



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL, ADMIRALTY & TAX DIVISION

HIGH COURT CIVIL SUIT NO 646 OF 2003

THOMAS NYANGERI MOGAKA.....PLAINTIFF/APPLICANT

-VERSUS-

NATIONAL BANK OF KENYA.....1ST DEFENDANT/RESPONDENT

JOSEPH MUNGAI GIKINYO T/A

GARAM INVESTMENTS.....2ND DEFENDANT/RESPONDENT

MT. ELGON ORCHARDS LIMITED.....3RD DEFENDANT/RESPONDENT

KENYA TROPISUN LIMITED.....4TH DEFENDANT/RESPONDENT

RULING

1. The Ruling herein relates to a Notice of Motion Application dated 8th February 2018, filed by the Plaintiff (herein “the Applicant”) under the provisions of Orders 1 Rule 10, Order 8 Rules 3, 5, and 8 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, & 3A of the Civil Procedure Act, Article 48 of the Constitution of Kenya and all other enabling provisions.

2. The Applicant is seeking for orders that, the Honourable Court grant him leave to amend his Plaintiff dated 13th October 2003, in the terms of the intended annexed amended Plaintiff which if allowed, be deemed as properly filed and served. That the Defendants/Respondents be at liberty to amend their defences in reply to the amended plaintiff and the costs of the Application be provided for.

3. The Application is supported by the grounds thereto and an affidavit dated 8th February 2018, sworn by the Applicant. He deposed that as shown by the proposed amended plaintiff, there have been fundamental issues which were not addressed in the original plaintiff that ought to be brought to the attention of the Court, so that it may adjudicate on all the matter in controversy and determine the suit quickly and conclusively.

4. The Applicant averred that the defendants will not suffer any prejudice if the Court grants the orders prayed herein. That under Order 8 Rule 5 of the Civil procedure Rules, the Honourable Court has jurisdiction to permit him effect the proposed amendments, and that under Order 8 Rule 5 of the Civil procedure Rules, the Honourable Court has jurisdiction to permit him effect the proposed amendments, and that in the case of; J.C. Patel –v- B.D Joshi 19 EACA 42, the Court held that;

“...the rule of conduct of the Court in such a case as this is that however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side”.

5. However, the Application was opposed by the 1st and 2nd Defendants (herein “the 1st and 2nd Respondents) on grounds that, the Applicant is using the Application to add to the suit, a cause of action in respect to which a legal defence under the Limitation of Actions Act, has accrued in their favour. That if allowed, the Application will serve to deprive them of the said legal defence and thereby prejudice their position in the proceedings herein and that the Application is otherwise an abuse of the process of the Honourable Court.

6. Subsequently, the parties agreed to dispose of the Application by filing submissions, whereupon the Applicant submitted that, the Defendants (herein “the Respondents”), have not filed any affidavits to controvert the averment or facts contained in the supporting affidavit. Therefore, they are deemed to have accepted the facts as stated by the Applicant. Reliance was placed on the case of; Standard Resources Group Ltd –v- Attorney General & 2 others [2016] eKLR.

7. The Applicant reiterates that under Order 8 Rule 5 of the Civil Procedure Rules, the Honourable Court has jurisdiction to permit the Applicant to make the proposed amendments which are intended to bring, before the Honourable Court, the real matters in controversy between the parties herein so that the same are determined on their true and substantive merits. That the case is yet to be heard and it is not disputed that the amendments sought arise out of the same facts as a result of which the cause of action accrued.

8. The Applicant further submitted that the law states that, cases must be decided on the basis of the pleadings on record and that if a party wishes to have a case decided on another basis, it must be placed on record through an amendment. Reliance was placed on the case of; Provincial Insurance Company of East Africa –v- Nandwa [1995- 1998] 2 EACA 288.

9. It was then submitted that for the Plaintiff to have a fair hearing, within the meaning of Article 50 of the Constitution of Kenya, he needs to lead evidence on the matters sought to be introduced through the proposed amendment. That the Court bars the taking away of a party's rights before the party has been given a chance to be heard as held in the case of; James Ndungu Wambu –v- Republic, Court of Appeal at Nairobi, Civil Appeal No. 85 of 1992.

10. The Applicant submitted that, it is worthy noting that the particulars of illegality and fraud have been pleaded in paragraph 13 of the amended plaint and that fraud has been described in the Limitation of actions Act, to include conduct which, having regard to some special relationship between the parties concerned, is an unconscionable thing for one to do towards the other; which is what the Respondents is exactly set out to do in this case.

