REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCA 56 OF 2006

PHYLISS JEROTICH KIMUTAI & ANOTHER.....APPELLANT

-VERSUS-

KENINDIA ASSUARANCE.....DEFENDANT

RULING

1. The plaintiff in this case has brought an application dated 23rd January 2017 seeking orders to amend the plaint; and, consequent upon the amendment being allowed, to have the amended plaint deemed as duly filed.

2. The application is brought on grounds *inter alia* that the plaintiff filed suit on 3rd March 2006 challenging the legality of a charge over the suit property and any intended sale thereof; that the intended amendments will not affect any accrued interests or the legal rights of the defendant; and, that even though pleadings closed in the suit, the suit has never taken off for hearing and parties have not complied with pretrial directions.

3. The supporting affidavit is sworn by one **Henry Kipkorir Kimutai.** The affidavit largely sets out the history of the case and the attendant delays and avers that the intended amendments shall not prejudice the defendants but rather will go a long way in determining the real questions in controversy in the suit. It is further deposed that the application has been made without inordinate delay.

4. The application is opposed by the defendant through the Replying Affidavit of **Ayuka Geoffrey Ondieki** who is his counsel on record. He deposes that the application is wholly unmerited, frivolous and vexatious and otherwise an abuse of the process of court. That the suit had already been dismissed by operation of the orders of the court made on 15th September 2016 and that the plaintiff/applicant had a history of failing to obey court orders. Counsel has further deposed that the suit papers filed in 2006 and amended on 20th November 2006 reflect the issues sought to be included in the proposed amendment and that the current plaint attached to the application was not the one sought to be amended by the applicant. It is further deposed that there was inordinate delay as the application is being made a decade after the close of pleadings.

5. The application was argued orally before me on 30th March 2017. **Mr. Aim** for the applicant relied on the supporting affidavit and list of authorities already filed. The gist of his oral submissions was that the amendments sought would go into fully determining the issues in controversy. He cited ***Central Kenya Ltd Vs. Trust Bank and 5 others (2007) eKLR*** on the principles for amendment of pleadings. He further submitted that though the case was filed in 2006 there was no undue delay in bringing the amendment as

the suit was first set down for hearing in 2016. He urged the court to exercise discretion and allow the amendment. For this he cited the ***Institute for Social Accountability & Another –Vs- Parliament of Kenya & 3 others (2014) eKLR.***

6. **Mr. Ayuka** for the respondent opposed the application submitting that there was no suit to amend as the suit stood dismissed by operation of the court's orders of 15th September 2016. He further submitted that the applicant was seeking to amend the plaint of 30th March 2006 when the same had been amended by consent on 20th November 2006 and that the amendment then brought on board what is sought to be amended now. Counsel drew the attention of the court to the fact that the present application was the 10th application during the pendency of the suit. He prayed that the application be dismissed with costs.

7. I will begin by considering whether or not the present suit subsists. The respondent's counsel has argued that there was no suit to amend while the applicant argues that they complied with the court's orders dated 15th September, 2016. My perusal of the record shows as follows. The suit was filed in 2006. The already tattered plaint with an already faded court stamp is dated 3rd March 2006. There is on record an amended plaint amended on 20th November 2006. Proceedings, however do not show when the amended plaint was admitted. Be that as it may other steps taken in the matter are on record and are as captured in paragraphs 5 – 15 of the applicant's supporting affidavit.

8. The defendants successfully applied for dismissal of the suit for non-prosecution vide an application dated 1st March 2016. The application was allowed on 31st May 2016 and the suit dismissed with costs by **Mulwa J.** Subsequently an application dated 14th July 2016 was made for reinstatement by the plaintiff. By a ruling dated 15th September 2016, **Mulwa J** allowed the application and reinstated the suit with conditions that the plaintiff take steps to have the suit filed for hearing within 45 days of the ruling; the plaintiffs pay the defendant's thrown away costs of Kshs.20, 000; and that failure to comply would cause the suit to automatically stand dismissed with costs.

9. The record shows that the plaintiff took a mention date on 22nd September 2016 and both parties appeared for pre-trial directions before **Mulwa J** on 14th November, 2016 when the court granted them time extension of 30 days to comply with pre-trial directions. **Mulwa J** further directed the parties to appear before the Deputy Registrar for confirmation that the suit was ready for hearing. There is no evidence on record that the parties appeared before the Deputy Registrar as directed. Instead, the plaintiff made the present application dated 23rd January, 2017 seeking to amend the plaint.

10. From the above, it appears that the applicant did take steps as directed by the court to set the suit for hearing. The record shows that a Mr. Onyango of the plaintiff's advocates firm took a mention date at the court registry on 22nd September 2016 and the parties duly appeared before the court on 14th November 2016 when the court noted that both parties had not complied with pre-trial directions and granted them 30 days extension. This to me shows that the parties were once more actively in court within the conditional timelines. Other aspects of non-compliance has not been demonstrated. The thrown away costs were, according to Mulwa J's ruling, to be paid before the hearing of the suit. I therefore find that the suit has not been rendered dismissed as submitted by the respondent's counsel. It is still alive.

Whether to allow the amendments to the plaint.

11. **Section 100** of the **Civil Procedure Act** gives the court power to amend any defect or error in any proceeding at any time for the purpose of determining the real question or issue in a suit. **Order 8 Rule 5 (i) of the Civil Procedure Rules** provides, "***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 on such terms as to costs or otherwise as are just***".

12. The principles upon which the court may order amendments were succinctly stated by the court of appeal in **Central Kenya Ltd –Vs- Trust Bank Ltd & 5 others, Civil Appeal No.222 of 1998 (2000)**

eKLR in the terms that: ***the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."***

13. The respondent in this case has strenuously opposed the amendment on the ground that it was being brought 10 years after the filing of the initial plaint. This by all standards is an inordinate delay. This matter of delay was however was addressed by **Mulwa J** in her ruling dated 15th September 2016 and cannot now be re-opened in this application. Suffice to state that any subsequent delays, and owing to the age of the case, will attract the sanction of the court in accordance with the obtaining procedural law.

14. I would therefore while taking a serious view of the delay in the prosecution of this matter take guidance from the court of appeal in **Elijah Kipngeno Arap Bii Vs Kenya Commercial Bank Ltd (2013) eKLR** that ***"as a general rule, however late, the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side"*** and allow the amendment notwithstanding the delay. I would do so particularly because the case has not taken off the ground and to avoid any further delays that may be occasioned if all the issues were not brought on board now. A look at the proposed amended plaint exhibited with the application shows that the amendments are on the amended plaint dated 20th November 2006, contrary to the respondent's submission that the applicant seeks to amend the initial plaint.

15. The plaintiff has submitted that the amendments were necessary. On the other hand the respondent has opposed the amendments stating that they do not introduce anything new and of value to the suit. I have perused the proposed amendment. Other than elaborating on the issues, they introduce new declaratory reliefs sought. The respondent has not shown the court how the new amendments will alter the suit, indeed it has not even raised such a concern. Further, the respondent has not shown what prejudice they will suffer that is not compensable with costs as provided by the rules.

16. For the foregoing reasons, I find the application merited. The further amended plaint be and is hereby deemed duly filed upon payment of requisite court fees. The applicant having occasioned the delay, though successful shall meet the respondent's costs of this application.

Ruling delivered, dated and signed in open court

This 27th day of July 2017

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R. LAGAT KORIR

JUDGE

In the presence of:

C/A Emojong

N/A for appellant

Mr. Nyamwange holding brief for Mr. Nyaundi for respondent