REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 174 of 2011

NUUYIA PIRIAS OLE NAKABASHI……..…….APPELLANT

V

SARINGE OIPARARI SAAYA…… …..…… RESPONDENT

JUDGMENT

(Appeal from original Ruling and order made by B.O.Ochieng, Senior Resident Magistrate in

Kilgoris, SRMCC No.46 of 2010 on 9th August, 2011)

Introduction:

1. This appeal a rises from the ruling and order of the Senior Resident Magistrate, **Hon**. **B.O.Ochieng** made on 9th August, 2011 in Kilgoris, SRMCC No. 46 of 2010(hereinafter referred to only as "**the lower court"**), in which the appellant herein was the defendant while the respondent was the Plaintiff. In the lower court, the respondent had sued the appellant on 23rd November, 2010 for trespass. The respondent had claimed that

on or about the 20th day of October, 2010, the appellant without any lawful authority or reasonable excuse trespassed on the respondent's parcel of land known as Plot No. 34 Lolgorian (hereinafter referred

to as Plot No.34) and built illegal structures thereon. The respondent sought a permanent injunction restraining the appellant from trespassing on the said plot. The appellant filed a statement of defence in which the appellant denied the respondent's claim. The appellant claimed that he had been allocated a parcel of land known as Plot No.94 Lolgorian (hereinafter referred to as Plot No.94) by Transmara County Council and that as far as he was concerned, that was the parcel of land on which he had carried out the construction works that the respondent had complained about. The appellant denied any knowledge of Plot No. 34 which the respondent had claimed to own. The suit in the lower court was listed for hearing on 26th January, 2011 when the respondent who was acting in person gave evidence and produced in court

a number of exhibits in support of his case. After his cross-examination by the appellant who was also acting in person at that time, the Court made an order that Kilgoris County Council Physical planner do attend court on 2nd March, 2011 to assist the court in determining the location of Plot No. 34 and 94 on the ground. On 2nd March, 2011, the said Physical planner failed to attend court. On that day, the Court summoned the Surveyor, Transmara to appear in Court to perform the same task. On 8th June, 2011, the Surveyor, Transmara County Council gave evidence and was cross-examined by the appellant. The said surveyor testified that Plot No.34 and Plot No.94 are distinct on the ground and they are in different locations in Lolgorian and do not share any boundary. The said surveyor testified that Plot No. 34 is owned by the respondent while Plot No. 94 was owned by one, Samwel M. Katam. He confirmed that the disputed plot was Plot No. 34 and it belonged to the respondent and that the respondent and the appellant had appeared before

him and he had advised them as much. The respondent closed his case with the evidence of the said surveyor and the court ordered the defence case to be heard on 29th June, 2011. On 29th June, 2011, the appellant appointed the firm of Oguttu-Mboya & Co. Advocates to act for him and the said law firm filed an application to amend the appellant's statement of defence. The appellant's application that was dated 29th June, 2011, sought leave of the court to amend the appellant's defence to join two parties to the suit namely, one, Sakui Ole Lisha and the County Council of Transmara and to plead a counter claim against the respondent and the said two new parties. The appellant application for leave to amend the defence was brought on several grounds. In summary, the amendment was sought on the grounds that the dispute between the appellant and the respondent was over Plot Nos. 34 and 94 and that both plots were allocated by the County Council of Transmara with Plot No. 34 being allocated to the respondent while Plot No. 94

to the said Sakui Ole Lisha who sold the same to the appellant. That although the Plot Numbers are different, the appellant and the respondent are claiming the same ground. In the circumstances, both Sakui Ole Lisha and the County Council of Transmara were necessary parties to the suit. It was therefore necessary to bring them on board so that the court may be able to determine all issues in controversy between the parties. The appellant contended that the amendment was necessary so as to avoid the filing of multiple suits over the same subject matter and that no party was going to suffer prejudice as a result of the said amendment. The appellant's application for leave to amend the defence was supported by the affidavit of the appellant sworn on 29th June, 2011 to which the appellant attached a copy of the appellant's proposed amended defence and counter-claim. The appellant's application was opposed by the respondent who had also engaged the law firm of O.M.Otieno & Company, Advocates to act for him in the matter. Through

affidavit sworn on 1st July, 2011, the respondent opposed the appellant's application on the grounds that the application was brought late in the day after the respondent had closed his case and that the intended amendment was meant to change the character of the defence that had been put forward by the appellant thereby raising a new cause of action. The respondent also claimed that the intended amendment was meant to cloud issues which were straight forward thereby prolonging and delaying the hearing and disposal of the suit. The respondent contended that the claim that the appellant intended to bring against Sakui Ole Lisha and the County Council of Transmara could be pursued in a separate suit. In conclusion, the respondent contended that the intended amendment would prejudice him while the appellant would not be prejudiced in any way if leave is not granted since the appellant could maintain another suit.

