



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**MILMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO 558 OF 2004**

ANDREW OUKO..... PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1<sup>ST</sup> DEFENDANT

KENYA AIDS NGO CONSORTIUM.....2<sup>ND</sup> DEFENDANT

PATRICK KAMUNYU.....3<sup>RD</sup> DEFENDANT

JAMES NJUGUNA.....4<sup>TH</sup> DEFENDANT

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated 12<sup>th</sup> March 2013 and filed on 13<sup>th</sup> March 2013 was brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the laws of Kenya and Order 8 Rules 3(1) of the Civil Procedure Rules, 2010 and any other enabling provisions of the law. It sought the following orders:-
  - a. **THAT this Honourable Court be pleased to grant the Plaintiff/Applicant leave to re-amend his Amended Plaintiff.**
  - b. **THAT the draft Further Amended Plaintiff be deemed as duly filed and served.**
  - c. **THAT costs of the application be provided for.**
  
2. The application was premised on the grounds that can be summarised as follows :-
  - a. **THAT the application was *bona fide* and it was therefore in the interest of justice and fairness that the Plaintiff be allowed to re-amend the Amended Plaintiff to assist the court in allowing a just and fair determination of the matter.**
  - b. **THAT the Plaintiff's current advocates took over the matter from M/S Muriithi & Co Advocates on 19<sup>th</sup> September 2011 and upon a close scrutiny of the pleadings, it became evident to his advocates now on record that there were certain crucial issues that needed to be brought to the attention of the court.**
  - c. **THAT the granting of the application would not occasion any prejudice to the Defendants and that if any prejudice was suffered, it could be compensated by way of costs.**

## AFFIDAVIT EVIDENCE AND GROUNDS OF OPPOSITION

3. In support of his application, the Plaintiff swore an Affidavit on 12<sup>th</sup> November 2012 setting out the averments on the face of the application.
4. The 1<sup>st</sup> Defendant filed its Grounds of Opposition dated 4<sup>th</sup> June 2013 on the same date. These were similar to the 2<sup>nd</sup> -4<sup>th</sup> Defendants' Grounds of Opposition dated 17<sup>th</sup> March 2013 and filed on 18<sup>th</sup> March 2014. The said grounds were generally as follows:-
  - a. **The application was misconceived, inept and bad in law.**
  - b. **There had been inordinate delay in filing the application and granting the orders would prejudice it.**
  - c. **The proposed amendments sought to introduce causes of action which in any event were time barred under the Limitations of Actions Act.**
  - d. **The application was an abuse of the process of the court as there had been a prior amendment to the Plaint.**

## LEGAL SUBMISSIONS BY THE PLAINTIFFS

5. In his written submissions dated and filed on 18<sup>th</sup> November 2013, the Plaintiff submitted that the court file had been missing for some time and his advocates had to reconstruct the same. He said that his advocates had taken dates for the hearing of the present application on several occasions but that the same did not proceed for hearing for one reason or the other.
6. He argued that pleadings could be amended at any time before judgment was delivered and that the law did not restrict the number of times a party could seek to amend his pleadings. In this regard, he relied on the provisions of Order 8 Rule 3 (1) and (2) of the Civil Procedure Rules, 2010 which stipulate that the court may, at any time of the proceedings and on such terms as to costs or otherwise, allow the application for amendment and the case of **Duke of Buccleuch (1892) P. 201** where Fry L.J stated as follows:-

**“ I base my decision upon the words “at any stage o the proceedings.” It has been argued that the rules do not apply after final judgment. They apply, in my opinion, as long as anything remains to be done in the case...”**

7. It was his contention that the guiding principle under Order 8 Rule 5 (1) of the Civil Procedure Rules, 2010 was whether or not the proposed amendments were necessary for the just determination of the matter and it was irrespective whether the first omission was careless or negligent. He referred the court to the case of **Steward vs North Metropolitan Tramways Co (1886), 11 QBD 556 at P.558** which had been adopted in the case of **General Manager Ear & H.A vs Thierstein (1968) EA 354 at 359** where Harris J stated as follows:-

**“The case, however, is still at hearing, judgment has not been pronounced, and such “right” (being deprived from a defence by an amendment) as the plaintiff claims has not come into existence.”**

