REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 19 OF 2019

HAMAN MBIMWA ANDUKU.....APPELLANT

VERSUS

ALPHONSE MACKENZIE.....RESPONDENT

JUDGEMENT

The appellant herein being aggrieved by the aforesaid ruling of Hon Malesi SRM in Kakamega MCL & E No. 3 of 2017 delivered on the 18th June 2019 puts forth the following grounds of appeal:-

1. That the trial magistrate erred in law and in fact by dismissing the applicant's application for reasons that he did not attach supporting documents to support his proposed amended statement of defence.

2. That the trial magistrate erred in law and in fact by delving in issues was not supposed to delve in.

3. That the learned trial magistrate erred in law and in fact by holding that the appellant herein was acting mala fide.

4. That the learned trial magistrate erred in law and in fact by declining to exercise his discretion judiciously to allow the prayer for amendment of defense.

The appellant submitted that the trial Magistrate erred in law by insisting that there are other documents other than the amended statement of defense which ought to have been attached to the application. The laws on amendment of pleadings only require attachment of the pleading being amended and nothing more. In this case the appellant attached an amended statement of defense which the court readily admitted raised substantive issues. By insisting that the appellant should have attached the documents he intended to rely on was an error on part of the trial magistrate. The most important is to give each party a chance to amend his pleadings and thereafter to defendant their case at the right time. In this case there was no such chance. In that regard they relied on the decision in the case of G.I. Baker Ltd vs. Medway Building and Supplies, LTD. (1958) 3 All ER. 540 and Republic vs. District Land Registrar, Uasin Gishu & Another (2014) e KLR

That the interest of justice such a statement of defence and in an emotive matter like land ought to be amended so that each party feels that his case has been handled fairly. The issue of mal fide on the part of the appellant cannot arise due to the above issues mentioned hence he cannot be said to have been acting in a way to delay the court process or circumvent the justice system. They ask that the court sets aside the orders by the trial court and the defendant be allowed to file an amended defense.

The respondents submitted that the appellant's application to amend his defence and particularly paragraph 7 of the supporting affidavit, the appellant annexed a draft amended defence and his complaint was that the respondent herein had acquired the disputed parcel of land by way of fraud. The appellant did not annex any document to support his allegations hence the refusal by the trial court to entertain him. That it is not in dispute that in declining to allow amendment of the statement of defence and counter-claim, the trial magistrate was exercising his discretion. They relied on the case of Apungu Arthur Kibira vs. Independent Electoral & Boundaries Commission & 3 others (2019) eKLR. That the appellant has not demonstrated that the learned trial magistrate committed an error of law irrelevant consideration or that decision was plainly wrong.

This court has considered the appeal and the submissions therein. I have perused the lower court proceedings and find that the plaintiff filed his suit on 15th December, 2017 and the defendant filed his statement of defence on 20th December, 2017 and served the same on the plaintiff's counsel on the same day. The plaintiff testified on 13th November, 2018 closed his case and defendant was given an opportunity to avail his statements and any documents he intended to rely on and the matter fixed for mention on 27th November, 2018 to confirm compliance. It is at this stage that the appellant came up with an application seeking to have the defence amended. The statutory provisions of Section 100 of the Civil Procedures Act gives the Court general power to amend proceedings.

> *"The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."*

According to Order 8, Rule 5 of the Civil Procedures Rule states that,

> ***"****For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.*

In *AAT Holdings Limited vs Diamond Shields International Ltd (2014) eKLR* it was held as follows,

> *"The law on amendment of pleadings is tempered with discretion so that a court of law, properly guided by principles of law, should be able to allow an amendment for purposes of determining real question or issue in controversy, which is what adjudication of cases and effectual dispensation of substantive justice to parties under Article 159 of the Constitution."*

In the case of *Harrison C. Kamau vs Blue Shield Insurance Co. Ltd (2006) eKLR*, the court stated that;

> *"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:*
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> *(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.…..…"*

Similarly, the court in the case of *Joseph Ochieng & 2 Others vs First National Bank of Chicago Civil Appeal No. 149 of 1999* stated as follows;

> *"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."*

In the instant case, the plaintiff testified on 13th November, 2018 and closed his case. Thereafter the defendant came up with the application to amend the defence introducing the element of fraud and a counterclaim. I find that the court has *power to so amend at any stage of the proceedings (including appeal stages), 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. I find that the appellant did not have an advocate when he filed his defence and the current application has been made in good faith. I find that the amendment is necessary for the purpose of determining the real question or issue raised by and/or depending on the proceeding. I find this appeal is merited and allow the application dated 18th March 2019 as prayed. There will be no orders as to costs on this appeal.*

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 20TH APRIL 2021.

N.A. MATHEKA

JUDGE