2. The respondent's application for leave to amend the defence

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was heard on 13th July, 2011 before Hon. B. O. Ochieng SRM. The arguments that were put forward before the learned Senior Resident Magistrate by Mr.Ochwangi who appeared for the appellant and Mr.Otieno for the respondent were along the lines that I have already highlighted herein above. In a detailed ruling delivered on 10th August, 2011, the learned Senior Resident Magistrate dismissed the appellant's application for leave to amend the defence. The appellant's application was rejected by the learned Senior Resident Magistrate for several reasons. First, on the ground that the proposed amendments would lead to delay in the hearing and disposal of the case. Secondly, that the proposed amendments were intended to vex the respondent. Thirdly, that the proposed amendments were not necessary as the issues in controversy between the parties were well pleaded and could be determined by the court without the amendment sought. Fourthly, that the appellant was not going to be prejudiced in any way if the amendment

sought was not allowed as he could lodge a separate suit instead of making the suit in the lower court unnecessarily complex. Fifthly, that it was too late in the day to mount a counter-claim as the suit had reached the defence case stage and it would be costly to the respondent to start the case afresh and lastly, that the proposed amendments were going to be prejudicial to the respondent, an abuse of the process of the court and an afterthought. Before arriving at this decision, the learned Senior Resident Magistrate considered various authorities on amendment of pleadings that were cited before him by the advocates for both parties.

3. The appeal to this court:

The appellant was aggrieved by the said decision of the learned senior resident magistrate and has appealed to this court. The appellant has challenged the learned senior resident magistrate's decision on nine (9) grounds which can

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be summarized as follows; namely, that the learned senior resident magistrate;

I. Failed to consider the special circumstances of the case that was before him and the consequences of failure to allow the amendment that was sought;

II. Misdirected himself in law in suggesting that the claims that the appellant wanted to mount in the counter-claim could be brought in a separate suit;

III. Misapprehended his jurisdiction and/or discretion in an amendment application thereby reaching an erroneous conclusion that the appellant had not satisfied the conditions for granting an application for leave to amend pleadings;

IV. Failed to analyze and/or evaluate the evidence and the submissions on record thereby arriving at a conclusion that was contrary to the weight of evidence and submissions on record;

V. Made a decision that was contrary to the provisions of Order 21 rule 4 of the Civil Procedure Rules, 2010.

4. On 28th January, 2013, the parties agreed to argue this appeal by way of written submissions. The appellant filed his written submissions on 25th February, 2013 while the respondents filed their submissions in reply on 7th March, 2013. I have perused the

pleadings that were filed in the lower court, the application for amendment that was made in that court by the appellant and the reply to it by the respondent, the submissions that were made before that court and the ruling of the learned senior resident magistrate. I have also considered the submissions filed herein by the advocates for both parties. Under Section 78 of the Civil Procedure Act, Cap. 21 Laws of Kenya, this court while considering an appeal, has the same powers as those of the trial court. This court therefore has the power to re-examine and evaluate the material that was placed before the lower court. I set out herein below my views on the various grounds of appeal raised by the appellant against the decision of the learned senior resident magistrate. I will deal with all the grounds of appeal together.

5. Consideration of the appellant's grounds of appeal:

The law on amendment of pleadings is now well settled.

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Applications for leave to amend should freely be allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be will not result prejudice or injustice to the other party which cannot be properly compensated for in costs(**see the court of appeal cases of, Central Kenya Ltd. vs. Trust Bank Limited & 4 others, Court of Appeal at Nairobi, Civil Appeal No. 222 of 1998(unreported)** and **Robert Ombaso Nyareru & another vs. Beldina Mokaya, Court of Appeal at Kisumu, Civil Appeal No.200 of 2011(unreported).** Parties should be allowed to make such amendments as may be necessary for the determination of real questions in controversy or to avoid a multiplicity of suits, provided, there has been no undue delay, no new or inconsistent cause of action is introduced and that no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side(**see, Volume 2, 6th edition, AIR commentaries on the**

