



One Step Family Group v Njenga & another (In their capacity as personal representatives of the Estate of Peter Njenga Ringiria) (Environment and Land Appeal E096 of 2022) [2024] KEELC 3610 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3610 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E096 OF 2022
OA ANGOTE, J
APRIL 11, 2024**

BETWEEN

ONE STEP FAMILY GROUP APPELLANT

AND

**PAUL NJAU NJENGA AND HANNAH WANJIKU NJENGA (IN THEIR
CAPACITY AS PERSONAL REPRESENTATIVES OF THE ESTATE OF PETER
NJENGA RINGIRIA) RESPONDENT**

(Being an appeal from the decision and Ruling of Hon. B.M Kimemia (MS) Chief Magistrate made on the 24th June 2022 in Nairobi Chief Magistrate's Court Civil Suit No. 5837 of 2018.)

JUDGMENT

Background

1. Before the Court for determination is the Appeal dated 7th October 2022. The Appellant is appealing against the Ruling of Hon. B.M Kimemia of 24th June 2022 in a Notice of Motion dated 4th January 2022.
2. In that Notice of Motion, the Appellant (Plaintiff in the lower Court) was seeking for the following orders:
 - a. That the Plaintiff be granted leave to amend the plaint;
 - b. That the Plaintiff be allowed to file additional statements and documents in support of its case; and
 - c. Costs of the application be in the cause.



3. The Appellant stated that it was seeking the amendment in view of the fact that the Plaintiff as filed did not reflect the wishes of its members; that more instructions/documentary evidence had been provided by the members necessitating the amendments and that the amendments would enable the Court to properly determine the issues in dispute.
4. The application was opposed by the Respondent (Defendant in the lower Court) who stated that the Appellant's application was time barred; that the contract that had been entered into by the parties and was being relied upon by the Appellant was invalid and that the application was an afterthought, not bona fide and intended to prejudice the Respondent.
5. The application was heard by way of written submissions. The Appellant submitted that the amendments would allow the Court to properly determine the issues in dispute between the parties. On whether the claim was statute barred, the Appellant submitted that as per case law, the acknowledgement of debt where there is an expiry of the limitation gives rise to a fresh period of limitation.
6. The Appellant argued that the Respondent had written a letter dated 19th September 2016 acknowledging they could not complete the sale and offered a refund of the deposit and that the statutory period therefore started to run then and was to lapse on 21st September 2022.
7. In dismissing the application, the Hon. Magistrate found that the Appellant had not explained the delay in amending the Plaintiff for a case that had been filed four years ago and that the Appellant had not proven that the discretion to amend the Plaintiff should be exercised in its favour.
8. The learned Magistrate also made reference to a ruling delivered by Hon. D. Mburu in the same case where he held that "the suit property was worth Kshs. 11,500,000 in 2012 and was likely worth more than Kshs. 20,000,000 in 2020 and therefore outside the pecuniary jurisdiction of the Magistrate's Court; the suit property was the subject of other suits in the superior Courts; the Magistrate Court should not issue interlocutory orders in the current suit as orders might have been issued on the same in the superior Courts."
9. The Hon. Magistrate in the application that is the subject of this appeal noted that the Appellant had not appealed against the above ruling and had waited for over two years since it was delivered to file the impugned application.
10. The Appellant was dissatisfied with the above ruling and filed the instant appeal. It is based on several grounds which I shall address later. The Appellant is seeking for the following orders:
 - a. The ruling delivered on 24th June 2022 by Hon B.M Kimemia(MS), Chief Magistrate in Nairobi Chief Magistrate's Court Civil Suit No. 5837 of 2018 be set aside and/or varied.
 - b. The Court be pleased to allow the amendment of the Plaintiff as per the terms of the Draft amended Plaintiff.
 - c. Costs of the appeal be provided for.

Submissions

11. The Appellant filed its submissions on 10th January 2024. The Appellant submitted that the dispute between the parties was founded on an unperformed agreement for sale; that the Respondents were supposed to sell the suit property to the Appellant and that a deposit of Kshs. 3,000,000 was paid but the Respondents failed to complete the sale.



