REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 147 OF 2006

BETWEEN

MATHEW KANDIE::::::::::::::::::::::::::::::::::::1ST APPELLANT
ROSE KANDIE::::::::::::::::::::::::::::::::::::::2ND APPELLANT
JACKSON KATAM::::::::::::::::::::::::::::::::::::3RD APPELLANT

AND

ESTHER JEPKEMBOI KIPLAGAT::::::::::::::::::::RESPONDENT

(Being an appeal from the decision of the Ag.Senior Principal Magistrate Hon. W. N. Njage dated 31st October, 2006 in Eldoret Senior Principal Magistrate's Court Civil Suit No. 1497 of 1998)

JUDGMENT

The appellants, **Mathew Kandie, Rose Kandie** and **Jackson Kattam** are the defendants in the Lower Court (Eldoret Senior Principal Magistrate's Court Civil Suit No. 1497 of 1998) where they have been sued by the respondents, **Barnaba Kiplagat Chemjor** and **Esther Jepkemboi Kiplagat.**

By their Chamber Summons dated 10th July, 2006, lodged in the said case under Order VI A Rules 3,5,7 and 8 of the Civil Procedure Rules, the appellants sought leave to amend their defence. The main reasons for the application, as expressed in the Chamber Summons, were that the defence had a fundamental defect which required to be rectified by amendment and that the amendment was necessary for the court to arrive at a just decision in the case. The appellants further contended that the amendment was necessary in view of explanation 4 to section 7 of the Civil Procedure Act.

In the affidavits in support of the application, the appellants elaborated the above grounds and swore that the amendment would not prejudice the respondents.

The application was opposed by the respondents and a replying affidavit was sworn by the 2nd respondent **Esther Jepkemoi Kiplagat**. She deponed, *inter alia*, that the proposed amendment, if allowed, would be prejudicial to them since they had already testified and had closed their case. She also averred that the appellants were setting up a new cause of action and had moved the court too late in the day.

The application was heard by the Learned Principal Magistrate who after hearing submissions from counsel from both sides declined to grant the leave on the grounds that the respondents and their witnesses had testified and so had the second appellant. It was also the Learned Magistrate view that the

proposed amended defence introduced new facts which would not be challenged by the respondents and that the proposed amendment departed from previous pleadings and also introduced a new cause of action. He also found that the application had been made too late even though the facts upon which the application had been made were known to the appellants when their original defence was filed.

The ruling provoked this appeal which raises the following main issues: that the Learned Principal magistrate erred in law and in fact in holding that the application for leave to amend had been made too late; that the purpose of the proposed amendment was to introduce new facts; that the proposed amendment introduced a new cause of action; that it was intended to build the appellant's case after the hearing of the plaintiff's case.

The gist, of the submissions by counsel for the appellants, is that the Learned Principal Magistrate failed to appreciate that under Order VIA Rule 3(5) of the Civil Procedure Rules, amendments to pleadings should be freely allowed since, according to counsel, the proposed amendment sought to correctly set out the parties and crystallise the issues in the defence which had not been done because of the previous counsel's mistake.

The appeal was opposed on the main ground that the application for leave to amend had been made too late when the respondents case had been closed and the 2nd respondent had testified. It was therefore argued for the respondents that they would not have challenged fresh issues in the amended defence had leave to amend been granted. It was further submitted that a new cause of action was proposed in the amended defence and the respondents would be greatly prejudiced.

It is settled that a party may be allowed to make such amendments to his pleading as may be necessary for determination of the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay; that no new or inconsistent cause of action is introduced; that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

(See **AIR Commentaries on the Indian Civil Procedure code by Chittaley and Rao)**

Put differently, the guiding principle in applications for leave to amend is that all amendments should be freely allowed, and at any stage of the proceedings, provided that amendment or joinder as the case may be, with not result in prejudice or injustice to the other party which cannot properly be compensated for in costs **(**See **Beoco Ltd -V- Alfa Laval Company Limited [1994] 4 All E.L 464)**

So, whereas leave to amend pleadings is freely allowed at any stage of the proceedings the discretion to amend is not unfettered. The following factors may affect the discretion.

(1) Undue delay;

(2) Whether a new and/or inconsistent cause of action is proposed.

(3) Whether the other side has a vested interest or accrued legal right.

(4) Whether the proposed amendment, if allowed, will occasion prejudice or injustice to the other side which cannot be compensated for in costs.

The above factors are not exhaustive. Each case will depend on its own peculiar facts. In the matter at hand, the Learned Principal Magistrate found that the appellants were guilty of inordinate delay. The application by the appellants to amend their defence and counter-claim was made eight (8) years after the institution of the suit. The fact of delay, parse, was not the only reason for declining leave. In his own words:

"In the case of Charles Omwaya Omwoyo African Highlands Produce, Milimani Commercial Court HCCC Appl. No. 308/2002, the court held that in some cases justice would be better served by

allowing the consequences of the negligence of lawyers to fall on their own hands then allowing an amendment at a very late stage of the proceedings though the court has discretion to allow an application to amend pleadings it will be unfair for a defendant to wait until the plaintiff's case is heard and closed and then come in with an application to amend the defence properly (probably) with the intention of building up the defendant's case after hearing the case of the plaintiff. In my view the application seeking to amend the defence in this case is sought at a very late stage of the proceedings."

So, plainly, the Learned Principal Magistrate found that, besides the delay, to grant the leave sought would prejudice the respondents who had already closed their case.

The Learned Principal Magistrate further held that the proposed amendment would prejudice the respondents as:

"they would not be able to re-open their case and challenge the new facts being introduced in the pleadings."

The Learned Principal Magistrate was exercising a discretion in declining to grant leave to amend. On the material availed to him I cannot say that he exercised his discretion idiosyncratially or whimsically. Indeed in my view, he was judicious in the exercise of his discretion.

I have perused the draft amended defence and counter-claim. It cannot be gainsaid that it raises facts which are not in the pleading on the record. A few examples will suffice: In paragraph 3A an agreement is introduced with a specific date which fact is not in the defence sought to be amended. In paragraphs 5(A) and 9C deposit of Kshs. 100,000/- with M/s Chemwok and Company Advocates is introduced which fact is nowhere in the existing defence. In paragraph 10(c) the date of purchase of the suit titles and a new figure of Kshs. 350,000/- are introduced. In paragraph 10(D), an allotment of the titles to the 2nd appellant is introduced and the issue of *locus standi* is raised. In paragraph 10, interest for a specific period is claimed and so is rent benefit for a specific period claimed in paragraph 19. In paragraph 20 the 3rd appellant seeks the eviction of the respondents and in paragraph 4 there is a prayer for general damages for annoyance.

The above are some of the new facts which the draft amended defence and counter claim sought to introduce. How were the respondents who had closed their case expected to challenge those facts. How would they have answered the new claims of interest, general damages for annoyance and eviction, given that their case and part of the defence had been taken? In all those premises, the Learned Principal magistrate cannot be faulted when he concluded that the application for leave to amend would be prejudicial to the respondents.

I have come to the same conclusion. To have allowed the application for leave to amend would have caused injustice to the respondents which could not properly be compensated for in costs.

Accordingly, I find no basis for this appeal and I dismiss the same with cost to the respondents.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 27TH DAY OF JULY, 2011

F. AZANGALALA
JUDGE
Read in the presence of:
Mr. Otieno for the Appellant and
Mr. Kimani for the Respondent.

F. AZANGALALA
JUDGE
27TH JULY, 2011