



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 1135 OF 2001

PETER G.N. NGANGA.....1ST PLAINTIFF

KEZIAH WANJIKU NGANGA.....2ND PLAINTIFF

VERSUS

KENYA FINANCE BANK LIMITED

(In liquidation, Liquidating Agent

THE DEPOSIT PROTECTION FUND).....1ST DEFENDANT

NJORO VEG LIMITED.....2ND DEFENDANT

NJORO CANNING LIMITED.....3RD DEFENDANT

DANIEL KARIUKI GICHANGA.....4TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs Notice of Motion application dated 20th June 2013 and filed on 16th July 2013 was brought under the provisions of Order 8 Rules 3 & 5 and Order 51 of the Civil Procedure Rules. It sought the following orders:-
 - a. **THAT the Plaintiffs be granted leave to amend file and serve their plaint herein in terms of the draft amended Plaint.**
 - b. **THAT the Honourable Court be pleased to make any orders for the ends of justice.**
 - c. **THAT costs occasioned hereby be in the cause.**
2. The application was premised on the ground that the amendment was necessary for purposes of determining the real issues in controversy between the parties and the same would not occasion any prejudice to the Defendants.

AFFIDAVIT EVIDENCE

3. The Plaintiffs' application was supported by the Affidavit of Peter G.N. Nganga. It was sworn on 20th June 2013. He deponed that there were pertinent irregularities in the charge or it contravened the provisions of Sections 34 and 35 of the Advocates Act. It was also his contention that the amended Plaint did not have averments regarding the invalid attestation on the charge contravening the provisions of the Transfer of Property Act. He explained that the omission of the said averments was inadvertent and contributed to by the sheer volume of the documents filed herein.
4. In response thereto, the 1st, 2nd and 3rd Defendants filed their Grounds of Opposition dated 29th August 2013 on 3rd September 2013. The grounds can be summarised as follows:-
 - a. **The application was an abuse of the court process as the amendments were always within the knowledge of the Plaintiffs.**
 - b. **The Plaintiffs intended to introduce a new cause of action.**
 - c. **The court certified the matter as ready for hearing and the Plaintiffs did not at that indicate to the court their intention to amend the Plaint.**
 - d. **The amendments would occasion the Defendants irreparable prejudice.**
 - e. **The Plaintiffs were guilty of laches and had offered no reasons for the inordinate delay.**

LEGAL SUBMISSIONS BY THE PLAINTIFFS

5. In their written submissions dated and filed on 19th December 2013, the Plaintiffs submitted that they had sought to effect the proposed amendments for the reasons that:-
 - a. **there were typographical errors, repetitive and tautologous terms that needed to be amended for clarity.**
 - b. **they were seeking declarations and reliefs befitting facts in evidence.**
 - c. **the addition of particulars of "breach of duty" did not state anything outside the scope of what was in the cause of action.**
6. They argued that the said amendments were aimed at removing ambiguities and clarifying the cause of action and not to introduce a new cause of action. They stated that the same would not occasion the Defendants any prejudice and cancel this instead if indeed declarations and orders based on any of the said documents would have occasioned them prejudice, it was hard to see why the Defendants had not found it fit to apply for expunging of the said documents from the records.
7. They relied on the cases of **Auto Garage & Ors vs Motokov (No 3) (1971) EA 514**, **Cottar V A G for Kenya (1938) 5 EACA 18** (not submitted to the court) and **Bullen & Leake 12th Edition** to fortify their argument that the amendments sought to be introduced were not hypothetical or fanciful as they were borne out of documents that had been exchanged by the parties and therefore did not constitute a new cause of action
8. It was their argument that the court could have given the same orders *suo moto* on the basis of the voluminous documentation and the new and repealed Land Law Statutes to bring out the real issues in controversy between the parties.
9. In persuading this court to allow the said application, the Plaintiff submitted that the court had wide power to order amendments and that it could exercise the same at any time during the proceedings to allow the fullest determination of the Plaintiffs' claim against the Defendants.