12. It was submitted that the Appellant came to the realization that the suit property was the subject of various suits and consequently sought to amend its Plaint to seek the prayers of forced transfer or a refund with damages and interest as an alternative to the prayers of specific performance/vacant possession that had earlier been sought.
13. The Appellant submitted that the amendments sought did not introduce a new cause of action but only sought to amend the reliefs sought and should therefore be freely allowed; that the amendments were sought before the hearing and would therefore not prejudice the Respondents who were free to amend their defence and supporting documents accordingly.
14. The Appellant submitted that the Hon. Magistrate misdirected herself in her reference to the earlier ruling by Hon. D. Mburu; that the ruling by Hon. D. Mburu related to an injunction while the application before her was for amendments and that the issue of pecuniary jurisdiction does not arise as the refund of deposit and damages sought were within the Court's jurisdiction.
15. In conclusion, the Appellant submitted that the time period of 1 year and 8 months that was between the two applications was not inordinate and that if it was, it could be cured by awarding costs to the Respondents.
16. The Respondents submitted that the ruling by Hon. D. Mburu determined that the matter in the lower Court fell outside the jurisdiction of that Court and was the subject of various suits in the superior Court and that the Appellant should have filed the case in the appropriate Court.
17. Concerning the appeal, the Respondent stated that the same was time barred as it was filed ten years after the sale agreement was executed (having been executed on 17th September 2012). Relying on Order 7 Rule 11, the Respondents submitted that the Plaint should be rejected as the suit was time barred.

Analysis and Determination

18. Based on the foregoing, the following issues arise for determination:
 - i. Whether the Appellant's Claim and Application are statute barred.
 - ii. Whether the Appellant should be granted leave to amend his Plaint in the lower court.
19. In the lower Court and in his submissions in this appeal, the Respondent averred that the Appellant's suit and application were time barred as they were based on a sale agreement that was executed in 2012. According to the Appellant, time started running in 2016 when there was an acknowledgement of debt.
20. It is not in dispute that the Respondents had intended to sell and that the Appellant had intended to buy the suit property. It also not in dispute that a sale agreement was entered into on 17th September 2012 between the parties and Kshs. 3,000,000 deposit was paid in furtherance of the intended sale.
21. The sale was not completed. The parties had a meeting to discuss the same as captured in a letter dated 19th September 2016. The letter was written by the Respondent and addressed to the Appellant. Part of the letter reads as follows:

“Again we regret the inconveniences. We now seek guidance from you on how we can repay back the deposit you had paid us.”



22. Section 4(1) (a) and (d) of the *Limitation of Actions Act* provides as follows:

- “(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
- (a) actions founded on contract;
 - (b)
 - (c)
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture.”

23. Section 23 (3) of the *Limitation of Actions Act* provides as follows:

“Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment.”

24. The Court in *Telkom Kenya Limited vs Kenya Railways Corporation* [2018] eKLR stated as follows:

“In both *Laemthong Rice Co. Ltd v Principal*

Secretary Ministry of Finance [2002] 1 EA 119 and *Shire v Thabiti Finance Co. Ltd* [2002] 1 EA 279, the appellate courts of both Tanzania and Kenya respectively addressed the issue of revival of a cause of action post the limitation period. Both courts held that an acknowledgment of debt made after the expiry of the limitation period gave rise to a fresh period of limitation.

60. The court in *Shire* (supra) was more explicit. The court held that an acknowledgment under s.23 resulted in not only the accrual of a fresh action which meant the revival of an otherwise statutorily barred claim but also the extension of limitation period where the acknowledgment was made prior to expiry of the limitation period. The court in citing, with approval, the English case of *Bush v Stevens* [1963] 1 Q B 1 quoted Lawson J as follows:

“It seems to me as a matter of syntax the right which shall be deemed to have accrued is a right of action to recover any debt or any other liquidated pecuniary claim. The subsection does not change the nature of the right; it provides that in specific circumstances of an acknowledgment or payment, the right shall be given a notional birthday and on that day, like the Phoenix of fable, it arises again in renewed youth and also like the Phoenix, it is still itself”

60. The decision in *Shire* (supra) is binding upon this court. I am also convinced with the reasoning and would agree with it wholly. An acknowledgment in the absence of a contrary provision in the statute gives an already barred action a new birthday. The action is revived de novo. The acknowledgment need not be made when the time is running. It may be made after expiry of time and will still suit the purposes of s.23 of the *Limitation of Actions Act*.”



