



REPUBLIC OF KENYA



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**Masinde v Mwaura (Environment and Land Appeal 8 of 2020)
[2022] KEELC 4872 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4872 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 8 OF 2020
FO NYAGAKA, J
SEPTEMBER 22, 2022**

BETWEEN

CHARLES MASINDE APPELLANT

AND

SAMUEL MWAURA RESPONDENT

(Being an Appeal arising out of the ruling and order of Hon. D.K. Mtai (Senior Resident Magistrate) in Kitale Chief Magistrate's Court ELC Case No. 2 of 2015 delivered on 29th October 2020)

JUDGMENT

Introduction

1. The appellant, Charles Masinde, the defendant in CM ELC No 2 of 2015, was sued by the respondent, then plaintiff. On October 15, 2020, the appellant through its newly appointed firm of Advocates, filed an application dated October 12, 2020 seeking leave to amend his defence to include a counterclaim. The application was opposed by the respondent. He filed grounds of opposition dated October 14, 2020. After hearing both parties, the appellant's application dated October 12, 2020 was on October 29, 2020 dismissed with costs to the respondent.
2. The appellant was aggrieved by the ruling and order of the trial court. He filed a memorandum of appeal dated November 3, 2020. It contained seven (7) grounds in support of his appeal. In precise, he challenged that the trial court erred in holding that the draft amended defence raised an entirely new case thereby dismissing the application without any valid grounds. He faulted the trial court for holding that the enjoinder of two (2) other parties as defendants would be fatal to the respondents. He lamented that the trial court was in error in holding that the application was not only an afterthought but also mischievous. Finally, he complained that the trial court misdirected itself in condemning the appellant for the delay in the hearing of the matter yet the same was occasioned by the frequent transfer



of the file from one (1) court to another. Ultimately, he urged this court to allow the appeal, set aside the trial court's ruling, transfer the matter to another magistrate for hearing and final disposal and award costs of the appeal in his favor.

Hearing Of The Appeal

3. The appeal was heard on the basis of the parties' rival written submissions. Relying on article 50 of the Constitution and order 8, rules 1 (1), 3 and 5 of the Civil Procedure Rules, the appellant submitted that a party can amend its pleadings, to include joinder of parties, at any stage of the proceedings where it is necessary to enable the court effectively adjudicate upon and settle all issues in dispute. He submitted further that the amendments raised triable issues that ought not to be locked out from the hearing and disposal of the suit. He thus propounded that his application was merited. He maintained that contrary to the trial court's holding, the amendments proposed to be introduced did not raise a new case as the reliefs sought centered on the subject suit land. He went on to restate that the joinder of parties was intended to present all the facts holistically that the trial court needed in adjudication of the dispute. Additionally, the appellant submitted that the amendments occasioned no prejudice on the respondent as the hearing of the substantive suit had not commenced. In fact, he proposed that the respondent could be compensated by an award of costs and will be equally granted leave to file a defence to the counterclaim.
4. The respondent on his part opposed the appeal thereby underpinning the impugned ruling. He submitted that the court's power to amend pleadings is discretionary. Thus, the only determination by this court was to be whether the trial court exercised its discretionary powers judiciously. They submitted that this court ought to answer that issue for determination in the affirmative as in his view, the trial court did not proceed on wrong material or principle. He cited that the trial court was right in holding the claim that the appellant's new Advocate believed that a counterclaim ought to be filed was insufficient and unreasonable justification for grant of the relief sought as his erstwhile Advocate had at all material times to the suit remained competent. The court noted that the enjoinder of the two (2) parties to the dispute served no beneficial value as they were to be called as witnesses by the respondent. The respondent further submitted that the proposed amendments raised a new cause of action of an entirely different nature though relating to the same parcel of land. He cited the appellant for being perverse as he only lodged the application over eight (8) years after institution of the suit when the matter was confirmed for hearing. He urged this court to find that the appeal lacked merit and accordingly dismiss the same with costs.

