



IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 22 OF 2018

BETWEEN

MARY NYABOKE SAGINI.....1ST APPELLANT

JOSEPHAT O. NYACHOTI T/A

MINIMAX AUCTIONEERS.....2ND APPELLANT

AND

MARY KERUBO MAINYE.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon. S. Onjoro, SRM dated 9th March 2018 at the Chief Magistrates Court at Kisii in Civil Case No. 621 of 2016)

JUDGMENT

1. This is an appeal against the ruling and order of the trial magistrate dismissing the appellants' Notice of Motion dated 30th August 2018 made under **Order 8 rule 3** of the **Civil Procedure Rules** seeking to amend the statement of defence.
2. In a nutshell, the respondent sued the appellants for damages for eviction. Initially, the 1st appellant entered appearance and filed defence. In the motion before the court, the appellants contended that it was necessary to file a joint defence to enable her defend the suit in view of the fact that she was aging and needed the 2nd appellant to assist her defend the suit.
3. The trial magistrate, in disallowing the application, observed that as follows:

A perusal of the plaint and the 1st defendant's defence reveals that the 2nd defendant was not a party to the alleged tenancy relationship between the applicant and 1st defendant.

The 2nd defendant herein did not also file any statement of defence to either deny the applicant's claim or explain his role (if any) in the dispute.

It is therefore list to this court how the 2nd defendant would take the right of the 1st defendant to defend herself. I do not see how allowing this amendment would effectively keep this court in determining the real question in controversy.

4. Since I am being called upon to review the exercise of discretion by the trial court, I am guided by the decision in **Mbogo and Another v Shah [1968] EA 15** where it was stated that:

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

5. The trial magistrate correctly appreciated the principles for amendment of pleadings stated by the Court of Appeal in **Central Kenya Limited v Trust Bank Ltd and 5 Others NRB CA Civil Appeal No. 222 of 1998 [2000]eKLR** where it observed that:

The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is

likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.

6. I have considered the decision of the trial magistrate, the proposed amendment against the principles I have cited above and I am constrained to take a difference position. The trial magistrate failed to appreciate the nature of the cause of action and assess the proposed amended defence. The respondent had sued the appellants following what it considered an illegal or wrongful eviction. At all times the 2nd respondent, as auctioneer, was the agent of the 1st appellant who is a disclosed principle. In other words, the 2nd appellant acted on behalf of the 1st appellant in effecting her instructions. In the circumstances, it was only proper that the parties file a joint defence which is in effect what the proposed amendment sought to do.

7. The trial magistrate placed too much emphasis on what the deponent stated about her disability and failed to take into account the nature of the cause of action and the tenor and effect of the proposed amended defence. Since the 2nd appellant was an agent of the 1st appellant, the trial magistrate reached the wrong conclusion that, *“the 2nd defendant ought to file a separate defence.”* A separate defence would only obfuscate issues and undermine speedy resolution of the dispute. Finally, there is no evidence that the respondent would suffer any prejudice by the proposed amendment.

8. I allow the appeal set aside the order dismissing the Notice of Motion dated 30th August 2017 and substitute the orders with the following order:

(a) The appellants are granted leave to file and serve the amended defence within the next seven (7) days.

(b) The respondents are granted leave to file a reply to the amended defence within the seven (7) days of service of the amended defence.

(c) The respondent shall bear costs of this appeal assessed at Kshs. 15,000/-.

DATED and DELIVERED at KISII this 7th day of MARCH 2019.

D.S. MAJANJA

JUDGE

Mr Sagini instructed by Ndemo Sagini and Company Advocates for the appellant.

Mr Onchwangi instructed by Oguttu-Mboya and Company Advocates for the respondent.