LEGAL SUBMISSIONS BY THE DEFENDANTS

10. In their submissions dated 10th January 2013 and filed on 13th January 2013, the 1st, 2nd and 3rd Defendants contended that the granting or refusal of amendments by a court was a discretionary one that had to be exercised judiciously. They relied on the case of **Eastern Bakery vs Catelino E.A. (1958)** in which the law had been laid down that to the effect that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side.
11. They pointed out that the Plaintiffs had made extensive amendments on 29th July 2002 giving

- particulars of alleged fraud, collusion and negligence on the part of the Defendants and that they would suffer prejudice as they would have to look for evidence to answer claims which were well over twenty three (23) years after the Charges and Debentures were drawn.
12. It was their argument that there had been inordinate delay in the filing of the Plaintiffs' application as they said the court had already certified this matter as having been ready for hearing. They relied on the case of **Phillips, Harrisons & Crossfield Limited vs Kassam (1982) KLR 1** as regards their averment that if allowed at this late stage would be prejudicial to them.
 13. They submitted that Paragraphs 6A-6F of the amended Plaintiff introduced new causes of action to their detriment. In support of their argument that the application if allowed would be a departure from the original cause of action, they referred the court to the holding of the **Court of Appeal in Kyalo vs Bayusuf Bros Ltd (1983) KLR 229** which disallowed an application for leave to amend.
 14. Finally, the Defendants argued that the Plaintiffs' application did not accord with the requirements of Order 8 Rule 7 (3) of the Civil Procedure Rules, 2010 for the reason that the colour coding was wrong. They therefore prayed for the dismissal of the Plaintiffs' application on the aforesaid grounds.

LEGAL ANALYSIS

15. After a careful analysis of the documentation herein and the case law in support of the respective parties' cases, the court wishes to point out right at the outset that the 1st, 2nd and 3rd Defendants submission that the colour used in the Plaintiffs' amended Plaintiff was misleading is a fundamental issue in determining whether or not this court should consider the merits of the application herein.
16. While Article 159 (2) (d) of the Constitution of Kenya, 2010 mandates the court to administer justice without undue regard to procedural technicalities and Order 51 Rule 10 (2) of the Civil Procedure Rules provides that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application, the court cannot rely on the said provisions to excuse every omission that is committed particularly where the law has been clearly set out.
17. The underlining on page 23 of the Amended Plaintiff stating that the Plaintiffs are praying for **"declarations in terms of paragraphs 6A, 6B, 6C, 6D, 6E, 6F, 6G, 7B, 7C, 7D, 11, 12, 18A, 23 and 26"** in red colour is misleading as it was being introduced for the first time. The amendment should therefore have been in any other colour other than red to avoid confusion. The same is stipulated in mandatory terms in Order 8 Rule 7 (3) of the Civil Procedure Rules, 2010 and cannot therefore be ignored.
18. It is also not lost to this court that the heading of the draft pleading attached to the Plaintiffs' application is headed **"Amended Plaintiff"** instead of **"Further Amended Plaintiff"** as the original Plaintiff dated 23rd July 2001 was amended on 24th July 2002.
19. The court finds that the issue of the underlining of some of the amended parts in red instead of any colour other than red and the heading of the draft pleading cannot be deemed to have been procedural technicalities. Rather they are substantive defects that go into the root of the Plaintiffs' application. Indeed, the Plaintiffs had sought that the draft Amended Plaintiff be filed and served in terms of the draft Amended Plaintiff. In view of the fact that the 1st, 2nd and 3rd Defendants may require to respond to the same, the question that arises is how they will refer to their response bearing in mind that they had responded to the Amended Plaintiff on 23rd August 2002.
20. The court cannot descend into the arena on behalf of the Plaintiffs to correct its pleadings. This would be prejudicial to the 1st, 2nd and 3rd Defendants herein as the court is required to be a neutral arbiter in the dispute between the Plaintiffs and the Defendants. The court relies on the pleadings as filed and placed on its record. It is the responsibility of each party to ensure that its pleadings reflect the correct position. The pleadings must therefore be accurate because courts and advocates change over the years. A lot of confusion would definitely ensue if subsequent advocates or subsequent courts that do not have had historical background of a matter were to take up the same. It is for that reason that any documents relied upon by parties must be self-explanatory.
21. Bearing in mind that the application herein would fail on this ground alone, in the very first instance, this court does not find it necessary to delve into the substantive issues raised by the

parties herein.

DISPOSITION

22. In the circumstances foregoing, the upshot of this court's ruling is that the Plaintiffs' Notice of Motion application dated 20th June 2013 and filed on 16th July 2013 is hereby dismissed with costs to the 1st, 2nd and 3rd Defendants.

23. It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of May 2014

J. KAMAU

JUDGE