



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 632 OF 2012**

**EVANS NJENGA MURITU.....APPELLANT**

**-VERSUS-**

**CONTINENTAL DEVELOPERS LIMITED.....RESPONDENT**

**THE COMMISSIONER OF LANDS.....THIRD PARTY**

*(Being an appeal against the ruling and order of Honourable F.R. Wangila (Mr.)*

*(Deputy Registrar) delivered on 8<sup>th</sup> November, 2012 in HCCC NO. 1945 OF 2001)*

**JUDGMENT**

1. Evans Njenga Muritu, the appellant in this instance, instituted the suit before the High Court vide the plaint dated 12<sup>th</sup> November, 2001 in which he sought for a declaratory order, an order for specific performance and general damages for breach of contract plus costs of the suit and interest against the respondent.
2. The appellant averred in his plaint that sometime in the year 1988 he and the respondent had entered into a sale agreement in respect to the property known as Nairobi/Block 82/4156 ("the subject property") situated in Donholm Sector A area where the respondent had agreed to sell the subject property to the appellant at a consideration of Kshs.320,000/.
3. The appellant pleaded that he paid the above consideration but that the subject property was not transferred to him for the reason that third parties had laid claim to ownership of the same.
4. It was the appellant's averment that consequently, it was agreed between the parties that the respondent would allocate a different parcel of land to the appellant but that the respondent has since not fulfilled his obligation, thereby prompting the suit.
5. The respondent entered appearance through his advocate and filed the statement of defence dated 7<sup>th</sup> January, 2002 and amended on 25<sup>th</sup> January, 2002 to refute the appellant's claim.
6. The respondent thereafter took out third party proceedings against the Commissioner of Lands.
7. At the hearing of the suit, the appellant testified as the sole witness for the plaintiff's case whereas the respondent closed its case without calling any witnesses.
8. The parties filed and exchanged written submissions on the suit. However, on the date of highlighting the same, it was brought to the attention of the court that the appellant had filed an application seeking leave to amend his plaint, which application was vehemently opposed by the respondent.
9. Upon hearing the parties on the aforementioned application, the learned Deputy Registrar declined to grant the appellant leave to amend his plaint and consequently dismissed the application vide his ruling delivered on 8<sup>th</sup> November, 2012.
10. Being aggrieved by the above decision, the appellant has sought to challenge the same by way of an appeal. Through his memorandum of appeal dated 22<sup>nd</sup> November, 2012 the appellant has put in the following grounds:

***(i) THAT the learned trial magistrate erred in law in dismissing the application thereby failing to exercise his discretion and/or exercising his discretion wrongly.***

*(ii) THAT the learned trial magistrate by dismissing the application failed to be alive to the provisions of the Constitution and the Civil Procedure Act.*

*(iii) THAT the order of the learned trial magistrate is in breach of the Constitution in as far as the principle of justiciability is concerned.*

*(iv) THAT the learned trial magistrate erred in law in finding that the amendment was being sought after the case had already been closed hence allowing himself to be influenced by extraneous factors leading to his arrival at a wrong decision.*

*(v) THAT the learned trial magistrate in failing to exercise his discretion correctly failed to uphold the principle that litigants ought to be granted an opportunity to ventilate their cases on merit.*

11. This court issued directions to the parties to file written submissions on the appeal. The appellant on his part submitted that the learned deputy registrar did not exercise his discretion judiciously and did not take into account the provisions of Order 8, Rules 3 and 5 which stipulate that an amendment may be allowed notwithstanding its impact of substituting or including a new cause of action arising out of the same facts and where the amendment is intended to assist the court in determining the real issues in controversy between the parties.

12. The appellant quoted a variety of authorities where the subject on amendment was aptly addressed. I will mention just a few of those authorities. In **Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR** for instance, the Court of Appeal held thus:

*“...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.”*

13. Further to the foregoing, the Court of Appeal in **Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago [1995] eKLR** went on to render that an amendment sought should be allowed where made in good faith so long as it can be established that the opposing party can adequately be compensated for any inconvenience suffered by way of costs.

14. On its part, the respondent argued that there was inordinate delay in bringing the application seeking to amend the plaint hence the learned deputy registrar's decision to disallow the amendments was justified. In so arguing, the respondent referred this court to the holding in **Kyalo v Bayusuf Brothers Limited [1983] KLR 229** that amendments brought too late in the day and which amendments are completely inconsistent with the original pleadings should not be allowed for the reasons that they are not only an abuse of the court process but will have the impact of delaying a fair trial and occasioning prejudice to the other party.

