REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

MISCELLANEOUS 1100 OF 2003

CHRISTOPHER MUSYOKA MUSAU.....PLAINTIFF

VERSUS

N.P.G. WARREN & THREE OTHERS.....DEFENDANT

JUDGMENT

The person now described as plaintiff was the Applicant in an Originating Summons (O.S.) taken out on 23rd September, 2003 against some four (4) defendants who traded as Daly & Figgis Advocates. That plaintiff subsequently took out the Chamber Summons dated 13th May, 2010 and filed in court on 21st June, 2010 praying for leave to amend the said Originating Summons so as to include some other four (4) persons said to practice law in the same firm. The Originating Summons prays that the defendants be compelled to pay to the Plaintiff certain moneys or in the alternative they be ordered to surrender certain title documents to the Plaintiff.

The application for amendment of the Originating Summons was heard by the Deputy Registrar of this court and the said amendments allowed. The defendants being dissatisfied filed an appeal and raised some nine(9) grounds of appeal amongst which are that the Deputy Registrar erred in law and fact in not finding that the addition of the four(4) new defendants denied them the defence of limitation and that they were prejudiced by such addition to the Originating Summons.

The appeal was argued before me on 7th February, 2012 and learned Counsel for the appellants submitted that the amendment should not have been allowed as it had the effect of adding some four(4) defendants long after expiry of Limitation of action thereby denying such defendants the defence of limitation. I was referred to authorities on the topic.

Counsel for the Respondent in turn submitted that the appeal cannot lie as it is against the discretion of the Judicial Officer who heard the application. Further that the said Deputy Registrar did not proceed on the wrong principle and did not rely on wrong material. That the court can allow an amendment irrespective of time lapse if the court be satisfied that it is just to do so because such amendment became effective as from the time suit was instituted. Counsel concluded that no injustice would be occasioned to the new four(4) defendants and if any such prejudice would occur then the same would be adequately compensated by way of costs. Counsel relied on Order 8 Rule (3) and various authorities all of which I have taken into consideration.

In determining this appeal it is necessary to set out the provisions of Order 8 Rule (3) Subrules (2) and (3) relied on by the Respondents. The said order provides as follows:-

“Order 8 Rule 3(2) where an application to the court for leave to make an amendment such as is mentioned in Subrule (3), (4) or (5) is made after any relevant period of limitation 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."

Subrule (3) Provides:-

"Order 8 Rule 3(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued."

It is clear from the above that amendments will be allowed where the court thinks it is just to grant them and no injustice is caused to a person being joined at an amendment. In the case of **EASTERN BAKERY –VS- CASTELLINO (1918) EA 262** it was held that an amendment will be allowed freely if it does not cause injustice to the other side and that there is no injustice if the other side can be compensated by costs, the main principle being that an amendment should not be allowed if it causes injustice to the other side. In the same case it was held that generally an appellate court will not interfere with the discretion of a judge in allowing or disallowing amendment to pleadings unless it appears that in reaching his decision he has proceeded upon wrong materials or upon a wrong principle. This court was shown neither the wrong principle the Senior Deputy Registrar of the court followed in allowing the amendment nor the wrong material relied upon. Considering the principle that applications for leave to amend should be freely allowed and at any stage of the proceedings so long as prejudice as may not be compensated by costs is not caused, and further noting that the Senior Deputy Registrar found the addition of the four(4) defendants a necessary action for the full and just eventual determination of the dispute, this court would hesitate to interfere with the proper exercise of judicial discretion by the Senior Deputy Registrar – **CENTRAL KENYA LTD –VS- TRUST BANK LTD (2000) 2 EA 365 (CAK).**

I have not found that the addition of the new parties has created a new course of action so that the defendants can be said to be prejudiced and a limitation placed to their rights. Authority has it that what the Limitation of Causes Act Cap. 22 of our Laws does is to provide a shield not a substantive right so the argument that the addition of the four(4) new defendants deprives them of the defence of limitation cannot hold in light of the finding of **Lord Denning M.R** in the case of **MITCHEL –VS- HARRIS ENGINEERING COMPANY LTD (1967) 2QB 203** that

"The statute of Limitation does not confer any right on the defendant. It only imposes a time limit on the plaintiff."

So, once the four new parties were added to the Originating Summons, then the amended Originating Summons, spoke from the date on which the same was originally issued and not from the date of the amendment, as the defect was cured and the action was brought in time. I do not find therefore that the Senior Deputy Registrar fell into an error. The Authority of **Atieno –vs- Omoro (1985) KLR 677** becomes bad in light of what is stated above and also in the case of **KULOBA -VS- ODUOL (2001) KLR 647** and the many authorities therein referred to which have been brought to my attention by the Respondents, for which I am grateful.

As to the issue raised by the added defendants that they would suffer prejudice, suffice to quote Bowen, LJ in **COPPER –VS- SMITH (1984) 26 Ch. D. 700**.

"I have found in my experience that there is one panacea which heals every sore in litigation and that is costs. I have seldom, if ever, been unfortunate enough to come across an instance where a party has made a mistake in his pleadings which has put the other side to such a disadvantage that it cannot be cured by the application of the healing medicine."

I adopt.

In the result I find the appeal to be one lacking in merit and dismiss the same with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS **15TH** DAY OF **MARCH 2012**.

P.M. MWILU
JUDGE

In the presence of:-

…….. Advocate for Appellants
…….. Advocate for Respondents
……. Court Clerk

P.M. MWILU
JUDGE