



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.38 OF 2003

NARWAR SINGH BHOGAL.....1ST PLAINTIFF

AMRIK SINGH BHOGAL.....2ND PLAINTIFF

JASPAL SINGH BHOGAL.....3RD PLAINTIFF

VERSUS

**ZAHIRR SHEIKH and ANDREW GREGORY
(Joint Receivers and Managers**

Receivership).....1ST DEFENDANT

DEFENDANT NATIONAL BANK OF KENYA.....2ND

**DEFENDANT NATBANK TRUSTEES INVESTMENT
SERVICE LIMITED.....PROPOSED 3RD**

DEFENDANT COMMISSIONER OF LANDS...PROPOSED 4TH

RULING

Before me is an application expressed to be brought under **Orders 1 rule 10** and **6A rules 5 and 8** of the revoked **Civil Procedure Rules** seeking leave to amend the plaint further by joining two additional defendants, NAT Bank Trustee and Investment Services Limited as the 3rd defendant and the Commissioner of Lands as the 4th defendant.

The amendment is sought on the grounds that the 1st and 2nd defendants have unlawfully transferred the suit property to the intended 3rd defendant with the consent of the intended 4th defendant without the knowledge or consent of the plaintiffs; that this fact came to the attention of the plaintiffs on 25th January, 2010 when the defendants wrote to the plaintiffs' advocates forwarding certain documents; that the plaintiffs were not involved in a consent recorded in Nbi.H.C.Misc. Civil Application No.1659 of

2008 between the defendants, Ministry of Lands and Housing, the Principal Registrar of Government Lands, the National Bank of Kenya and NAT Bank Trustee and Investment Services Limited; that the expiry of the lease over the suit property affected the legality of pending charges. For the 1st and 2nd defendants as well as the intended 3rd defendants, grounds of opposition have been filed in which it is averred that:

- i) the application is fatally defective and is an abuse of the process of the court
- ii) the amendments sought have the effect of a new and inconsistent cause of action against the intended 3rd and 4th defendants.
- iii) the amendments will not assist in the determination of the real question in controversy
- iv) the amendments will adversely affect already vested legal rights
- v) the amendments will lead to a serious misjoinder of issues and parties
- vi) the amendments will be prejudicial to the intended 3rd defendant

I have considered these arguments as well as the extremely useful written submissions and authorities. The jurisprudence emerging from those authorities may be summarized as follows:

- 1) a party will be joined to a suit if it is necessary for the effective and complete settlement of all questions involved in the suit in order to avoid multiplicity of suits;
- 2) similarly, powers of the court to allow amendments is to determine the true, substantive merits of the case;
- 3) leave to amend, as a general rule, will be granted at any stage before judgment so long as it will not occasion injury to the other party;
- 4) however late the amendment is sought, it should be allowed if made in good faith provided costs can compensate the other side;
- 5) if the court is not satisfied as to the truth and substantiality of the proposed amendment, it ought to be disallowed;
- 6) the proposed amendment must not be immaterial or useless or merely technical;
- 7) if the proposed amendments introduce a new cause of action or a new ground of defence, it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action;
- 8) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitation;
- 9) the court has powers to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek amendment;
- 10) amendments must be timeously sought.

Starting with the last requirement, there is no doubt that the suit was filed on 26th March, 2003 and the plaint amended on 11th October, 2006. The present further amendment is being sought nearly seven years after the suit was instituted. In the case of **Kassam Vs. Bank of Baroda** (2002) 1KLR 294, it was stated

that where an amendment is sought after a period of delay, the applicant must satisfy the court that the delay was not deliberate. The applicants have demonstrated and I am satisfied that they learnt of the developments that have necessitated this application from a letter from the respondents dated 25th January, 2010.

It has not been shown by the respondents that the applicant had all along known of these developments but elected to wait until this time. *Mala fides* on the part of the applicants has similarly not been demonstrated. The proposed further amendments clearly flow from the original suit and has averments that relate to those in the original suit. The only issue that is new but still related to the dispute is the roles of the proposed 3rd and 4th defendants with regard to this suit property. It is deposed that the two colluded and without notice or consent of the applicants unlawfully and illegally made a transfer of the suit property to the proposed 3rd defendant; that the consent to transfer recorded in Nbi. H.C.Misc. Civil Application No.1659 of 2005 was void; that the mortgage was settled.

In the result and arising from these averments, the applicants' new reliefs, namely declaration that the mortgage was settled; a declaration that the consent recorded in Nbi.H.C. Misc. Civil Application No.1659/05 was bad in law and void and finally an order revoking the transfer to the proposed 3rd defendant, rectification of the register by cancelling title deed issued in the proposed 3rd defendant and re-issue of the same to the plaintiff. These issues, which are substantial and have direct nexus to the original dispute, can only be effectually and finally determined by the participation of the two intended defendants. This will also help to avoid multiplicity of suits based on the same subject matter. I see no prejudice to the intended defendants.

The applicants have deposed without being contrverted that they learnt of the transfer of the suit property in 2010. The proposed amendments have not been caught up by

the
limitation period. Whether or not a notice to sue was issued to the Attorney General in respect of the intended 4th defendant cannot be for the other defendants to confirm and at any rate not at this stage.

In the result, I allow the application and order that the further amended plaint be filed and served within 14 days. The 1st and 2nd defendants are at liberty to also amend their defence. The applicants will meet the 1st and 2nd as well as the intended 3rd defendants' costs of this application.

Dated, Delivered and Signed at Nakuru this 24th day of February, 2011.

**W. OUKO
JUDGE**