REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 304 of 2004

BENSON NDEGWA MBUGUA ……..……..PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI……..……..…….1ST DEFENDANT

HENRY ANDANDE ……..……..……2ND DEFENDANT

DENNISK. CHEBITWEY …….……..…….3RD DEFENDANT

JOHN KIPSANG BUNDOTICH…..……..……..4TH DEFENDANT

R U L I N G

The Plaintiff filed the Plaint dated 29th March, 2004 against all the four Defendants.

The 2nd Defendant did not appear in response to the service of summons and hence an interlocutory Judgment was entered against him on 23rd November, 2004.

The three remaining Defendants appeared and filed their Statements of Defence.

The hearing of the suit thereupon commenced before this court on 12th February, 2007. The Plaintiff testified and stated *inter alia* that on the basis of P Ex 1 and 2, Paragraph 9 of the Statement of Defence filed by the 1st Defendant, and with particulars of fraud, unlawfulness and unreasonableness as well as from the facts deponed, he can say that the sale between 2nd Defendant and 3rd and 4th Defendants is fraudulent.

He also raised the issue of validity of the certified Lease issued to the 3rd and 4th Defendants.

In short he has given evidence as regards the documents sought to be supported by the 3rd and 4th Defendants. During his testimony there was no indication of any lacuna in the case of the Plaintiff which was substantially on the issue of fraud and illegality.

In the original Plaint there was no allegation of fraud against the 3rd and 4th Defendants either in the Plaint or in the particulars of fraud, illegality, unlawfulness and unreasonable. Similarly, in the prayers,

the Plaintiff did not seek compensation against the 3rd and 4th Defendants. He sought for the same only against the 1st Defendant.

3rd Defendant thereupon testified after which the case of the Defence was closed and the date was fixed for submissions.

In the meantime before the close of the Defence of the 3rd Defendant the learned counsel for the Plaintiff prayed for witness summons against the 4th Defendant. I was not given any legal provision for the Plaintiff to call a Defendant to give evidence and the court asked him to review the application after the close of Defence.

No such application was made and the suit was fixed for submissions.

In the meantime, the Plaintiff filed a chamber summons dated 6th June, 2007 seeking to amend the Plaint, and to be allowed to re-open the Plaintiff's case and to adduce evidence.

The application was made under Order VIA Rule 3, 5(1) and 8 of Civil Procedure Rules and sections 3A and 100 of the Civil Procedure Act.

It is supported on the grounds set forth on the face of the application and on the affidavit sworn by the Plaintiff on 6th June, 2007.

I shall like to quote paragraphs 7, 9, 10 and 11 of the affidavit.

"**7. <u>THAT</u> at the hearing of this suit, the 3rd Defendant gave evidence in which he implicated the 4th Defendant on various aspects of the case whereas in fact the 4th Defendant himself did not turn up in court.**

9. <u>THAT</u> in my suit before this Honourable Court, besides seeking a declaratory Judgment, I am also seeking an alternative relief to be compensated by the 1st Defendant on account of the suit premises.

10. <u>THAT</u> I did not give evidence in respect of the market value of the suit premises.

11. <u>THAT</u> the suit premises has a market value of about Kshs.1.8 million."

The amended Plaint, as per its draft annexed to the application, seeks to include the particulars of fraud etc allegedly committed by the 3rd and 4th Defendants. They are in clause (g), (gg), (i), (j) and (k) of the amended particulars.

(g) The 1st Defendant knowingly and in total disregard of the Plaintiff's interest transferred that parcel of land known as Nairobi/Block/63/498 to the 2nd Defendant and who subsequently sold and transferred the same to the 3rd and 4th Defendants hurriedly and fraudulently to defeat the Plaintiff's interest.

(gg) The 3rd and 4th Defendants knew and/or ought to have known that the said suit property belonged to the Plaintiff but in complete disregard of the Plaintiff's interest caused swift, hastened and unprocedural registration of the suit property in their names to put it out of the Plaintiff's reach.