25. The import of the above is that since the Appellant's claim in the lower Court is based on both contract and a recoverable sum, it would have been statute barred six years after 17th September 2012.
26. However, there was an acknowledgement of the debt as per the letter dated 19th September 2016. The period of limitation was given 'a new birthday' on that date. The period would have expired on 19th September 2022. The amended Plaintiff is dated 4th January 2022 and is therefore not statute barred.
27. The next issue for determination is whether the Appellant should be granted leave to amend his Plaintiff in the lower court. While declining the application for amendment, the Hon. Magistrate found that the Appellant was not entitled to the order of amendment of the Plaintiff because there was an inexplicable delay in bringing the application.
28. The Hon. Magistrate also noted that the Appellant had filed the impugned application two years after a separate ruling had been delivered in the same suit. In her view this amounted to the Appellant sleeping on its rights.
29. Order 8 Rule 3 (1) of the Civil Procedure Rules provides as follows:
- “Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 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.”
25. In the case of Joseph S. Wafula vs Elena Chepkurgat Talam (Sued as the Legal Administrator of the Estate of the late Kiptalam Arap Kogo [2019] eKLR, the Court stated as follows:
- “Thus, the overriding consideration in an application for leave for amendment ought to be whether the amendments sought are necessary for the determination of the suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.
30. The principles that guide the court in considering an application for amendment of pleadings were set out by the Court of Appeal in Central Kenya Limited v Trust Bank limited (2000)2 E.A 365 as follows:-
- “A party is allowed to make such amendments as may be necessary for determining 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.”
31. Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition, provides as follows concerning amendment of pleadings:-
- “...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...”



32. In view of the foregoing, I find that the Hon. Magistrate erred in denying the Appellant the orders of amendment on account of delay/indolence without first considering whether the prejudice (if any) that could be occasioned to the Respondents by the delay could be compensated by costs.
33. Having perused the impugned application, the submissions thereon and the amended Complaint, I am convinced that the amendment was sought in good faith and not casually as stated by the Hon. Magistrate. Further, the amendments do not introduce a new cause of action nor do they affect any of the Respondent's legal rights.
34. Further, the proposed amendments are material because the Appellant is seeking reliefs that are alternative to an order of specific performance. The Respondent stated in his submissions that specific performance was not possible as the contract was a nullity.
35. If that is so, it would be unjust to lock out the Appellant from being heard on matters where it would otherwise not have a relief, yet the other party has not proven that allowing the amendment would cause prejudice.
36. Further, the Hon. Magistrate erred in finding that the Appellant had been indolent in not filing the application until two years after the last ruling in the suit (The ruling by Hon D. Mburu referred to above). That ruling had no legal bearing to the impugned application for amendment.
37. Indeed, the Appellant cannot be penalized for not taking any action on a ruling pertaining to an injunction, which is different from an application for amendment. Further, the issues of pecuniary jurisdiction and the cases in superior courts were stated in passing in that ruling, and no determination was made on them.
38. In stating that the Appellant had been indolent by not appealing against the ruling of Hon. D. Mburu, the Hon. Magistrate erred in law and fact by considering matters that were irrelevant to the application before her.
39. I consequently find that whereas there was a delay in filing the application for amendment, the same did not warrant a denial of the orders. The application was filed in good faith, and it dealt with matters that are material to the suit. Any delay could be cured by costs to the Respondent.
40. For those reasons, this appeal succeeds as follows:
 - a. The ruling delivered on 24th June 2022 by Hon B.M Kimemia, Chief Magistrate in Nairobi Chief Magistrate's Court Civil Suit No. 5837 of 2018 be and is hereby set aside.
 - d. This court hereby allows the amendment of the Complaint as per the terms of the Draft amended Complaint.
 - d. The Amended Complaint to be filed within 14 days of this ruling.
 - d. The costs of this Appeal to be paid by the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF APRIL, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Njau for Respondent



Mr. Karugo for Njoroge for Appellant

Court Assistant: Tracy

