



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 937 OF 1986

GEORGE GIKIBU MBUTHIA.....PLAINTIFF

Versus

CONSOLIDATED BANK OF KENYA LTD.....1ST DEFENDANT

PETER NJERU.....2ND DEFENDANT

RULING

Amendment of plaint

[1] I have before me an application dated 22.8.2013 by the plaintiff which is seeking leave of the court to amend his plaint dated 25.3.1986. He is also seeking for the defendants to be condemned to pay costs of the application. The application was argued on 1.2.2014 by the Applicant in person. He asked the court to grant him leave to amend his plaint dated 25.3.1986. The grounds in support of the application are set out to be;

- 1) By a Ruling dated 26.7.2013 the Court of Appeal ordered this case to be heard on merit;
- 2) No new or inconsistent cause of action will be introduced in the amendments;
- 3) No accrued legal rights of the defendants will be prejudiced; and
- 4) No injustice will be caused to the defendants.

[2] He elaborated on those grounds in admirably sheer simplicity and accuracy, and added that the amendments sought must be allowed for the reasons that; 1) they will bring all disputes to the fore; and 2) the defendants or their accrued rights will not be prejudiced for they will have opportunity to defend the suit. He referred the court to the latest decision of the Court of Appeal which required the suit to be set down for hearing. To him amendment is allowed at any time.

[3] Mr McCourt argued the case for the defendants and opposed the application. He relied on the grounds of opposition and the replying affidavit. He submitted that the Plaint sought to be amended is the one dated 13.12.1991. After filing the suit on 25.3.1986, the Applicant filed an application to amend the plaint dated 25.3.1986. The application was dismissed in 1991. Later, the defendants allowed him to amend the plaint and they withdrew their application to dismiss the

suit. In 1999 he applied to amend plaint again but the late Hewet J dismissed it. In 2009 he applied to amend and it was dismissed by judge Lesiit. He appealed against the dismissals and all appeals were dismissed. Now, he is trying to capture the new legal or legislative development of the new law- the Land Act which will not apply in these proceedings. The way he wants to introduce Land Act is prejudicial to the defendants. In 1996 he had been granted an injunction whose conditions he did not fulfil. An order of transfer was then made and was never appealed upon. Plaintiff has never prosecuted his suit at all. Although 2nd Defendant is absent, he filed a replying affidavit. For those reasons, Counsel for 1st defendant asked the court to dismiss the application and give a priority dated for hearing of the suit.

COURT'S RENDITION

[4] Like the Court of Appeal, I lament this case has seen many days, copious turn of incidents and events. It has also been attended to by a very large number of applications that can possibly be made in a single suit. Being alive to the need to dispose this suit expeditiously, the Court of Appeal took the liberty to advice that the best course is to set the suit down for hearing. But despite all these things, I reckon a party still has a right to apply to amend his pleadings before judgment is delivered. And the court has unfettered power and discretion to allow amendment of pleadings, except the discretion should be exercised judiciously and judicially. The defined legal principles which guide that exercise of discretion are well settled and there are copious judicial decisions on the matter, which I do not wish to multiply. Perhaps only refer to what the court said in the case of **NBI HCCC NO 442 OF 2013 AAT HOLDINGS LTD v DIAMOND SHIELDS INTERNATIONAL LTD**, that

[6] The general power of the court to amend pleadings draws from section 100 of the Civil Procedure Act (hereafter the CPA). Parties to the suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. I agree with counsel for the Defendant that the discretion should be exercised judicially. Section 100 of the CPA and Order 8 rule 3 of the CPR, provides a broad criteria which should guide the court in the exercise of discretion that; 1) the amendment should be necessary for purposes of determining the real question or issue which has been raised by parties; and 2) is just to do so. Case law has then broken down these broad requirements into biteable and defined principles of law which circumscribe the exercise of discretion in an application for amendment of pleadings. The principles were set out by the Court of Appeal in CENTRAL KENYA LTD v APPEAL NO 222 OF 1998 as shown below:-

- (i) That are necessary for determining the real question in controversy.***
- (ii) To avoid multiplicity of suits provided there has been no undue delay.***
- (iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.***
- (iv) That no vested interest or accrued legal rights is affected; and***
- (v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.***

[7] It is quite clear from decided cases that the discretion of a trial court to allow amendments of a Plaint is wide and unfettered except [is] should be exercised judicially upon the foregoing defined principles. That is why the court has power to allow amendment of a plaint disclosing no cause of action. See the case of MOTOKOV v AUTO GARAGE LTD. AND OTHERS [1971] E.A. 353. Also, the court has power, in

special circumstances, to allow amendment of a plaint, notwithstanding that the effect will be to defeat a defence of limitation, which is an accrued defence in law. On this see the case of BARCLAYS BANK D.C.O. v SHAMSUDIN [1973] E.A. 451. But can it be said that there was an accrued defence in the present case? Let me examine the circumstances of this case.

