REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 15 OF 2015

DAVID NJUGUNA MUTONYA .....APPEALLANT

VERSUS

1. THE MUNICIPAL COUNCIL OF MOMBASA

2. NICODEMUS MUSYOKA NDALANA.....RESPONDENTS

J U D G M E N T

1. On 4/2/2015, the trial court, L.T. Lewa RM, delivered a ruling by which the court allowed an application to amend the statement of defence and rendered itself as follows:-

> **"In this case, I am of the view that, if the amendments sought are not allowed, the 1st defendant's case shall not only be left without limbs but shall be denied a fair chance to prosecute his case.**
>
> **This said therefore and having directed my mind to the finding of the court in MOTOKOV VS AUTO GARAGE & OTHERS (1971) which the 1st defendant has substantively quoted in his submissions, and the provisions of Section 3A of the Civil Procedure Act and the substantive rules of amendment cited herein, I shall allow the application on the following conditions:-**
>
> > **1. The amended statement of defence be filed and served within 14 days from today.**
> >
> > **2. The plaintiff reserves the right of re-opening his case and accordingly re-call his witness and/or responds to the issues raised if he wishes to.**
> >
> > **3. Within 30 days from the delivery of this ruling, the matter be fixed for hearing and the same be heard on a priority basis.**
> >
> > **4. Failure of the 1st defendant to strictly comply with these directions will automatically discharge the leave granted herein and the matter, automatically proceed for defence hearing.**
> >
> > **5. The 1st defendant to bear the costs of this application".**

2. That decision aggrieved the Appellant, as plaintiff at trial, who then filed the current appeal vide the Memorandum of Appeal dated 23/2/2015 and faulted the trial court on four grounds upon which it seeks orders that the decision be set aside, rescinded and the appeal be allowed with costs.

3. Those four grounds, in summary, fault the court for having erred in allowing an application to amend after the plaintiff's case had been closed which would visit injustice upon the Appellant an irreparable injustice and prejudice incapable of compensation by an award of costs and that the application was presented after undue and unexplained delay and thus contrary to the overriding objectives of the court.

4. I have had the benefit of rendering the record of the application as argued at trial and compiled in the record of appeal herein, the amendment allowed together with the submissions offered by the parties and the authorities cited. The only issue for determination is whether or not the trial court acted properly or erroneously in coming to the decision it came to.

5. The law on amendment, substitution and correction of names of parties and even consolidation of cases are all geared and intended to

bring all the issues in controversy to the table to enable the court handle and determine same in a holistic manner. It is one of the prongs to bolster the Constitutional dictate on fair administration of justice and helps the court meet its adjudicative mandate in an exhaustive manner with all issues brought on board so that all disputes belonging to one litigation are handled together to arrest prospects of litigation proliferating and thus demanding more judicial time and resources with the undesirable prospects of different and varying determination on an issue that ought otherwise to have been one.

6. It is a remedy that not only saves court's time but also saves parties towards efficient use of resources so that costs of litigation are kept affordable. Amendment must therefore be seen as a central pillar in upon which the overriding objective stand and must be sustained.

7. Owing to its useful propose the court is empowered to move *suo motto* or be moved by parties, at any time of the proceedings, before pleadings close, after pleadings close, just before judgment including during an appeal[1]. The only caution being that leave ought not to be granted to amend if the amendment was the effect of visiting an injustice of prejudice like taking away a vested and crystalized right [2]. In this appeal, the amended statement of defence exhibited at page 61-63 of the Record of Appeal, the 1st Respondent introduced pleadings to admit some payment by the Appellant (para 4) which is contended to have been in breach of the offer on allotment, the fact that notices were issued without the Appellant complying and that the suit when filed was statute barred by dint of Section 3A Cap 39.

8. Those to this court are matters that cannot be seen to go outside the parameters of matters enabling the court to determine the real questions in controversy. It matters not that the Appellant had closed its case because the trial court wholly appreciated that fact and gave liberty to the plaintiff to re-open its case. It is to be remembered that every time leave is granted to amend the pleadings open and the matter can in effect start *denovo*. In those circumstances and noting that the costs of the application and amended were ordered to be borne by the 1st Respondent' I have seen nothing that can be considered an injustice or prejudice that cannot be compensated by the award of costs nor do I see any vested right that has been prejudice.

9. Accordingly, I do consider this appeal to have been wholly misconceived, it lacks merit and the same is hereby ordered dismissed with costs.

Dated and delivered at **Mombasa** this **10th** day of **April 2019**.

P.J.O. OTIENO

JUDGE

---

[1] Bullen and Leak and Jacob precedents of pleadings 12th Edition page 127

[2] Unga Limited Vs Magina Limited [2014]eKLR