



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. 119 OF 2009**

**LOCHAB BROTHERS LIMITED.....APPELLANT**

**VERSUS**

**PETER A. MULAMA.....RESPONDENT**

**RULING**

1. The plaintiff craves leave to amend its memorandum of appeal dated 7<sup>th</sup> August 2009. From the annexed draft amended memorandum, the applicant intends to enjoin a new party, *Eldoret Express*, as the 2<sup>nd</sup> respondent in this appeal.
2. The grounds are set out in the chamber summons dated 29<sup>th</sup> June 2012 and buttressed by the deposition of Joseph Songok, learned counsel for the appellant. The appellant contends that *Eldoret Express* was a party in the suit in the lower court that is the subject of this appeal. The decree in fact apportioned liability to the intended party at the ratio of 10%. The applicant avers that when its counsel drafted the memorandum of appeal, he “erroneously failed to enjoin the intended party”.
3. The motion is contested by the intended respondent. There are grounds of opposition filed on 3<sup>rd</sup> October 2012. In a nutshell, the intended respondent pleads that the motion is incurably defective; that it is prejudicial because the intended respondent has already met its share of the decree; that there has been *laches*; that the motion is statute barred; and, that there are no sufficient grounds to invoke the leave of the Court.
4. The parties filed written submissions: those by the appellant were filed on 19<sup>th</sup> November 2012; those by the intended respondent on 12<sup>th</sup> March 2013. The 1<sup>st</sup> respondent is unaffected by the present application. On 21<sup>st</sup> October 2014, the learned counsel for the disputants informed the court that they would rely *entirely* on their submissions. I have carefully considered the pleadings, depositions, grounds of opposition and the rival submissions.
5. I am alive to the notion that amendments to pleadings should be liberally allowed. An application for amendment may be made at any stage before judgment. The key rationale is to allow a court to effectively and finally determine all the issues in the suit. See *Eastern Bakery v Castelino* [1958] E.A. 461, *The British India General Insurance Co Ltd v Parmar* [1966] E.A 172, *Leroka v Middle Africa Finance Company Limited* [1990] KLR 549, *Kuloba v Oduol* [2001] 1 EA 101, *Unga Limited -vs- Magina Limited* Nairobi, High Court Case 1250 of 1999 [2014] eKLR. See also the dictum of Madan JA (as he then was) in *D. T. Dobie & Company -v- Muchina* [1982] KLR 1.
6. Under Order 1 of the Civil Procedure Rules 2010, the court has wide discretion to enjoin a necessary party or remove an unnecessary party. It is aimed at getting to the root of the dispute

- and to prevent multiplicity of actions. It is also cost effective in the long run. In addition, the court is now enjoined by article 159 of the Constitution and Sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. See Harit Sheth Advocate v Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.
7. Justice is however a two way street. Accordingly, amendments will not be allowed where they cause a serious injustice to the other party. The British India General Insurance Co Ltd v Parmar [1966] E.A 172, Eastern Bakery v Castelino, supra, at page 462. Since the grant of leave is a *discretionary power*, a party who abuses the process of court or seeks to cause further delay of the suit will be denied the remedy. See Unga Limited v Magina Limited [2014] eKLR, supra.
  8. Under section 79G of the Civil Procedure Act, an appeal from a decision of the lower court to the High Court must be presented within *thirty days*. It is common ground that the decree in the lower court was issued on 16<sup>th</sup> July 2009. The appellant, being aggrieved by that decision, lodged an appeal to this court way back on 11<sup>th</sup> August 2009. A period of nearly three years has thus passed before the presentation of the present application to amend the memorandum of appeal. I am aware that the court has power to extend the time within which to appeal. The exercise of that power is however discretionary. See Issa Mwabumba and others v Loita Development Limited Court of appeal, Mombasa, civil appeal 287 of 2006 [2012] eKLR. The application for leave must also be brought without delay. Wasike v Swala [1984] KLR 591.
  9. The delay in this case has not been explained *at all* in the chamber summons or the supporting deposition. The appellant's learned counsel only deposes at paragraph 5 that "*we erroneously failed to enjoin the intended party as the 2<sup>nd</sup> respondent*". When delay is established, unless it is well explained, it is deemed to be inexcusable. See Allen v Mc Alpine & Sons Ltd [1968] 1 All ER 543, Ivita v Kyumbu [1984] KLR 441, Unga Limited v Magina Limited supra. The delay here of nearly three years is inordinate and inexcusable. That in turn militates against the grant of a discretionary relief.
  10. The effect of the amendment would also be to introduce a new party to this appeal. I am alive that the court has discretion to enjoin such a party. But there are three serious caveats in this case: For starters, it will lead to further delays which would be anathema to the overriding objective. Secondly, the time within which to present an appeal, as against the intended respondent, expired way back in the year 2009. Thirdly, it is not contested that the intended respondent met its share of the decree to the 1<sup>st</sup> respondent and has no interest in these proceedings. The joinder has obvious prejudice to the intended respondent: there are the costs of litigation at the very least.
  11. I thus agree with the intended respondent that beyond the *laches*, the joinder is statute barred. I have also reached the conclusion that there are no sufficient grounds to grant the leave. In addition, it would be highly prejudicial to the intended respondent. See The British India General Insurance Co Ltd v Parmar [1966] E.A 172, Eastern Bakery v Castelino [1958] E.A. 461, Leroka v Middle Africa Finance Company Limited [1990] KLR 549, Kuloba v Oduol [2001] 1 EA 101.
  12. For all those reasons, I am *disinclined* to exercise discretion in favour of the appellant. Leave to amend the memorandum of appeal dated 7<sup>th</sup> August 2009 is *refused*. The upshot is that the appellant's chamber summons dated 29<sup>th</sup> June 2012 is dismissed. As the intended respondent is not a party to the appeal, I order that each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 18<sup>th</sup> day of November 2014**

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

Mrs. Kamau for the appellant/applicant instructed by Nyaundi Tuiyott & Company Advocates.

No appearance for the intended respondent.

Mr J. Kemboi, Court clerk.