Indian Civil Procedure Code, at page 2245, cited in the case of

Central Kenya Ltd. vs. Trust Bank Ltd. & 4 others(supra)). From the foregoing, it can be said that what is expected of an applicant for leave to amend a pleading is to satisfy the court that the amendment sought is necessary for the determination of real questions in controversy between the parties or that it would avoid multiplicity of suits. The onus then shifts to the party opposing such amendment to show that the amendment sought would result in prejudice to him which cannot be compensated in costs and/or that the amendment sought would introduce an inconsistent cause of action and/or that the amendment if allowed would take away interests or legal rights that have accrued to him and/or that the amendment would cause injustice to him. As I have mentioned herein above, the appellant had sought to amend his defence to plead a counter-claim and to join two other parties to the suit as defendant's to the said counter-claim together with the respondent. The reason given for the amendment sought was that one of the parties sought to be joined

into the suit had sold Plot No. 94 that was in dispute to the appellant and the other had allocated both Plot No.34 and 94 whose location on the ground was being disputed in the suit. It was the appellant's contention therefore that the presence of these two parties in the suit was necessary to enable the court determine the real questions in controversy in the suit. As mentioned above, the respondent had objected to the amendment on the grounds that the amendments sought would completely change the defence that had been put forward by the appellant and that the same was intended to delay the hearing and disposal of the case. The other grounds were that the appellant's counter-claim that he had sought to introduce with the said amendments could be determined in a separate suit and that the amendment would lead to unfairness to the respondent as it would introduce other parties to the suit that would lead the respondent's case being started afresh. The learned senior resident magistrate agreed with the respondent and dismissed the appellant's

application for leave to amend the defence. The question being raised in this appeal is whether the learned senior resident magistrate was correct in his decision in light of the guiding principles in applications for amendment of pleadings that I have highlighted above. The learned senior resident magistrate found that the two parties that the appellant wanted to join into the suit by way of a counter-claim were necessary parties as they had some information that would help the court to determine the ground position of Plot Nos. 34 and 94. See page 17 of the record of appeal where the learned senior resident magistrate rendered

himself as follows,

"**There is a huge contention on the position of the suit plot whether 34 or 94 and the 2nd and 3rd defendant in the draft counter-claim are relevant. I find that the defendants to the counter-claim especially the county council of Transmara needs to shed more light into the allocation."**

With this finding, the learned senior resident magistrate had no doubt reached a conclusion that the intended amendment was

necessary for determining the real issue in controversy in the suit. What the learned senior resident magistrate needed to consider next was whether any prejudice would be occasioned to the respondent that could not be adequately compensated in costs or whether the amendment would cause injustice or prejudice to the respondent. Unfortunately, these are not the questions that the learned resident magistrate asked himself. He went to minute examination of the counter-claim that the appellant intended to bring through the amendment whether it was properly pleaded, whether it had merit and whether it could give rise to other issues. The learned senior resident magistrate also proceeded to consider the appellant's possible causes of action in the event the amendment was refused and he loses the suit. The learned senior resident magistrate also considered the complexities that would arise if the amendment was allowed. In this regard, this is what the learned senior resident magistrate said at page 18 of the record of appeal,

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"If one reads the whole of the counter-claim one will discover that it makes this case unnecessarily complex. We can't mix the rights arising from the two transactions. We will be confused at the end of the day."

The learned senior resident magistrate also went ahead to consider whether the facts giving rise the appellant's counter-claim were within his knowledge or not as at the date of institution of the suit so as to justify the amendment at that stage of the proceedings. I am of the view that the learned senior resident magistrate asked himself all the wrong questions and as such got erroneous answers. It was not for the court to plead for the parties. The inadequacy or otherwise of the draft counter-claim was not something that the court should have taken into account while considering whether or not to grant leave to the appellant to amend his defence. The same applies to the issue whether the counter-claim had merit or not. These were issues for the trial court. The fact that the suit would be more complex after the amendment was also not a ground to deny the

applicant leave to amend the defence. The same applies to the fact that the facts giving rise to the counter-claim were within the knowledge of the appellant when he filed the suit and that the appellant could file a separate suit. In any event, amendments are to be allowed if it is to avoid multiplicity of suits. At one point in the ruling, the learned resident magistrate posited that the appellant could file another suit if he lost the suit against him by the respondent and on another he was stating that he was not encouraging multiplicity of suits. It was hard to follow the learned senior resident magistrate's reasoning on this issue although ultimately he held that the appellant's counter-claim would be better off being pursued in a separate suit a position which is inconsistent with public policy and rationale behind the need to freely allow amendments.