[5] I should add, before I examine the circumstances of this case that any party who applies to court must act *Bona fides*, which is wider than only the presence of *mala fides*; a court may deduce acts which are not *Bona fides* from a variety of things including delay in bringing the application or that the application will breed delay to the disposal of the case.

[6] I will reproduce the major amendments being proposed as well as the texts being amended. I will not be concerned with the amendments being proposed to the first three paragraphs of the plaint as they relate to the addresses of the parties; really that does not matter as where address of a party has changed, the affected party only need to inform the other parties in the suit of the changes without having to amend the pleadings. But that does not mean there is anything wrong for a party not to amend the description part of the pleading if at the time of the amendment there had been changes. It is a good practice. The texts in bold print represent the proposed amendment, and the ones not in bold represent the original text to be amended. They are reproduced below;

3A. The plaintiff is the lawful registered proprietor of L.R. Nairobi/Block 73/225. Buru Buru Nairobi.

4. On 23rd June 1982 the plaintiff was granted a friendly advance of Kshs.210,000/- by the then Jimba Credit Corporation Ltd. to develop his property L.R. Nairobi/Block 73/225 and was to be secured by the suit property upon successful execution and registration of a valid charge. On or about the month of February 1982, the plaintiff borrowed the sum of Kshs.210,000/- to develop his house L.R. No. Nairobi/Block 73/225 and the said loan was to earn an interest rate of 19%.

4A. The purported Charge dated 23rd June, 1982 contained eleven fatal defects and was therefore invalid and ineffectual to pass Nairobi Block 73/225 to the defendants as under:-

4B. First, the 1st defendant's lawyer deliberately and with intent to defraud the plaintiff excluded in the purported charge the special acknowledgment clause which would later be signed by the proposed charger in confirmation that (he) the proposed charger was explained and understood the effects and import of Section 74 of Registered Land Act – cap 300.

4C. The requirement that the proposed charger understands the effects of Section 74 of Registered Land Act – Cap 300 must be incorporated into the charge document and unless that mandatory requirement has been properly understood, by the borrower the 1st defendant could not exercise any redemption right.

4D. The right under Section 74 of Registered Land Act was precedent upon fulfilling the requirement under Section 65(1) of Registered Land Act – Cap 300, and, until that first bridge was properly and legally crossed, Jimba Credit Corporation Ltd had no authority to exercise its redemption powers or step at the gate of Nairobi/Block 73/225; hence the requirement had to be observed strictly if the 1st defendant wished to exercise its right Section 74 of Registered Land Act – Cap 300.

4E. The requirement under Section 65(1) of Registered Land Act – Cap 300 was a threshold issue to be crossed by the 1st defendant before stepping at the gate of Nairobi/Block 73/225, and, that; that important requirement was not expressly excluded

by the 1st defendant's lawyers who drew the defective Charge.

4F. The charge herein did not contain a "Special acknowledgment" that the plaintiff understood the effects of Section 74 of Registered Land Act – Cap 300 so that no acknowledgment was signed or owned by the plaintiff and, therefore, in the absence of that golden signature and his ID number, no contract was formed or conceived between the 1st defendant and the plaintiff.

4G. Lack of "Special acknowledgment" properly signed and ID number given by the plaintiff in the space provided in the intended charge was a strong caveat and signal that the purported future attempted sale by the 1st defendant will be highly contested and it has happened!

4H. Second, the purported lender's advocate's certificate thereof is void on the ground that there was no Special Acknowledgement to be certified.

4I. Third, the charge was not executed as required by Rule 59 and 113 of Memorandum and Articles of Association of Jimba Credit Corporation Ltd. and, in absence of proof of execution by way of certificate by the Registrar – the mandatory requirement of Section 110(2) of Registered Land Act – Cap 300 the purported charge was void ab initio.

4J. Fourth, there was no evidence of appointment of the two official's signatures purportedly duly appointed in writing as required by Section 109(2) (ii) of Registered Land Act.

4K. Fifth, neither of the two 1st defendant's un-named officials could be said to have witnessed the execution of the charge on behalf of the 1st defendant – the mandatory requirement of Section 109(2) (ii) of Registered land Act.

