



CHARLES OTISO G. OTUNDO PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD DEFENDANT

RULING

The applicant/Plaintiff's applicant seeks leave to amend the plaint so as to introduce a second defendant. One RAMESH CHANDER DHINGRA who is currently the registered owner of the suit properties.

This suit was commenced by way of plaint by the plaintiff/applicant way back in 1996. He was seeking for orders that the defendant

KENYA COMMERCIAL BANK discharge the charge against his properties L.R. NO. NYARIBARI CHACHE/B/B/BOBURIA/1448, 2780, 2995 and 3328 and thereafter release the security documents to the plaintiff/applicants.

He was also seeking for damages and costs. In time judgment was entered in favour of the plaintiff applicant, defendant appealed in the

Court of Appeal who set aside the said judgment. In the meantime the defendant had transferred the suit properties to the intended second defendant and hence this application.

It was submitted by Mr.Ogutu that the properties in question were transferred after the suit had been filed. He said that the file had been forwarded to Court of Appeal and was only returned to the High Court Registry on 18th July 2005 and applicant promptly filed this application.

He submitted that it is necessary to enjoin the 2nd defendant as a party and that to do so will not be bringing a new cause of action nor will it prejudice the hearing of the suit.

Mr. Bunde opposed the application and stated that the amendment will only sway the attention of the court from determining this suit.

He submitted that the amendment sought is an after thought and that the plaintiff has no cause of action against the intended 2nd defendant as no allegations have been made against him in the annexed draft amended plaint.

He further said the amendment sought to be brought on board are brought late – after 10 years which is a long delay. Allowing the amendment would be allowing abuse of court process.

I have considered the rival submissions by both counsel.

I too have perused and considered the authorities cited by both counsels.

Order 6A rule 3(1) CPR gives court powers to allow a party to amend his proceedings at any stage of the proceedings.

The rule provides:

3(1) subjects to Order 1 rule 9 and 10, Order XX11 Rules 3, 4, 5 and 7 and the following provisions of this rule, 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 law also allows for amendment to join other parties if to do so will help court to properly determine the issues in dispute. In this application the court has been told that after the suit was filed the defendant transferred the suit properties to the intended 2nd defendant.

That was done when the suit was still alive. It is therefore necessary to bring the person in whose the suit properties are currently registered in our board.

This will help the arbitration of the dispute as the property in dispute has changed ownership. If the applicant were to proceed with the suit against the only defendant on record, and at the end of the day he succeeds he cannot be able to execute the judgment as the defendant would be powerless to discharge charge on properties in name of a 3rd person. The court cannot order cancellation of transfer of those titles without hearing the current registered owner. Thus the intended amendment will not be prejudiced to the defendants and will stifle any multiplication of suits.

Hearing of the suit has not started and as such no party will be prejudiced.

There is the issue that the application has been brought after an undue delay. Indeed in the case of KYALO VS BAYUSUF BROTHERS LTD (1983) KLR 229 the court held applications for amendments should be allowed if brought within reasonable time. Otherwise it may amount to allowing the abuse of due process of the court. Indeed this application

was filed 10 years after the suit had been filed. However the applicant had explained the delay and the explanation is satisfactory. Court was told that the file was in Court of Appeal until the year 2005 when it was returned to our registry. The applicant filed the application soon thereafter. He could not possibly file the application when the file was still in the High Court. That delay is therefore explained.

In the case of Central Kenya Ltd vs TRUST BANK Ltd and 4 others C. A. No.222 of 1998 the court of appeal held:

“Hence the guiding principles in applications for leave to amend is that all the amendments should be freely allowed at any stage of the proceedings, provided that the joinder as the case may be, will not result in prejudice or injustice to the other party which cannot be properly compensated for in costs.”

The court was echoing the holding in the case of BASCO LTD VS. ALFA LAUAL CO. LTD (1994) 4 All ER 464 I have stated that in this case neither defendants will suffer injustice or loss that cannot be compensated, and the delay having been properly explained, I find the application has merit.

The upshot of the above is that the application is allowed.

The applicant/plaintiff is granted leave to amend the plaint dated

22nd October 1996 and introduce the name of RAMESH CHANDER DHINGRA as a second defendant. The annexed draft amended plaint is hereby deemed duly filed as the applicant paying the requisite fees.

The applicant to serve the said RAMESH CHANDER DINGRA with all the pleadings – i.e initial and amended plaint and the defence filed by the defendant within the next 21 days. The said DINGRA to file his pleadings within 21 days after service.

Costs of the application in the cause.

Dated 27th September 2006.

KABURU BAUNI

JUDGE

In presence of

cc. Mobisa

Mr. Otieno for Ogutu for applicant.

Ms. Obaga for Bunde for the Respondent