Analysis And Determination

5. I have considered the parties' rival written submissions, the relevant law and the proceedings at trial. The appeal emanates from a court's discretionary power to allow or deny a party to amend its pleadings. The power to amend pleadings is governed by the provisions set out in section 100 of the Civil Procedure Act and order 8 of the Civil Procedure Rules.
6. Under order 8, rule 3 (1), the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings. The amendment, as stated in order 8, rule 5 (1), serves the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings in terms that are just.
7. As rightly stated by the respondent, the issue that falls for determination is whether the trial court exercised its discretionary powers injudiciously or on wrong principles in denying the appellant the right to amend his defence to include a counterclaim. Thus, as an appellate court, I am reminded that



this court will not normally interfere with the exercise of discretion unless it has been shown that the discretion was exercised injudiciously. This has been reiterated in a number of court decisions, one of which is *Kiriisa vs Attorney General & another* [1990 - 1994] EA 244. In that vein, this court will not interfere with the discretion of the court below in allowing or disallowing an amendment to a pleading, unless it appears to me that in reaching his decision, the trial court proceeded upon wrong materials or a wrong principle. I will buttress my view further by the decision of *Eastern Bakery vs Castelino* (1958) 1 EA 461 CAK.

8. The general power to amend pleadings is at the discretion of the court. Several decisions have enunciated the guiding principles constituent to enable a court make a determination on whether to allow or refuse an order for amendment of pleadings. The Court of Appeal in *Central Kenya Limited vs Trust Bank Limited* (2000) 2 EA 365, whose holding was approved in *Harrison C Kamau vs Blue Shield Insurance Co Ltd* (2006) eKLR, held:

“The amendments of pleadings.... (is) aimed at allowing a litigant to plead the whole of the claim he (is) entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as (are) necessary for determining the real issue in controversy or avoiding a multiplicity of suits, provided: (i) there has been no undue delay, (ii) no new inconsistent cause of action is introduced, (iii) no vested interest or accrued legal right is affected and (iv) the amendment can be allowed without injustice to the other side.”

9. Similarly, the court in the case of *Joseph Ochieng & 2 Others vs First National Bank of Chicago* Civil Appeal No 149 of 1999 acknowledged the writings in *Bullen and Leake & Jacob's Precedents of pleading*, 12th edition as relied on by one of the parties to the suit. The court held:

“The ratio that emerges out of what was quoted from the same book is that powers of the court to allow amendment is to determine the true substantive merits of the case, amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that, as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendments introduce a new case or 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, that the plaintiff will not be allowed to reframe his case or claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitation acts.”

10. The above quoted book states as follows regarding amendment of pleadings:

“...the power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or 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...”

11. In *Ochieng & Others vs First National Bank of Chicago* Civil Appeal No 147 of 1991 (unreported) as cited with approval in *St Patrick's Hill School Ltd vs Bank of Africa Kenya Ltd* [2018] eKLR, the Court of Appeal set out the principles governing the amendment of pleadings as follows: -



- (a) The power of the court to allow amendments is intended to determine the true substantive merits of the case.
 - (b) The amendments should be timeously applied for;
 - (c) The power to amend can be exercised by the court at any stage of the proceedings.
 - (d) As a general rule, however late the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side.
 - (e) 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 limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
12. Finally, the court in *Eastern Bakery v Castelino* (Supra) had this to say:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs....the court will not refuse to allow an amendment simply because it introduces a new case.....but there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit...the court will refuse leave to amend where the amendment would change the action into one of a substantially different character...or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the writ...the main principle is that an amendment should not be allowed if it causes injustice to the other side.”

13. Succinctly speaking, what is evident from the above is that an application to amend pleadings ought to be allowed, irrespective of the delay in invoking the desire to show wish to amend, as long as it is made in good faith. In balancing competing interests as such in granting an amendment, the court will only allow the amendment in good faith, if the respondent can be compensated by an award of costs. However, an amendment will be disallowed if from the court’s analysis, the said amendment would change the action into one of a substantially different character which conveniently makes the subject of a fresh action thereby occasioning a miscarriage of injustice to the respondent. Another instance that a court will deny an order of amendment is if the amendment would deny the defendant the benefit of relying on the Limitations Act as a defence.
14. Based on those principles this court proceeds to analyse whether or not the lower court acted judiciously or to say on the right principles. In its ruling, the trial court found that while the defence did not introduce any amendments, the appellant introduced a counterclaim seeking six (6) reliefs against the respondent. Further, that the introduction of Larry Carruthers and Steve Duane Pippin as 2nd and 3rd defendants respectively, was immaterial as the appellant failed to disclose the claim against them. The court further noted that the appellant sought a declaration against Bible Fellowship Ministries without enjoining it as a defendant. In his considered view, the amendments, coming eight (8) years after filing of his defence, which delay was inexcusable, changed the cause of action into an entirely different nature, irrespective of the fact that it was in relation to the suit land. The trial court added that the amendment sought to further delay the efficacious and expeditious disposal of the matter thereby fettering the provisions of article 50 of the Constitution encompassing the right to have a dispute heard and determined within a reasonable time.