4L. Sixth, the purported charge was not attested by a clerk of the 1st defendant as required by Section 109 (2) (b) (i) of Registered Land Act and, therefore this is a serious defect which renders the document invalid.

4M. Seventh, the purported charge was not verified by the Land Registrar – Nairobi as required by Section 110(i) of Registered Land Act.

4N. Eighth, the Land Registrar did not complete a certificate as required by Section 110(2) of Registered Land Act on the ground that no person appeared before him to ascertain whether he freely and voluntarily executed the charge.

4O. Ninth, the purported charge was not endorsed by any advocate as required by Section 35(i) of the Advocates' Act – Cap 16 was therefore illegal thereby attracting the well-known legal maxim – *Ex-turpi causa on oritur octio* – that is to say – "No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal."

4P. Tenth, the purported charge was not registered as required by Section 35(2) of the Advocates Act – Cap 16.

4Q. Eleventh, the purported charge was illegal; and, parliament prohibited the Registrar of Titles, Principal Registrar of Government Lands, the Registrar General and the Registrar of Companies and any other registering authority to refuse, accept or recognize it.

4R. It was the 1st defendant's Advocate who prepared the defective charge and it had a duty to ensure all the legal process is complied with In order to minimize the risk of default based on non-observance of the provisions of law.

4S. Instead, the plaintiff fell into a well laid and perfectly prepared trap by the 1st defendant solely with the intention of defrauding him off his property.

4T. The defendants cannot show a better title and right to seisin in Nairobi/Block 73/224. Seisin is the root of title. Without it the defendant are trespassers. Fraud on the purported "instrument" of transfer upon the suit property by Mr. S.O. Odak who was not the proprietor does not affect the plaintiff's title.

4U. On 24th February, 1992, the then Deputy Registrar of the High Court a Mr. S.O. Odak committed serious fraud and forgery on Form RL 4 purporting to transfer Nairobi/Block 73/225 (the plaintiff's property) under a defective charge to the second defendant without consent of the proprietor (plaintiff).

4V. The protection which Section 39(1) of Registered Land Act – Cap 300 gives to person who deal for valuable consideration with a proprietor is not available to the defendants on the grounds inter alia that there was no contract ab initio and the defendants were merely trespassers.

4W. Further the protection given be Sub-section (2) of Section 143 of Registered Land Act – Cap 300 is not available to the defendants on the ground that the defendants committed fraud.

4X . The defendants were trespassers and fraudulent as follows:-

5. On 12th July 1988 the Court of Appeal ordered the plaintiff to continue paying Kshs.8,000/- per month until this suit was determined by the 2nd respondent purportedly sold it off and now the plaintiff seeks a refund of Kshs.340,310/- plus compound interest.

6. The plaintiff was supposed to pay the said amount by way of monthly instalments.

7. The plaintiff has been repaying but due to the high interest rate, the amount outstanding is about Kshs.350,000/-.

8. It is the plaintiff's contention that the first defendant has not credited some of the monies paid by the plaintiff and the amount allegedly owing is not correct.

9. That the said property is worth over Kshs.400,000/-

10. That in spite of the fact that the said property is over Kshs.200,000/- to the second defendant.

11. That the said sale was unfair and or fraudulent especially taking into account the 1st defendant would claim the balance from the plaintiff.

PARTICULARS OF TRESSPASS AND FRAUD

The sale was unfair and or fraudulent in that:-

(a)No contract was formed between the plaintiff and the 1st defendant and the defendants cannot lay any claim over Nairobi/Block 73/225.

(a)It was not a true market value.

(a)The 1st and 2nd defendants trespassed into the plaintiff's property and goods and have remained there to-date.

(b)The 1st and 2nd defendants trespassed into the plaintiff's property with full knowledge that it was not charged as required by law.

(b)It was without notice to me.

(c)The 2nd defendant did the search at the Lands Registry before the auction date and must have confirmed that the charge dated 23rd June, 1982 was defective and invalid.

(c)It was without notice to me.

(d)There was a purchaser who was offering more than Kshs.200,000/-.

(e)There was no reserve price advertised and or placed.

(f)There was not adequate advertisement.

[REASONS WHEREFORE the plaintiff prays for judgment against the defendants jointly and severally for:]

(a)Nullification of the alleged sale held on 13th day of February 1986.

(a)A declaration that the defendants are trespassers and fraudulent and, any other subsequent person cannot derive title by reason of such trespass and fraud.