15. Moreover, the respondent contended that the appellant did not offer any explanation for taking so long in seeking an amendment of his plaint and that in any event, the amendments which were sought constituted facts which were well within the appellant's knowledge all along, hence he is left with no excuse.

16. It was also the respondent's submission that the learned deputy registrar acted properly in denying the appellant an opportunity to introduce new causes of action at a late stage in the suit proceedings.

17. In closing, the respondent contended that the additional claims which the appellant sought to introduce by way of the amendments were statute barred by dint of Section 4 of the Limitation of Actions Act.

18. I have considered the rival submissions and the vast array of authorities cited therein in respect to the appeal. I have also re-evaluated the relevant evidence placed before the trial court. It is noteworthy that the appeal is essentially against the trial court's decision to decline to grant the appellant leave to amend his plaint.

19. The record shows that the application dated 22<sup>nd</sup> March, 2012 seeking leave to amend the plaint was premised on the fact that the appellant's advocate omitted to plead fraud and further omitted to include a prayer seeking a refund of the consideration.

20. In reply, *Bernard King'ori Thigah* who is a director of the respondent company stated that the proposed amendments seek to introduce new causes of action which are statute barred and that there has been an inordinate delay in bringing the application in the first place.

21. In the end, the learned deputy registrar reasoned that to allow an amendment at such a late stage would essentially amount to re-opening the appellant's case. The learned deputy registrar concluded that the application was brought too late in the day and therefore dismissed it with no order on costs.

22. The law encompassing the amendment of pleadings is well settled. The provisions of Order 8, Rule 3 of the Civil Procedure Rules stipulate that the door for amendment of pleadings with leave of the court remains open at any stage of the proceedings provided judgment has not been entered.

23. Whereas it is true that an application for amendment can be made at any stage, it is imperative for this court to consider the circumstances under which the appellant's application was brought.

24. Courts have held that an application for leave to amend pleadings should not be rejected on the sole basis that there has been a delay in filing the same.

25. However, the same courts have been known to acknowledge that an application of the above nature ought to have been made in good faith for it to stand a chance. This position was brought out in the case of **Joseph Ochieng & 2 others trading as Aquiline Agencies v First National Bank of Chicago [1995] eKLR** with the Court of Appeal holding thus:

*“...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...”*

26. The suit was filed way back in 2001 whereas the amendment was sought close to 11 years later. In my view, there has certainly been an inordinate delay in bringing the application which leads me to the conclusion that the application amounted to an abuse of the court process. In so finding, I am guided by the rendition in **Kyalo v Bayusuf Brothers Limited [1983] KLR 229** which I have laid out under paragraph 14 of this judgment.

27. Going by the record, it is also clear that at the time of filing the application, the parties had closed their respective cases and filed written submissions, which means that the suit was in its last leg. No viable explanation has been given to indicate why the appellant or his advocate had to wait until the last minute.

28. I have re-examined the amendments being sought and I have observed that the same include particulars of fraud and a prayer for refund of the purchase price. To my mind, these do not constitute issues which will necessarily facilitate the determination of the real issues in controversy of the parties at this point in time since the relevant facts were all along within the knowledge of the appellant and his advocate.

29. From where I stand, the appellant appears not to be acting in good faith and as I have already pointed out, the explanation given for the inordinate delay is not satisfactory. I associate myself with the High Court’s following analysis in **St. Patrick’s Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR** with reference to **Bramwell, LJ in Tildesley v Harper (1878), 10 Ch.D. at p.296**:

*“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide...”*

30. I am therefore inclined to conclude that the application for amendment of the plaint was not only a mere afterthought but would have had the impact of causing prejudice to the respondent who was equally awaiting the conclusion of the suit, which prejudice I am doubtful would be adequately compensated by way of costs.

31. I also noted that the particulars of fraud which the appellant sought to amend would inevitably affect the limitation of time pursuant to the Limitation of Actions Act, Cap. 22 Laws of Kenya. **Section 26** of the Act provides as follows:

*“Where, in the case of an action for which a period of limitation is prescribed, either—*

*(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or*

*(b) the right of action is concealed by the fraud of any such person as aforesaid; ...*

*the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”*

32. From the foregoing, it is clear that to allow the appellant to amend his plaint accordingly would alter the character of the cause of action which in my view would equally put the respondent at a disadvantage.

33. Flowing from the above, I am convinced that the learned deputy registrar not only considered all relevant factors but exercised his discretion judiciously, thus arriving at a well-reasoned finding which needs no interference.

34. Accordingly, the appeal is hereby dismissed with costs to the respondent.

**Dated, Signed and Delivered at Nairobi this 13<sup>th</sup> day of December, 2019.**

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**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent

..... for the Third Party