(i) The 1st, 2nd, 3rd and 4th Defendants transacted in the suit premises and finally transferred the same to the 3rd and 4th Defendants illegally, unlawfully, fraudulently and contrary to the Provisions of the relevant Registration Act, to defeat the Plaintiff's interest of which they were always well

aware of and/or which they ought to have been aware of.

(j) The 2nd Defendant acquired the suit premises fraudulently and illegally, and without being issued with a Letter of Allotment by the 1st Defendant and further conspired with the 3rd and 4th Defendants to transfer the same to the latter fraudulently to defeat the Plaintiff's interest and rights in the suit premises, interest and rights of which all the Defendants were fully aware.

(k) In their illegal and fraudulent acquisition of the suit premises, the 2nd, 3rd and 4th Defendants never paid the statutory rates which were payable to the 1st Defendant and similarly the said Defendants never obtained the necessary Consents to transact in the suit premises and hence their respective acquisition thereof is illegal, unlawful, null and void. None of the Defendants (i.e. the 2nd, 3rd and 4th Defendants) was a bonafide purchaser for value without notice.

In the affidavit the Plaintiff has not shown or explained why those particulars were not pleaded earlier in the Plaint, which, in my considered view, should have been done. In his testimony he had given evidence against the 3rd and 4th Defendants and on the veracity of the documents in their support.

The main ground in support of the application for amendment and re-opening of the Plaintiff's case, as per what I do see and am told, is that the 1st, 2nd and 4th Defendants did not appear before the court and the 3rd Defendant testified by saying everything was done by the 4th Defendant.

If I can really look closely, the Plaintiff is trying to tell the court that as the Defendants have not given evidence before the court, he should be allowed to re-open his case. I pause here and ponder: is the Plaintiff expecting his case to be proved through the Defence evidence? When a Plaint is filed, the burden to prove on balance of probability is on the Plaintiff and he should not wait to discharge his burden till the Defence case is closed.

There is nothing to show to the court that what is now asked by the Plaintiff could not have been asked before the close of the Plaintiff's case, which has to be proved by its own strength and not on the vicissitudes of the events happening during the Defence case.

Has the Plaintiff shown the court that his application is meritorious?

In the case of **Central Kenya Ltd. v Trust Bank Ltd. (2002)2 EACAK 365** the Court of Appeal held

"***The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (i) there had been no undue delay, (ii) no new or consistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected, and (iv) the amendment could be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs; Beoco Ltd v Alfa Laval Co. Ltd. [1994] 4 AII ER 464 adopted".***

I do agree to the above holding as it is trite law that the court has wide discretion to allow amendments before the Judgment is pronounced.

But that does not mean that the amendments could be given for asking. The court has to weigh the circumstances of each and every case considering the prejudices and injustice to all the parties before it.

Howsoever wide discretion the court has, the discretion has to be exercised judiciously and what is judicious depends on the facts and circumstances of each case.

I have detailed the salient facts of the case before me and I do not have hesitation to find that the

Plaintiff intends to take a fresh go at his case after having had benefit of hearing the case of the Defence. This cannot be allowed and I shall be brave to include this factor as one of the factors, which the court has to include in the proviso enumerated in the Central Kenya's case (supra).

In short, allowing this amendment shall result in prejudice to the Defendants as they shall have to re-defend the Plaintiff's case without due justification. The litigation cannot be protracted unduly which the Plaintiff herein wants the court to do. The litigant should come before the court with all the claims and prayers, and cannot be allowed to keep on trying by trials and errors methods.

I should not fail to note that an interlocutory Judgment on the basis of the Plaint has been entered against the 2nd Defendant in this case. This may be an added factor, which can weigh against the Plaintiff. I may, however, make it clear that I am not relying solely on this fact in this ruling.

In my considered view, the Plaintiff has not satisfied the court so as to grant him the prayers he had asked from the court.

The application dated 6th June, 2007 is thus dismissed with costs to the Defendants (1st, 3rd and 4th Defendants).

Dated, Delivered and Signed at Nairobi this 22nd day of November, 2007.

K.H. RAWAL

JUDGE