(b)A declaration that the alleged charge dated 23rd June 1982 is invalid and illegal by reason of fraud.

(b)An order restricting the first defendant from transferring L.R. No. Nairobi/Block 73/225 to the second defendant.

(c)The Registrar of Title be compelled to forthwith rectify the Register of Titles – entries No. 7, 8, 11 and 12 of the suit property in compliance with Section 143 (2) of Registered Land Act – Cap 300; reinstate the plaintiff's entry No. 4 and 5, and, after effecting the above at the defendants' cost, the Registrar be compelled to return the plaintiff's Certificate of Title or issue another.

(d)The 1st and 2nd defendants be compelled to jointly and severally pay to the plaintiff aggravated damages for the suffering of himself and his family from March 1992 until 30th November 2013 in the sum of Kshs.200,000,000/- (Kshs.200Million) and thereafter additional Kshs.375,000/- per month from December, 2013 until payment in full.

(e)The 1st and 2nd defendants be compelled to jointly and severally refund to the plaintiff Kshs.340,310/- plus interest compounded at 20% per month from 15.5.1987 until final settlement.

(f)The defendants do pay compound interest of 14% p.m. on the refund from 15.5.87 and compound interest of 20% p.m. from 16.5.87 until payment in full.

(f)The 1st and 2nd defendants be compelled to jointly and severally pay to the plaintiff compound interest of 20% per month on aggravated damages for the suffering of the plaintiff and his family from March 1992 until final settlement.

(g)Costs of the suit together with 14% compound interest per month from 25th March 1986 until date of decree and at 20% compound interest from date of decree until full payment.

[7] The amendments being sought are not only substantial in quantity but also in quality. But that is not the problem. The problem is that they seek to introduce new matters into the suit, some of which will substantially alter the original suit filed. The amendments will also introduce new causes of action for trespass and fraud. That is not all. The amendments particularly paragraph 4 seeks to change the character of the charge herein; it alleges it was a friendly loan, and that will completely change and withdraw the earlier admission in the plaint that the loan he had borrowed was at a repayment interest rate of 19% per annum. He also intends to remove the averment in paragraph 6 where he admitted he had been paying the loan but due to the high interest rate, the amount owing swore to Kshs. 350,000. Of significance, the fact of interest and the charge is the major issue in controversy and there is already a joinder of issues on it. And, therefore, that kind of departure being proposed by the Applicant is not permissible in law especially where a positive averment had been made and is a basis of admission of facts in the suit; it will not only deprive the other party of the benefit of the admission but will also aid the applicant to propagate force and injustice on the other party. I also note that he is making allegations of fraud against the 1st defendant's lawyer in the proposed paragraph 4B without caring to make them parties to the suit.

[8] Other than the proposed amendments introducing new causes of action, a careful look at the essential core of most of the amendments reveals that their true character is essentially evidence and the law which the Applicant intends to rely in support of his case. It is most inappropriate method to allow parties to plead such supporting materials in their pleadings, as that that would not only offend the law on pleadings but also obscures the real issues in controversy. Apart from that, matters being proposed in the amendments could be raised in the trial of the case. In the context of the foregoing, it is profitable to note as a proper guide, the country is moving away from complicated obscured pleadings to simple but clear documentation in pleading of cases in a court of law. Again, I note that the amendments will not serve any useful purposes in assisting the court to resolve the issues in the suit and I have already demonstrated that.

[7] One other thing; the application has been filed more than 27 years since the suit was filed. What that does is to occasion further or double prejudice; 1) to the administration of justice; and 2) to the Respondents. Prejudice to the administration of justice entails further delay of the case, which then prevents a just, proportionate, affordable and expeditious disposal of the case. Prejudice to the Respondents entails the fact that this case has been over their heads for far too long now. It has been a tedious long litigation and its end is not in the immediate term because a hearing date is yet to be taken after the court is satisfied that all preparatory processes have been adhered to. Litigation is supposed to be concluded within reasonable time. And invariably, protracted litigation results into prejudice.

[8] As I have found that the amendments are prejudicial to the Respondents; they are introducing new causes of actions; they will cause further delay which is already inordinate; the interest of justice dictates that I refuse the application for amendment. Accordingly, the application dated 22.8.2013 is dismissed with costs to the Respondents. I need not repeat that costs follow the event, but I do not understand why the Applicant was praying that the Respondents should be condemned to pay the costs of the Application.

Dated, signed and delivered in open court at Nairobi this 18th day of March, 2014

F. GIKONYO

JUDGE