



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 150 OF 2016

BETWEEN

EQUITY BANK.....APPELLANT

AND

STEPHEN GATOTO MWANGI.....RESPONDENT

(Being an Appeal from the Ruling and Order in Thika CMCC No. 279 of 2009 by Hon. J.W.Onchuru (RM) on 06th May, 2013)

JUDGMENT

1. By a chamber summons dated 03rd August, 2010, **EQUITY BANK** (*hereinafter referred to as Respondent*) applied to amend its plaint dated 16th April, 2009 to correct the name of **STEPHEN GATOTO MWANGI** (*hereinafter referred to as Appellant*) to read **STEPHEN KIMANI GATOTO**. The respondent vehemently opposed the application by way of a replying affidavit filed on 01st October, 2010.
2. The trial court heard both parties and by a ruling dated 06th May, 2013 allowed the application.

The Appeal

3. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 06th June, 2013 filed the Memorandum of Appeal of even date which sets out 2 grounds of appeal that may be summarized into the following 6 grounds that:

- 1) **The application was brought with inordinate delay**
- 2) **That the application was prejudicial to the Appellant**

Analysis and Determination

7. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another [2016] eKLR**). It then behoves this court to summarize the evidence that was tendered before the trial court.
8. I have perused the entire record of appeal and considered the submissions of counsels for both parties
9. Order 8 rule 3 that deals with amendment to correct the name of a party provides that:

An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

10. The application to amend was filed 16 months from date of filing of the plaint, 13 months after the filing of the defence and reply to defence. The Appellant contends that there was inordinate delay in filing the application to amend but from the foregoing, I find that the delay was not inordinate.

11. It is therefore trite that amendments, whether to plaints or defences or other pleadings, are freely permitted unless some factor exists to disentitle a party from the proposed amendment.

12. Over the years, courts have suggested factors which would disentitle a party from the sought amendment. The factors include:

(a) A party cannot, through an amendment, substitute one distinct cause of action for another;

(b) A party cannot change the subject matter of the suit or substantially change the character of the suit;

(c) A party will also not be permitted to amend where such an amendment will prejudice the rights of the other party existing at the time of the proposed amendment. For example, a party will not be permitted to amend its pleadings if the effect would be to deny the opposite side a defence of limitation which might already have accrued.

(d) A party will not be permitted to amend where such an amendment is sought in bad faith or where it is a device to abuse the process of the court.

13. These principles are derived from a number of cases including but not limited to ***Eastern Bakery Vs Castelino (1958) EA and Central (K) Limited Vs Trust Bank of Kenya Ltd (2000) 2 EA 365***. The singular principle to be distilled from these cases and principles is that an amendment will be allowed if it does not cause injustice to the other side.

14. Applying these principles to the current case, no evidence was availed before the trial court that the application was made in bad faith. I am persuaded that the Respondents established that there was a genuine mistake sought to be corrected, was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

15. From the foregoing analysis, I am not persuaded that this appeal has merit. The same is disallowed with costs to the Respondent.

DELIVERED AND SIGNED AT KIAMBU THIS 12th DAY OF September, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - Nancy & Morris

For the Appellant -Ms. Mbirwe hb for Mr. Ngige

For the Respondent -Ms. Maina hb for Mr. Ndungu