8. In addition, he averred that the court had inherent power under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court and could therefore exercise its discretion to determine the matter. He referred the court to the case of **Baker vs Medway Limited (1958) 1 WLR** where the holding was that an application for amendment was to :-

**“... ensure that litigation between parties is conducted not on a false hypothesis of facts but on the basis of the true state of things.”**

9. It was his case that the issue of limitation did not arise as Order 8 Rule 3(2) of the Civil Procedure Rules, 2010 empowered the court to allow an application for amendment even after the relevant

period of limitation had lapsed, which position, he argued, was fortified by the provisions of Sections 1A and 1B of the Civil Procedure Act that required justice to be done to all parties. He relied on the case of **Cheleta Coffee Plantations Limited vs Eric Mehlsen (1966) EA 2013 at 208.**

10. He denied that the Defendants would suffer any prejudice and that if any prejudice was to be suffered, the same could be compensated by an award of costs as was held in the cases of **Waljee's (Uganda) Limited vs Ranji Punjabhai Bugerere Tea Estates Limited (1971) EA 188** and **Cropper vs Smith (1884) 26, CHD 700.**

### **LEGAL SUBMISSIONS BY THE 1<sup>ST</sup> DEFENDANT**

11. The 2<sup>nd</sup> – 4<sup>th</sup> Defendants did not file their written submissions despite the court having given them an opportunity to do so on 25<sup>th</sup> March 2014. As was stated hereinabove, their Grounds of Opposition were similar to those of the 1<sup>st</sup> Defendant which filed its submission dated 5<sup>th</sup> December 2013 on the same date.
12. In their said submissions, the 1<sup>st</sup> Defendant contended that although amendments were to be freely allowed, they were to be made promptly and not cause injustice to the other side. It was its argument that an application should not be allowed if the same would cause prejudice which could not be compensated by way of costs. It submitted that prejudice was two-fold and interlinked, namely, delay and limitation.
13. On the issue of delay, the 1<sup>st</sup> Defendant argued that the matters herein dated as far back as 1998 and the suit having being filed in 2004, the amendments which came after a delay of eight (8) years ought not to be allowed. It referred the court to the case of **Kyalo vs Bayusuf (1983) KLR 229** in which the Court of Appeal stated as follows:-

**“Applications for amendment of pleadings should only be made if they are brought within reasonable time...In this case, the amendment came six years later...Amendments that contain allegations completely inconsistent with the previous pleadings in the same suit cannot be allowed, especially if they are made late, as they would delay fair trial and prejudice the other party.”**

14. It averred that the explanation that the 1<sup>st</sup> Defendant had changed advocates thus blaming its previous advocates was not a sufficient reason to allow the amendment. In this regard, it relied on the case of **Harrison C Kariuki vs Blueshield Insurance Company** where Waweru J quoted with approval the Court of Appeal decision of **Civil Appeal No NAI 41 of 2001 Municipal Council of Thika & Another vs Local Government Workers Union (Thika Branch)** where it was stated as follows:-

**“We can no longer afford to show the same indulgence towards negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice is better served by allowing the consequences of negligence of the lawyers to fall on their own heads rather than by allowing amendment at a very late stage.”**

15. It stated that the Plaintiff was having a second bite at the cherry and that it was clear that the proposed amendments were raising fresh grounds of fraud and breach of fiduciary duty and pleaded matters pertaining to a third party who was not a party to the suit herein. It relied on the case of **HCCC No 311 of 2011 Bash Hauliers Limited vs Damco Logistics Lenya Limited** (unreported) where the court declined to allow an application to enjoin a third party for the reason that it would further delay in the proceedings therein.
16. In addition, it argued that the Plaintiff fresh causes of action which were time barred under Section 4 of the Limitations of Actions Act. It submitted that it would be prejudiced, as with the passage of time, it encountered difficulties in rebutting the Plaintiff's case as its witnesses came and went. It was its contention that this was a prejudice or injustice that could not be compensated by way of costs as no amount of costs would cure the permanent passage of time. It therefore prayed for the dismissal of the Plaintiff's application with costs to it.

## LEGAL ANALYSIS

17. While considering an application for amendment of pleadings, the court must continuously have at the back of its mind that every person is entitled to be given a reasonable opportunity to present his case. This connotes a situation where each person is given a reasonable opportunity to present his case in the best way he knows how. That opportunity is enshrined in Article 50 of the Constitution of Kenya, 2010 which stipulates that every person has a right to have any dispute resolved by the application of law decided in a fair hearing before a court.
18. The sole purpose of pleadings is to give the court an opportunity to adequately consider the issues in dispute. This means that the court must be very cautious while denying a party an opportunity to ventilate its case sought to be achieved through amendment of pleadings. A court should only deny such party leave to amend its pleadings as a last resort and with good or sufficient cause.
19. While exercising its wide and unfettered discretion whether or not to allow an application for amendment of pleadings, the court ought to consider several factors. It would be most minded to establish whether or not there has been inordinate delay, whether or not the other party will suffer great prejudice which cannot be compensated by way of costs or otherwise as may be just if the application is allowed or whether or not the application for amendment is *bona fide*.
20. Mere delay is not a ground for declining to allow an amendment. It is intertwined with the aspects of prejudice and the *bona fide* nature of the application. These are observations that have been made by courts in the past and which conclusion, this court ascribes to.
21. While considering the issue of delay and prejudice, in the case of **Central Bank Limited vs Trust Bank Limited (2000) 2EA 365**, cited by Mutungi J in the case of **Maria Rosita Cardozo vs Robert Kibagendi Otachi & Another (2013) eKLR**, the Court of Appeal observed as follows:-

**“The overriding consideration in applications for leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite side beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless allowing them the opposite side would be prejudiced or suffer injustice which cannot be properly compensated by costs.”**

22. In the case of **Joseph Ochieng & 2 others t/a Aquiline Agencies vs First National Bank of Chicago (1995) eKLR** cited in **David Jonathan Grantham & Another vs National Social Security Fund (2005) eKLR**, Shah J.A. (as he then was) stated thus:-

**“...amendments should be timeously applied for...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...”**

23. Similarly, in the case of **Corner Holiday Inn Limited & Another vs Andrew Kuria Wangunyu [2008] eKLR**, Mwilu J (as she then was) cited the case of **Tilde vs Harper (1878) 10 Ch. D 393** which this court finds to be persuasive, Bramwell L.J stated thus:

**“My practise has always been to give leave to amend unless I have been satisfied that the applying party was acting mala fide or that by his blunder he had done some injury to his opponent which could not be compensated by costs or otherwise.”**

24. To establish whether the application is *bona fide*, the court will be minded to consider the reasons for the delay. Indeed, where there is inordinate delay in bringing an application to amend a pleading, it is incumbent upon that party to give a plausible explanation why there has been such a delay.
25. The Plaintiff herein explained that the inordinate delay in bringing the present application emanated from the fact that he changed advocates and that the court file had been missing for quite a while leading to its reconstruction.
26. It is not lost to the court that parties continuously look at their cases introspectively before the

same are finally heard by the court to ensure that they fully present their cases for determination by the court. Upon instructions by a party and perusal of documentation in a matter, a firm of advocates may form a particular opinion about how to prosecute its client's case while another firm that takes over the matter from that previous firm, might look at the matter differently necessitating a change of tact.

27. This court takes the firm view that until such time that judgment is delivered, the door for amendment of pleadings remains open. Evidently, Order 8 Rule (1) of the Civil Procedure Rules, 2010 permits amendments to pleadings at any stage of the proceedings. This is irrespective of the fact that an application for amendment has been made after the relevant period of limitation or the amendment purports to add or substitute a new cause of action.
28. Order 8 Rule 3(2) of the Civil Procedure Rules, 2010 provides that:-

**“ Where an application to the court for leave to make an amendment under subrule (3), (4) and (5) is made after the relevant period current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any subrule if it thinks just to do so.”**

29. Under Order 8 Rule 5 of the Civil Procedure Rules, 2010, it is provided as follows:-

**“An amendment may be allowed under subrule (2) notwithstanding that its effect will be add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which the relief has already been claimed in the suit by the party applying for leave to make the amendment.”**

30. The court has carefully considered the cases of Kyalo vs Bayusuf Brothers Limited (Supra) and Harrison C. Kariuki vs Blueshield Insurance Company Limited (Supra) cited by the 1<sup>st</sup> Defendant and notes that the same are distinguishable from the facts of this case as evidence had been taken unlike in this case. Parties have also not yet even got to the pre-trial stage as was the position in the case of Bash Hauliers vs Damco Logistics Kenya Limited (Supra).
31. While the court has cautioned itself of the inordinate delay by the Plaintiff in bringing the present application, the court finds the explanation that new advocates had taken over the matter and the fact that the court file was missing to have been sufficient to have explained the said delay. This does not, of course, give a license to parties to neglect to amend their pleadings for years on end in the hope that a change of advocates late in the day would be a ground to apply for amendment of pleadings.
32. Further, as has been seen hereinabove, the Defendants' arguments that the Limitation of Actions Act had kicked in and that the Plaintiff was purporting to bring a fresh cause of action would not dissuade a court from allowing an application for amendment of pleadings as the provisions of Order 8 Rule (3) and (5) of Civil Procedure Rules, 2010 clearly empower the court to exercise its discretion in allowing an application for an adjournment under those respective grounds.
33. Paragraph 14 of the Plaintiff amended on 29<sup>th</sup> November 2004 shows that the Plaintiff had contended that the sale by the Defendants was illegal, irregular and thus null and void. Itemising the particulars of fraud, illegality and breach of fiduciary duty cannot be said to be a departure from the Plaintiff's claim as the cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of the relief that he had sought. It does therefore not appear to this court that the application for amendment of the Plaintiff as sought by the Plaintiff was *mala fide* as result of which it ought not to be granted.
34. Perusal of the particulars of fraud, illegality and breach of fiduciary duty indicates that the 1<sup>st</sup> Defendant would generally be required to show that it exercised reasonable care to obtain the best possible price when it sold the suit property, that it complied with the provisions of the Auctioneers Act, that it properly exercised its statutory power of sale and that it did not collude with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The Defendants did not demonstrate that the evidence to rebut the said contentions would be adduced by witnesses other than those it had contemplated in which case would result in great prejudice or that their Defence that the sale was lawful would be altered or compromised in any way if the court allowed the amendments sought.

- 35.As regards the 1<sup>st</sup> Defendant's apprehension that there might be further delays due to the enjoining of a third party, the court finds that the same is merely speculative at this stage. It is the Plaintiff's case and he will be required to show the relevance of the said third party mentioned in the draft Further Amended Plaintiff in the proceedings herein.
- 36.Accordingly, having carefully considered the Plaintiff's application, the affidavit evidence, the Grounds of Opposition by the Defendants, the written submissions and the case law in support of the Plaintiff's and Defendants' cases, the court has come to the conclusion that great injustice would be caused to the Plaintiff if the court herein does not grant him leave to re-amend his Amended Plaintiff.
- 37.That is not to say that the Defendants have not suffered any injustice. The inconvenience and annoyance suffered by the Defendants by the Plaintiff in re-amending his Amended Plaintiff cannot be understated. Indeed, great prejudice will be caused to them as they will be forced to look at their cases afresh with a view to filing amended Defences, if at all. In view of the inordinate delay in the Plaintiff bringing the application herein, the court finds that this is a prejudice that he ought to compensate the Defendants for.

### **DISPOSITION**

- 38.Bearing in mind the foregoing, this court is satisfied that this is a case which merits the exercise of its discretion in favour of the Plaintiff herein to enable it determine the real issue in controversy between the parties herein.
- 39.In the circumstances foregoing, the Plaintiff's Notice of Motion application dated 12<sup>th</sup> March 2013 and on 13<sup>th</sup> March 2013 is hereby allowed on the following terms:-
- a. **The Plaintiff shall file and serve a Further Amended Plaintiff upon the Defendants within seven (7) days from the date of this ruling.**
  - b. **The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants shall file and serve Further Amended Defences and Counter-Claim, if need be, within fourteen (14) days from the date of service.**
  - c. **Subsequent pleadings shall be filed within the timelines stipulated in the provisions of the Civil Procedure Rules, 2010.**
  - d. **The Plaintiff shall pay to the 1<sup>st</sup> Defendant a sum of Kshs 30,000/= and to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, a further sum of Kshs 30,000/= within thirty (30) days from the date of this ruling failing which the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants will be at liberty to apply for further appropriate orders from the court.**

40.It is so ordered.

**DATED and DELIVERED at NAIROBI this 21<sup>st</sup> day of May 2014**

**J. KAMAU**

**JUDGE**