4. **This court's findings;**

Due to the foregoing it is my finding that all the grounds of appeal put forward against the decision of the senior resident magistrate

have merit. In my own assessment of the application before the senior resident magistrate, the only prejudice to the respondent that would have resulted if the application for amendment was allowed was the possibility of the respondent and the Surveyor Transmara County Council being re-called to testify afresh. Since the Court was not told that the respondent and the said surveyor would not be available, this was not a prejudice or injustice that could not be properly compensated in damages. Even the learned senior resident magistrate acknowledged that the only loss that the respondent would suffer was costs. At page 18 of the record of appeal, he stated as follows in the last paragraph,

"This suit is at a very advanced stage we are on the

defence stage and going back would be costly for the plaintiff. We need to recall that the litigation should be short and not expensive."

I don't agree with the submissions put forward by the advocates for the respondent that since the proposed amendment was going to introduce new grounds of defence that was a valid ground to

deny the appellant leave to amend the defence. I don't think also that there was an inordinate delay in this case that would justify denial of leave to amend defence. The suit in the lower court was filed on 23rd November, 2010, the hearing commenced on 26th January, 2011 and the application to amend was made on 29th June, 2011 before the defence case had commenced. In the case of, **Harrison C. Kariuki .vs. Blue Shield Insurance Co. Ltd. [2006] eKLR,** which has been cited herein by the respondent in support of the decision of the learned Senior Resident Magistrate's, the amendment was sought after the case for both parties had been closed and the defendant had already filed its written submissions. Furthermore, in the course of the proceedings in that case, the defendant had made certain admissions for the purposes of aiding the expeditious disposal of the suit which admissions the Plaintiff intended to use against it in the amendments that he wanted to introduce. The judge rightly held that the amendments that had been sought would occasion great

prejudice and injustice to the defendant that could not be made good in costs. In the case of, **James Ochieng' Oduol t/a Ochieng' Oduol & Co. Advocates .vs. Richard Kuloba [2008]eKLR,** also cited by the respondent, the court disallowed the amendment on the grounds that to do so would have amounted to aiding a negligent pleader and would also take away the defence of limitation that had accrued to the defendant. In the present case, both the appellant and the respondent were initially acting in person when they laid the pleadings in the lower court and commenced the hearing of the case. I agree with the submission by the appellant that this was a special circumstance that should have weighed in the mind of the Senior Resident Magistrate while considering whether or not the amendments could have been made much earlier. Unlike in the **James Ochieng' Oduol case,** the appellant herein who was acting in person cannot be accused of negligent pleading. The intended amendments herein were not also going to take away any accrued right from the respondent. The two

cases are in my view distinguishable.

5. Conclusion;

The power of the court to grant leave to amend pleadings is discretionary. In the case of, **Mbogo .vs. Shah [1968] E.A 93,** it was held that an appellate court would only interfere with the exercise of discretion by the lower court where the judge in the lower court in the exercise of his discretion has misdirected himself in some matter and as a result arrived at a wrong decision, or where it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result, there has been a misjustice. From what I have stated herein above, it is my finding that whereas the learned Senior Resident Magistrate correctly set out in his ruling the principles applicable to applications for amendment; he failed to apply the said principles correctly to the facts of the case that was before him and as a result he arrived at a wrong decision. This is therefore an appropriate case in which this court should interfere

with the exercise of discretion by the lower court. The upshot of the foregoing is that, the appellant's appeal succeeds and the same is hereby allowed. The Ruling and Order of the Senior Resident Magistrate dated 10th day of August, 2011 in Kilgoris, SRMCC No. 46 of 2010 is set aside. In place thereof, I allow the appellant's Notice of Motion application dated 29th June, 2011, in Kilgoris SRMCC No. 46 of 2010 in terms of prayers 1 and 2 thereof save that in place of the County Council of Transmara, the appellant may if so advised join its successor in title since the entity does not exist anymore. The amended defence and counter-claim should be filed within the next twenty one (21) days from the date of this order. I direct the Deputy Registrar to forthwith return the Original file for SRMCC No. 46 of 2010 which was brought to this court for the purposes of this appeal to Kilgoris so that the parties can set the case down for further hearing. Since the proposed amendment will subject the respondent herein who has lost the appeal to additional expense in the lower court,

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I order that each party shall bear its own costs before this court and in the lower court in relation to this application for leave to amend the defence. Orders accordingly.

Dated, signed and delivered at KISII this 31st day of May, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Ochwangi for the Appellant

No appearance for the Respondent

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

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