11. It was submitted that, the law is that where a property is transferred to another through unconscionable action, the transferee holds it upon trust for the beneficiary; as stated in Parker & Mellows, the Modern Law of Trust, and 9th Edition. Finally the Applicant reiterated that the Respondents will not suffer any prejudice and have not shown what prejudice they will suffer if the Court grants the orders prayed for herein and as a matter of fact, prayer No. 3 seeks for an order that, they be granted leave to amend their defences, if need be.

12. The case of; Africa Safari Club –v- Safe Rentals Limited C.A Nairobi Civil Application No. 53 of 2010, was cited to argue that, issues of substantive justice must be considered both in the course of resolving issues of stay of execution or amendment of pleadings and also in the substantive trial or hearing of an appeal. That the provisions of overriding objective of the Civil procedure Act, impresses upon the Courts to look at substantive justice rather than technicalities as stated under Article 159 (2) (d) of the Constitution.

13. However, in response submissions the Respondents stated that the principles upon which the Courts exercise the jurisdiction to allow amendment of pleadings are well settled. Thus whether or not to grant leave to amend a pleading involves the exercise of judicial discretion. That in exercising such discretionary jurisdiction, these principles enjoin the Courts to freely allow amendments to pleadings sought before hearing, for purposes of determining the real issue in controversy in a suit “provided that there has been no undue delay, no new or inconsistent cause of action is introduced, no vested interest or accrued legal right is affected and the amendment does not occasion prejudice or injustice to the other side.” The decision in; John Mulwa Kang’aatu –vs. - Pan African Insurance Co. Ltd [2015] eKLR, was relied on.

14. That the averments sought to be introduced at paragraphs 6A, 6B, 6C and prayer d(1) of the proposed amended plaint, introduce a cause of action against the 1st Respondent relating to alleged breach of legal duty and breach of statutory obligation. That, it is common ground that, the right of action in the suit springs from the sale of the suit property by the 1st Respondent in exercise of its chargee's statutory power of sale on 3rd October 2002. The 3rd Respondent has an accrued defence in respect of the new cause of action sought to be introduced through the averments aforesaid, since whether the plaintiff's suit is taken to be found in an action for breach of contract under the pleaded charge and further charge over the suit property or one for recovery of land, the limitation period prescribed by the provisions of the Limitation of Actions Act, Cap. 22 Laws of Kenya in either respect has lapsed, since 3rd October 2002, the date of accrual of the right of action.

15. That there exist no exceptional and peculiar circumstances to warrant allowing an amendment to the Plaint whose effect would be to defeat the 1st Respondent accrued defence on limitation and to grant the application under consideration would visit an injustice on the 1st Respondent. Reliance was placed on the decision of the Court of Appeal in the case of; James Ochieng' Oduol T/a Ochieng Oduol & Co. Advocates –vs.- Richard Kuloba [2008] eKLR.

16. The Respondent argued that the facts relating to the averments sought to be introduced through the paragraphs of the proposed amended plaint are not new, as the Applicant must all along have been aware of the same, and yet did not plead these matters were in the original plaint and now seeks to introduce them more than fourteen (14) years since the suit was filed. That the undue/inordinate delay has not been explained. The case of; Unqa Limited –vs. - Magina Limited [2014] eKLR, was relied on.

17. The Respondent argued that besides the foregoing matters, although the proposed amended plaint seeks to introduce a 4th Defendant therein, there is no complaint pleaded or relief sought against it. Therefore no useful purpose will be served by adding the said party into the suit. The filing of the application in these circumstances amounts to an abuse of the process of the Honourable Court.

18. I have considered the Application, the Affidavit in support, the grounds in opposition thereto and the submissions, I find that, all that the Court needs to consider is whether the Applicant has satisfied the legal requirements relating to amendment of pleadings.

19. The parties have made reference to several legal principles and I shall not repeat the same, save to emphasis that, the Court may at any stage of any proceedings, in such manner as it may direct, allow a party to amend pleadings at any time before judgment. This position is founded on Order 8 Rule 3 of the Civil Procedure Rules, 2010 which stipulates as follows:

“3) 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”.

20. The sub-rule 2 thereof states that:-

“where an application to the court for leave to make an amendment under sub-rule (3), (4) and (5) is made after the relevant period current to the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any sub rule if it thinks just to do so.”

21. As aforesaid, the grant of leave to amend pleadings is a discretionary power of the Court that should be exercised judiciously and in the interest of justice. Indeed, the amendment of pleadings is basically for the purpose of bringing about final adjudication in a suit and to avoid multiplicity of proceeding. 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:

(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”

22. I have considered the proposed amendments herein as per the annexed draft amended plaint and I find that first and foremost, the Applicant intends to join the 4th Defendant to the suit. He is described as the customer of the 1st Defendant in the banker-customer relationship. It suffices to note that, that 4th Defendant did not participate in the hearing of this Application, as it is not yet a party. Therefore any issues raised on its behalf by the 1st and 2nd Respondents will not lie.

23. Be that as it were, I note that as regards the proposed paragraph 6A, the Applicant is merely expounding on the terms of engagement, between the 1st and the 4th Defendant, as creditor and the principle borrower under the underlying contractual relationship between them. It is on the basis of this relationship that the guarantee contract between the Plaintiff and the 1st Defendant arose. Therefore no prejudice will be suffered by the Respondents if the amendment in relation to the same is allowed.

24. As regards the proposed paragraph 6B and 6C, the Applicant makes reference to the legal principles that protects a guarantor’s rights in relation to realization of any property offered to a creditor, in consideration of a credit facility to a third party, otherwise known as a principal borrower. In that regard the case of; *“Kenya Commercial Bank Limited vs Osebe (1982), KLR 296 and Section 69 of the repealed Transfer of Property Act of 1882”*. In my considered opinion and with utmost respect, these are matters of law and evidence that should not be pleaded in the plaint or defence. Even then, the pleading of the same does not prejudice the Respondents.

25. The other proposed amendment is under paragraph 13 (o), (p), and (q); on the particulars of fraud. These particulars are addition to those already stated there under. Again the matters stated there under are matters of evidence and law and therefore whether stated herein or not and whether admitted herein or not, will still be canvassed at the hearing of the suit. Again I find no prejudice thereof to the Respondents.

26. Finally, the Applicant intends to add new reliefs under paragraph 23 (d) (1), (g) (1), (2) and (h). In this regard I find that, the relief under paragraph (d) and the proposed paragraph (d)(1), are in relation to the same issue basically the valid of the sale conducted herein. A similar situation avails in relation to prayers under (g), and (g) (1), (2).

27. The prayer for damages under (h) is indeed a new relief and in that regard the 1st and 2nd Respondents argue that the Applicant is using the application to add to the suit, a cause of action in respect to which a legal defence under the limitation of actions Act has accrued in their favour. However, I find that the said relief is founded on the matters pleaded herein and therefore it is better canvassed herein than create a new cause of action in future. Once the proposed aments are allowed the Defendants will have a right to amend their pleadings whereupon they can raise the issue of limitation period or seek at the earliest to deal with it through a preliminary objection, so that it can be determined at the earliest possible stage.

28. In this regard I wish to associate myself with the holding of the Court in the case of; Hiram Bere Kinuthia & 2 Others vs Edick Omondi & 3 Others (2014) eKLR, where the Court held that;

“the Defendants have not demonstrated that the proposed amendments do not arise from the same facts or substantially similar facts that gave rise to the suit. Their objection solely on grounds that the proposed amendments seek to introduce a new cause of action ought to fail as the matters giving rise to the amendment in my view can be said to have arisen out of the same facts and circumstances out of which the cause of action arose.”

29. In conclusion, I hold that the key factors in applications for leave to amend pleadings is for the Court to guard against any prejudice that may be occasioned to the opposite party which cannot be compensated by award of damages. I find the Respondents will not be prejudiced by the proposed amendments herein.

30. However as rightfully stated, the matters being introduced herein were within the knowledge of the Applicant at the time of drafting the pleadings. The suit was filed in the year 2003. The delay is not explained. Obviously in that regard, the delay prejudices the Respondents and

the Applicant must be condemned to pay costs for the same. I note that only the 1st and 2nd Defendants opposed the Application. I therefore allow the Application and award the 1st and 2nd Respondent a sum of Kenya Shillings Twenty Thousand (20,000) as costs.

31. It is so ordered

Dated, delivered and signed in an open court on this 20th day of September 2018 at Nairobi

G.L NZIOKA

JUDGE

In the presence of:

Dr. Kamau Kuria for the Applicant

Mr. Ouma for Mutua for the 1st and 2nd Respondents

Mr. Ouma for Ojiambo for the 3rd Respondent

Dennis-----Court Assistant