15. Looking at the application, the subject of the present appeal proceedings, I note that the grounds in support of the amendment are that the appellant's new firm of Advocates were of the firm view that the amendment of the defence constructively safeguarded his interests. He added that the amendment will determine the real issues in controversy and will occasion an injustice if the orders sought were not granted.
16. I have carefully scrutinized the draft amended defence and counterclaim vis-a-vis the plaint in ascertaining whether the amendment will change the action into one of a substantially different character or prejudice the right of the respondent existing at the date of the proposed amendment.
17. The summary of the respondent's claim is that he sold a portion the suit land to Bible Fellowship Ministries, the vendor. Following the sale, the suit land was subsequently divided as between the plaintiff and the vendor. However, title deeds were yet to be issued. Thereafter, the appellant registered a caution on the original parcel of land. Following the respondent's objection to the caution, the Land Registrar ordered that the caution be withdrawn and vacated to pave way for subdivision. If at all there was a dispute as to ownership, the registrar added that it vested with the portion of land sold to the vendor. He thus sought a declaration that the caution be vacated, removed and/or withdrawn as the appellant vested no interest against the respondent.
18. In its draft defence and counterclaim, the appellant averred that he was the founder of a CBO known as Children Rescue Centre. It relocated the said CBO in 2005 to the suit land following a month to month lease agreement entered into between the appellant and the respondent. In a subsequent agreement dated March 18, 2008, it is alleged that the respondent offered to sell the suit land. The appellant paid in full the agreed purchase price by way of installments through proxies. Organically, the appellant sought consent from the Land Control Board on October 6, 2009. It was around this time that the appellant discovered that he had been ensnared by the respondent who claimed to have sold the suit land to Bible Fellowship Ministries. He sought to *inter alia*, have the contractual agreement between the respondent and Bible Fellowship Ministries declared *null and void*, a declaration that he had proprietary interest in the nature of a trust in a portion of the suit land, specific performance of the sale agreement dated March 18, 2008 and the consent of the Land Control Board consent dated October 6, 2009.
19. From the above, it is apparent that both parties are laying credence to the fact that they are both proprietors of the suit land. They further both claim that they followed due process in obtaining proprietary interests over the suit land. If I look at those facts on face value, I do not see the introduction of a substantially different character and the introduction of a new cause of action. In fact, the determination as to who the legal and rightful proprietor is the kernel of the dispute subsisting between the rival parties. However, from the facts pleaded in the draft amended defence and counterclaim, it is manifest that the alleged breach of contract by the respondent occurred in or about the year 2009. It is discernible that the appellant's allegations circumnavigate around a breach of contract by the respondent.
20. Under section 4 of the [Limitation of Actions Act](#), actions founded on contract may not be brought after the end of six (6) years from the date on which the cause of action accrued. Imposition of the word 'may' connotes that a party is at liberty to seek exemption from the general rule if the party can furnish good grounds. A party wishing to exercise its right to file a suit outside the limitation period must raise cogent grounds before a court that by virtue of section 27 as read together with section 28 of the [Limitations of Actions Act](#), he is favored to seek extension of time.
21. In the present case, not only was the appellant acting outside the statutory limited period of six (6) years in his attempt to introduce amendments to his draft amended defence and counterclaim, he had also



not sought leave to file the suit outside the limitation period. For those reasons, I find and hold that the amendments introduced in the draft amended defence and counterclaim, will occasion an injustice to the respondent who will be deprived of a defence of limitation accrued since the issue of the writ. This is because if this court were to allow the amendments, it would be sanitizing the unlawful procedure taken by the appellant who remains in violation of the provisions of section 4 (1) of the Limitation of Act.

22. In view of the above, I find that save for the reasons stated above, which in my humble view did not negatively impact the proper application of his mind to the issues before him, the trial magistrate judiciously exercised his discretion and also proceeded on proper principles in the exercise of that discretion. Also, I agree with the trial court that the introduction of Larry Carruthers and Steve Duane Pippin as 2nd and 3rd defendants respectively, was not ably demonstrated. Their introduction to the suit as defendants remains unwarranted. I similarly uphold the trial court's view that the appellant sought a declaration against Bible Fellowship Ministries without enjoining it as a defendant and that was a wrong and prejudicial step that would ultimately condemn a party unheard. The introduction of the parties serves no other reasons other than to vex the trial court.
23. Consequently, I find that the present appeal lacks merit. it is hereby dismissed with costs to the respondent.
24. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE

