



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 75 of 2012**

**MARIA ROSITA CARDOZO suing through her appointed agent\_MASAI MARA SOPA LODGE LIMITED.....PLAINTIFF**

**VERSUS**

**ROBERT KIBAGENDI**

**OTACHI.....1<sup>ST</sup>  
DEFENDANT**

**THE HON. ATTORNEY**

**GENERAL.....2<sup>ND</sup>  
DEFENDANT**

**JUDGMENT**

The suit came for substantive hearing of the main suit on 31<sup>st</sup> May 2011 before the Hon. Justice Okwengu when PW1 testified and the Plaintiff closed her case.

The 1<sup>st</sup> Defendant testified on 27<sup>th</sup> June 2011 and on 22<sup>nd</sup> November 2011 when he closed his case. The court directed written submission to be filed but before the parties could highlight their submissions the Plaintiff on 6<sup>th</sup> February 2012 filed an application dated 2<sup>nd</sup> February 2012 seeking to amend her pleadings. The application was canvassed by way of written submissions and the burden fell upon the Deputy Registrar P. Gichohi to consider and render a ruling on the application which she duly did and delivered a ruling on 26<sup>th</sup> June 2012 allowing the application for leave to amend on the terms.

The 1<sup>st</sup> Defendant was aggrieved by the ruling of the Deputy Registrar and filed a memorandum of appeal against the ruling dated 29<sup>th</sup> June 2012 citing eight (8) grounds of appeal.

The gist of the 1<sup>st</sup> Defendant’s appeal is that the Deputy Registrar wrongfully and injudiciously exercised her discretion in granting the Plaintiff leave to amend the pleadings even after making a finding that the Plaintiff’s delay in seeking leave was inordinate.

Following the filing of the appeal the parties’ counsels opted to canvass the appeal by way of written submission.

**Appellant’s Case:**

Submissions were filed by Counsel on behalf of the 1<sup>st</sup> Defendant, the Appellant herein on 4<sup>th</sup> December 2012, in summary it was the submission of the 1<sup>st</sup> Defendant that the Deputy Registrar having found that

the Plaintiff's delay in seeking leave to amend the plaint was inordinate; the application ought to have been declined. The 1<sup>st</sup> Defendant relied on the case of **KASSAM –VS- VANK OF VARODA (KENYA) LTD (2002) 1 KLR 294** where the court made a finding inter alia that where late amendments are done an applicant must show why the application was made late and must satisfy the court that the delay was not deliberate.

It was submitted on behalf of the 1<sup>st</sup> Defendant that the Deputy Registrar erred in failing to find that the plaintiff's application for amendment was an afterthought, was filed in bad faith and was intended or meant to delay the case. Further, the 1<sup>st</sup> Defendant submitted that the Deputy Registrar erred in law and fact by failing to consider the prejudice and costs which would be occasioned to the 1<sup>st</sup> Defendant by allowing the amendment. Additionally the 1<sup>st</sup> Defendant's counsel submitted that despite the Deputy Registrar making a finding that costs would be an adequate compensation, no award for costs was granted to the 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant contends that there was no basis for the Deputy Registrar to reserve the costs of the application having found that the plaintiff was guilty of inordinate delay in making the application.

### **Respondent's case**

The plaintiff opposes the appeal and filed her submissions on 18<sup>th</sup> December 2012. The plaintiff submitted that mere delay is not a ground for declining leave to amend a pleading if the same does not prejudice the opposite party. The plaintiff has further submitted that the appellant has not shown what prejudice he will suffer that cannot be compensated for by an award of costs. Counsel for the Plaintiff has placed reliance on the case of **CENTRAL KENYA LTD –VS- TRUST BANK LTD (2000) 2EA 365** where the court of Appeal held that neither the length of the proposed amendment nor delay were sufficient grounds of declining leave to amend and that the overriding consideration were whether the amendments were necessary for the determination of the suit and whether delay was likely to prejudice the opposing party beyond compensation in costs.

The plaintiff's counsel contends that there was no basis for the court to interfere in the exercise of discretion by another court unless it is shown and/or it is apparent that in reaching the decision, the court proceeded on wrong principles of law. In this submission the plaintiff relies on the case of **JAMES NANDASABA –VS- WILLIS WACHILONGA (2005) eKLR** where the court held that the court will not interfere with the discretion of a judge in disallowing or allowing an amendment to a pleading unless it appears that in reaching the decision, the judge proceeded on wrong material or wrong principles.

On the issue of costs, the plaintiff submits that the Deputy Registrar reserved the issue of costs to follow the event and that the 1<sup>st</sup> Defendant if he succeeds in his defence, the costs awarded to the 1<sup>st</sup> Defendant would include the costs of the application for amendment.

The foregoing is the brief background to the appeal before me and the contrasting positions taken by the parties in urging the matter before this court. I will now turn to the consideration of the merits or otherwise of the appeal before me.

The appeal in essence challenges the decision of the Deputy Registrar in allowing the application for leave in spite of the apparent delay that was evident before the plaintiff made the application. The issue whether delay should be a factor to be considered in determining applications for amendment was considered by the court of appeal in the case of **CENTRAL KENYA LTD –VS- TRUST BANK LIMITED (Supra)** where the appellant judges held as follows:

***“The overriding consideration in applications for such 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 party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot***

***properly be compensated for costs”.***

In the premises therefore delay alone cannot be the sole consideration in refusing an application for amendment.

The Deputy Registrar in making her decision it is evident in her ruling that she considered the question of the delay when she observed:-

***“Though the delay herein appears inordinate, I am not persuaded, in the circumstances herein that the amendments are an afterthought, in bad faith and meant to delay the hearing and determination of this suit or disrupt judicial determination”.***

The Deputy Registrar further in her ruling finds thus: -

*“No injustice will be occasioned to the 1<sup>st</sup> Defendant/Respondent herein as costs will be an adequate compensation. The amendments sought herein are necessary to enable the court to determine the real issue in controversy. I therefore exercise my discretion in favour of the Plaintiff/Applicant and allow the Application...”*

The lower court held the intended amendment to be necessary to enable the court to determine the real issue in controversy and exercised its discretion to grant leave to the Plaintiff to amend her plaint. The power of the court to grant leave to amend is discretionary. In the case of **MBOGO & ANOTHER –VS- SHAH (1968) EA 93** the court of appeal held that an appellate court has no jurisdiction to interfere with exercise of such discretion unless the court has acted on wrong principles, has misapprehended the law or has acted on no evidence or that he is plainly wrong. **Newbold P** in the **MBOGO –VS- SHAH** case while considering the issue of exercise of discretion rendered himself thus:-

***“We come to the second matter which arises in this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge, where his discretion is unfettered as in this case, was unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive to the same ultimate result. For myself I like to put it in the words that a court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice”***

I have considered the ruling by the Deputy Registrar and I cannot fault the exercise of her discretion save for the award of the costs of the application which I consider should have been awarded to the 1<sup>st</sup> Defendant in any event and ought not to have been reserved to await the determination of the suit. I therefore uphold the decision by the Deputy Registrar allowing the Application for amendment and as the plaintiff has filed the amended plaint pursuant to the order of the Deputy Registrar, I would grant the Defendants leave to file and serve their amended defence if any within 14 days of the date of this judgment.

The costs of the application for amendment are awarded to the 1<sup>st</sup> Defendant in any event but the costs of the appeal will be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF FEBRUARY 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant