



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 628 OF 2006

GARLEY ENTERPRISES LTD.....PLAINTIFF/APPLICANT

-VERSUS-

AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT/RESPONDENT

LUSTER LIMITED.....2ND DEFENDANT/ RESPONDENT

RULING

1. The subject notice of motion application is dated 26th April 2017, brought under the provisions of Order 8 Rules 3 & 5 of the Civil Procedure Rules and any other enabling provisions of the law. The application is supported by the grounds thereon and the affidavit dated 26th April 2017, sworn by Samuel Ngari Gihinji, a director of the Plaintiff/Applicant's company.

2. The Applicant is seeking for orders:

- a) *That the plaintiff/Applicant be granted leave to make a further amendment to the Amended plain;*
- b) *That the further amended Plaint be deemed duly filed and served; and*
- c) *That costs be in the cause.*

3. The background facts of the case are that, the Plaintiff commenced this suit vide a plaint dated 20th November 2006, seeking for orders inter alia;

(a) A declaration that the Defendant's exercise of the right of foreclosure is contrary to the Registered Lands Act (Cap 300) of the Laws of Kenya and any public auction sale or transfer of the suit property or any act done pursuant to the said right is null and void ab initio;

(b) A permanent injunction to restrain the Defendants whether by itself, its employees, servants, agents, Advocates or Auctioneers or any of them or otherwise from doing the following acts or any of them, that is to say, from advertising for sale, selling by public auction or private treaty or otherwise howsoever and any other manner or by completing the conveyance or transfer of any sale concluded by public auction or otherwise howsoever or leasing, alienating or in any way parting with possession of the property comprised in the premises known as Kajiado/Kaputiei-North/3467, without complying with the provisions of the Registered Lands Act (Cap 300) of the Laws of Kenya (now repealed), the Auctioneers Act and the express terms of the Contract;

(c) The costs of the suit.

4. Subsequently on the 26th November 2008, the Plaintiff filed an amended plaint where it was averred that on 26th June 2007, the Defendant with full knowledge of the pending suit and without complying with the provisions of the law, fraudulently registered a transfer of the property in its name. The Plaintiff sought for additional prayers as here below stated;

“15 (a a): A declaration that the registration of a transfer of the suit premises into the name of the Defendant was obtained

illegally and by fraudulent means and is null and void ab initio;

(aa1): An order of rectification of the register of L.R. No. Kajiado/Kaputiei-North/3467, at Kajiado Land Registry to remove the name of the Defendant as the registered owner of the suit premises and cancellation of the transfer registered in their favour.”

5. On 18th August 2014, the Plaintiff again filed another notice of motion application dated 15th August 2014 seeking to be granted leave to further amend the plaint on the grounds that;

(a) The Defendant transferred the suit property into its name and subsequently into the name of the proposed 2nd Defendant after the filing of the suit;

(b) The suit herein revolves around title to the suit property and it is imperative that the proposed Defendant be joined as a party to the suit;

(c) The Defendant and the proposed Defendant do not stand to suffer no prejudice, embarrassment or hardship.

6. The proposed draft amended plaint was annexed to the affidavit dated 15th August 2014, sworn by Samuel Ngari Gichinji, in support of the application. The Applicant sought for further orders that;

“15 (A1) A declaration that the registration of a transfer LR No. Kajiado/Kaputiei-North/3467 in favour of the 1st Defendant and subsequently the 2nd Defendant was obtained fraudulently and by illegal means and is null and void ab initio;

15 (A2) A An order of rectification of the register of LR No. Kajiado/Kaputiei-North/3467 to cancel the transfers registered in favor of the 1st Defendant and subsequently the 2nd Defendant and the restoration of the Plaintiff as the registered proprietor of the suit property.

7. A Perusal of the court file reveals that, the said proposed draft amended plaint was subsequently filed in court on 8th October 2014. The Plaintiff (herein the Applicant for the purpose of this application) has now filed the subject application seeking for orders as stated herein before. Upon service of the application, the 1st Defendant opposed the same vide a Replying affidavit dated 26th May 2017, sworn by John M. Kithinji a Legal officer of, the 1st Defendant. He deposed that, the suit was instituted against the 1st Defendant, on 20th November 2006, about 11 years ago and that, the Plaintiff has not made any attempt to prosecute its claim, save for the numerous applications to incessantly amend the Plaint.

8. The application is an afterthought and is purposely and deliberately filed with a view to violate the overriding objective and principles of; fair, just, speedy, proportionate, time and cost saving disposal of cases before it.

9. That the object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on.

10. It was averred that the proposed amendment is made in bad faith and it will potentially harm, injure and/or prejudice the 1st Defendant's case by substantially exaggerating the claim by the Plaintiff. That it is the 1st Defendant's legitimate expectation is that litigation should come to an end and to allow the application amounts to prolonging the matter which is contrary to the overriding objective of the Civil Procedure Act and the judicial process as a whole.

11. The 2nd Defendant also opposed the application vide a Replying affidavit dated 2nd May 2018 sworn by Michael Mutuku Maweu, an Advocate of the High Court of Kenya, in the firm of M/s Adera & Company Advocates representing the 2nd Defendant. He joined issues with the 1st Defendant averments that it is about 10 ½ years since the institution of the suit and the claim is statute barred. He termed the delay in presenting the application as inordinate, unexplained, unjustified, lethargy, unreasonable, whimsical and fatally incompetent for failure to exhibit a draft proposed further amended plaint. Further that the proposed amendments are too drastic to warrant the lodgment of a fresh or separate suit.

12. That the application is mischievous, speculative, vague, legally embarrassing and offends the overriding objectives and that it is the 2nd Defendant's legitimate expectation that litigation should come to an end. As such the Applicant is undeserving of a favourable exercise of the court's discretion.

13. The application was disposed of through the filing of submissions. The Plaintiff filed its submissions dated 9th June 2017, reiterating the averments in the affidavit in support of the application and arguing that the 1st Defendant illegally exercised its power, sold and transferred the property to the 2nd Defendant and in view of the fact that the 2nd Defendant is protected by Section 99 of the Lands Act 2012, the Court may not deem it fit to reverse the transfer. Hence the need for further amendment to include an alternative prayer.

14. That the mere fact that the current market value of the suit property has been brought to the attention of the other parties does not injure them. It was submitted that Section 100 of the Civil Procedure Act and Order 8 Rule 3, allows a party to amend pleadings with court's leave.

15. Reference was made to the case of; Hiram Bere Kinuthia & 2 Others –vs- Edick Omondi & 3 others [2014] – Central Kenya Limited – VS- Trust Bank Limited where the Court held that “mere delay is not a ground for declining leave to amend, but that such delay must be one

unlikely to prejudice the other party beyond monetary compensation”

16. The case of; Andrew Ouko –vs- Kenya Commercial Bank Limited & 3 others [2014] eKLR, was also cited where it was stated, that until such time that judgment is delivered, the door for amendment of pleadings remains open and evidently, Order 8 Rule (1) of the Civil Procedure Rules, 2010 permits amendments to pleadings at any stage of the proceedings irrespective of the fact that an application for amendment has been made after the relevant period of limitation or the amendment purports to add or substitute a new cause of action.

17. Further reference was made to the case of; Andrew Wabuyeke Biketi –vs- Chinese Centre for the Promotion of Investment Development & Trade in Kenya Limited & 2 others [2015]

eKLR where it was stated that;

“ the Court has discretion to order amendment at any stage before judgment. An amendment should be freely allowed provided it is not done mala fide, and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs ”

18. Finally it was submitted that, the Court cannot proceed blindly without having the benefit of the current market value of the suit property and ought to allow the Application.

19. However, the 1st Defendant filed its submissions and reiterated that, the application is defective in view of the fact that a draft proposed further amended plaint has not been attached thereto and the Court cannot grant prayers blindly without having the advantage of perusing and interrogating the cause of action seeking to be introduced.

20. The 1st Defendant relied on the case of; Musamarini Limited & Others vs A.D.M. Limited & Others Civil Application No. 171 of 2010, where it was held:

“ ... to enable the Court know what new thing is being asked to give leave to introduce and consider whether indeed the amendment for which leave is sought would be within the requirements of the law, whether for instance it would introduce a completely new matter into the case it would thus would irrelevant to talk about it in its absence.”

21. That, in the absence of an annexed proposed draft amended plaint and the failure to clearly state in its application the nature, form or what it specifically wants to amend, the Honourable Court is left in a state of confusion as the Plaintiff is not clear on what it intends to amend. That keen scrutiny of the contents of the proposed amendments as stated in the application, clearly show the intention to introduce new issues aimed at altering the cause of action in the matter and not merely amending the plaint, which contravenes Order 2 Rule 6 (1) of the Civil Procedure Rules which states that;

“...no party may in any pleading make an allegation of fact or raise any new ground of claim inconsistent with a previous pleading of his in the same suit”.

22. It was submitted that, a plaint is required to include the whole claim and any claim omitted is deemed to have been waived or relinquished by a party required to make such pleading as required under Order 3 Rule 4 of the Civil Procedure Rules and that the Plaintiff’s conduct amounts to outright abuse of the court process aimed at dragging this matter further and subjecting the 1st Respondent to unwarranted and lengthy litigation as the Plaintiff has been amending its pleadings in piece meal.

23. The 1st Defendant submitted as a public body its reputation and good will has been affected by this never ending suit which has been in court for over twenty two (22) years since the cause of action arose, thus it has defeated the objective of the overriding objectives.

24. That, the proposed amendments seek to introduce a new cause of action through a back door and which is statute barred in that as stated above, a contract between the Plaintiff and the Defendant was entered into in the year 1995. The suit was filed in the year 2006 and the limitation period for a cause of action in contract is six (6) years. The cause of action cannot therefore be brought after twenty two (22) years. Reference was made to the cases of; Wareham t/a AF Wareham & 2 Others vs Kenya Post Office Savings Bank – Civil Appeal Nos. 5 & 48 of 2002., Mulla, on Code of Civil Procedure, 18th Ed., Vol. 2, and Nairobi Civil Appeal No. 155 of 2005 George Gikubu Mbuthia vs Consolidated Bank of Kenya Limited & Peter Njeru Mugo (2009) eKLR.

25. The valuation report which is the subject of the intended amendment was faulted for having been filed ten (10) years since the institution of the suit and being unprofessional, inter alia, in that;

(a) it does purport to capture what would be assumed to be developments by a 3rd party which the Plaintiff wishes to rely upon;

(b) does not contain the details of the owner of the demised premises; and

(c) it is incomplete and does not contain a copy of the latest search.

26. Finally, it was submitted that the Plaintiff lacks capacity in these proceedings from the onset for want of authority to plead, as it is succinctly clear that, even from the initial Plaint, the verifying affidavit was executed by a party who had no authority to plead and therefore proceedings in the matter have been going on without such authority as required by the Civil Procedure Rules.

27. The 2nd Defendant also filed its submissions and reiterated that, the cause of action in the tort of fraud and/or breach of contract accrued on 21st September 2006, and limitation periods are three and six years, respectively. Therefore, the application seeking to further amend the plaint is seemingly grossly and inexplicably belated and statute-barred under the Limitation of Actions Act Cap 22 Laws of Kenya. Reference was made to the case of; *Elijah Kipng'eno Arap Bii –vs- Kenya Commercial Bank Limited*[2013] eKLR, where the Court cited with approval the Bullen Leake and Jacobs Precedents of Pleadings, 12th Edition Page 127, which states inter alia:

“...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 provides costs can compensate the other side;.....that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaint the Defendant would be deprived of his right to rely on Limitations Acts”

28. It was further submitted the proposed amendments to introduce for the first time the claim for Ksh 154,000,000.00 is too drastic in magnitude and far-reaching as to change the character/essence of the suit and to warrant the lodgment of a fresh/separate suit to agitate such a claim and new cause of action.

29. I have considered the application, the affidavit in support and in opposition thereto, and the arguments by the respective parties, and I find that the issue to determine is whether; the applicant has met the threshold for grant of the orders sought.

30. The parties have made reference to several cases that have clearly stated the settled position in law that the court has the discretion to allow the amendment of the pleadings at any stage of the proceedings and for the purposes of determining the substantive merits of the case, and/or to enable all the issues in dispute to be brought to the court's attention.

31. In that regard indeed Order VIA Rule 5, of the Civil Procedure Rules states that;

“5. (1) 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.

32. However, it is also trite law that, an amendment of pleadings will not be allowed when it will alter the substance of the cause of action and/or cause prejudice to the opposite party, which prejudice cannot be compensated by costs. Neither should an amendment be allowed which introduces a new cause of action that is time barred, although late amendments may be allowed if sought in good faith.

33. An analysis and/or the history of this matter as stated herein reveals that, from the time the suit was filed on 20th November 2006, the Plaintiff has sought for amendments of the pleadings and in particular the plaint, on two previous occasions, before the subject application, namely; on the 26th November 2008 and 18th August 2014. Therefore, this is the third time the Plaintiff is seeking to amend a further amended plaint. It is therefore, not in vain when the Defendants/Respondents complain that the amendments have been made in piece meal. It is also indicative of the fact that the Plaintiff will seek to amend its pleadings as and when new matters arise, whether these matters were within their knowledge or not at the time when the pleadings were filed.

34. The Defendants argue that this conduct of the Plaintiff is intended to delay the matter. I agree with the Defendants. The purpose of overriding objectives is to facilitate an expeditious and affordable disposal of cases and such piece meal amendments are contrary to these objectives. Be that as it were, a key issue has been raised by the Defendants to the effect that, the Applicant did not annex a copy of the draft proposed further amended plaint, to enable the court determine whether the said proposed amendments have merit or not.

35. It suffices to note that, when the first two applications for leave to amend the plaint referred to herein were made, the Applicant annexed thereto the copies of the draft amended and further amended plaint respectively. It beats logic why in this particular application; the Applicant found it fit not to annex the said draft of further amended Plaint.

36. The provisions of Order VIA Rule 7, stipulates how the proposed amendments should be effected and/or indicated on the existing plaint or defence to be amended. These provisions states as follows:

7. (1) Every pleading and other document amended under this Order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made.

(2) All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.

(3) Colours other than red shall be used for further amendments to the same document.

37. It therefore pre-supposes the proposed draft will be annexed to the application to enable the court ascertain whether these provisions have been complied with or not. Therefore the failure to comply accordingly renders the application fatally defective and on that ground alone, this application should be struck out.

38. However, I find that, even when the application is considered on merit, it is revealed that the Applicant has not explained why it has taken them so long to file the application. The Applicant argued that the aim of the amendment is to introduce the value of the suit property and to enable them plead an alternative prayer for payment of a sum of Kshs. 154,000,000, being the current value of the suit property.

However I note that transfer issue was a subject of an application made on 25th August 2014. Thus the Applicant was aware of the same as far as that date. Why didn't the Applicant file this application immediately thereafter and/or seek for the subject prayer during the hearing and determination of that application.

39. The Court record also indicates that, this matter was certified ready for hearing as far back as, 2nd November 2015, and has been fixed for hearing on several occasions and unfortunately without proceeding. On 26th July 2016, the Plaintiff indicated to the court that they were ready to proceed. However, due to pressure of work the matter did not proceed. The Plaintiff/Applicant then informed the Court and the Defendants that, it will be seeking for leave to amend the plaint.

40. The matter was then fixed for hearing on 14th November 2016. On that day the parties indicated that they were ready to proceed but even then, the Plaintiff had not filed the application to amend the plaint. The matter was stood over to 2nd March 2017, and still, there was no formal application to amend the Plaint. It was only filed on 3rd May 2017. The reason why the Plaintiff took so long is not even explained. Thus in the absence of the explanation, the court will not be prepared to assist an indolent party, guilty of laches.

41. The other issues raised by the Defendants are in relation to limitation of actions. In this regard, the 1st Defendant sought that the suit be struck out. But I find that the issue of limitation of action can only be dealt with, if the amendment is allowed and/or during the hearing of the case. Similarly the Court cannot grant the prayers to strike off the suit, when the same was raised in the submissions by the 1st Defendant for the first time. It requires a formal application.

42. The upshot of all this, is that, the application is not only fatally defective as aforesaid but lacks in merit and I dismiss it with costs to the Defendants/ Respondents.

43. Those then are the orders of the Court.

Dated, delivered and signed this 21th day of November 2018.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Jaoko holding brief for Mr. Ochieng for the Plaintiff/Applicant

Mr.Ngaira for 1st Defendant/1St Respondent

Mr. Maweu for the 2nd Defendant/2nd Respondent

DennisCourt Assistance