngeno Arap Biivis Kenya Commercial Bank Limited [2013] eKLR

[2] Rubina Ahmed & 3 others v Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR