



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 561 OF 2013

KAMPALA COACH LIMITED.....PLAINTIFF/APPLICANT

VERSUS

**FIRST COMMUNITY BANK LIMITED.....1st
DEFENDANT/RESPONDENT**

DALALI TRADERS AUCTIONEERS.....2^NDEFENDANT/RESPONDENT

RULING

1. By way of a Notice of Motion dated 18th September, 2015, the Plaintiff herein seeks the leave of the court to amend its Plaint dated 18th December, 2013. That pursuant to granting leave as prayed, the draft amended plaint attached to the application be deemed duly filed and served upon payment of requisite court fees.
2. The application is expressed to be brought under Order 8 rules 3, 5 and 7 of the Civil Procedure Rules, 2010. The Plaintiff relies on the grounds contained in the face of the application and the supporting affidavit of Mohamed Abdul Basiet sworn on 18th September, 2015.
3. It was deponed that the Plaintiff herein instituted the main suit seeking to stop the sale of the suit property. That while the dispute was still pending in court, the 2nd Defendant sold the suit property to the proposed 4th Defendant, Triki Electronics Limited. It was also averred that the as per the terms of the loan facility, the suit property was registered in the name of Interstate Courier Express Limited, the proposed 2nd Plaintiff. That further, the proposed 3rd Defendant, Joseph N. Kariuki T/A Josrick Merchants Auctioneers also received instructions from the 1st Defendant to repossess and sell the Plaintiff's vehicles valued at Kshs. 24,000,000/=.
4. According to the deponent, the 1st Defendant did not credit the sale proceeds to the loan account. It was therefore the Plaintiff's case that it is pertinent for the proposed parties to be enjoined in the case through the leave to amend as they are pertinent to the case. The plaintiff further averred that the intended amendment will enable the honourable court adjudicate on and determine all the issues in dispute.
5. In response to the application, the Defendants filed ground of opposition dated 28th September, 2015. It was contended that the application before the court was lacking in merit and should be dismissed. The Defendants argued that there was no basis in law for the introduction of new parties by way of an amendment as sought in the instant application.
6. That further, there was undue delay in making the application. In opposing the application, the Defendant also stated that the proposed amendments constitute a new suit against the proposed new defendants and thereby will occasion prejudice to the 1st and 2nd defendants.
7. It was also contended that the amendment introduces a new and inconsistent cause action which would change the action into one of a substantially different character that can only be subject to a

fresh action. In its defence, the 1st Defendant stated it complied with the law in exercise of its statutory power of sale. That in view of the foregoing, the orders sought by the Plaintiff are untenable and incapable of being granted. The Defendant therefore urged the court to dismiss the application accordingly.

8. On 29th September, 2015 directions were granted to determine the motion by way of written submissions. The Plaintiff filed its submissions on 27th October, 2015 while the Defendants filed their submissions on 27th October, 2015. I have considered the pleadings, depositions and rival submissions including the various cases cited. The issue for determination is whether or not to allow the proposed amendments as sought by Plaintiff.
9. Before analyzing whether the Plaintiff's application is merited it is important that I deal with the issue of joinder of parties. I note that in its application, the Plaintiff has sought to enjoin three other parties by way of an application to amend. The parties to be enjoined are Interstate Courier Express Limited as the 2nd Plaintiff.
10. According to the Plaintiff, the suit property in this case was registered under the said company's name. The proposed 3rd and 4th Defendant are Joseph Kariuki T/A Josrick Merchants Auctioneers and Tirik Electronics Limited, respectively, whose role in the case I will outline later in this ruling.
11. In my assessment, the Plaintiff did not cite any provisions of the law that are in support of the prayer for joinder of parties. Despite this omission and given that this court is enjoined to do justice between the parties without any undue regard to technicalities, it is my reasoning that the court can consider the prayer for joinder of parties in view of **Order 1 Rule 10 (2). Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:**

“the Court may at any stage of the proceedings order that the name of any person who ought to have been joined and whose presence may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit be added.” From the foregoing provision, I find that the court can thus proceed to deal with the merits of the application as it is.

12. With regard to the prayer to amend the plaint, it is trite law that amendments to pleadings can be freely allowed at any time before delivery of a judgment. According to Mulla, The Code of Civil Procedure, 17th Edition Volume 2, at pages 333, 334 and 335; as a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order.
13. Leave to amend must always be granted unless the party applying was acting mala fide and where it is not necessary for determining the real question in controversy between the parties. I am also of the opinion that an application to amend must be made bona fide and made in good faith.
14. In **Ogders on Pleadings and Practice 20th Edition** at page 170 the learned authors also state that where the amendment is necessary to enable justice to be done between the parties, it will be allowed on terms even at a late stage. However, if the application be made mala fide, or if the proposed amendment will cause undue delay, or will in any way unfairly prejudice the other party, or is irrelevant or useless, or would raise merely a technical point, leave to amend will be refused.
15. I will buttress these points through the case of **Eastern Bakery v Castelino [1958] EA 462 (CAU)** where it was held at page 462 that:-

“The court will not refuse to allow an amendment simply because it introduces a new case..... The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ” Further to the above, the Court of Appeal also stated in the case of **Central Kenya Limited –v- Trust Bank Limited (2000)2 EA 365** that ;

"..... a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits,

provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

16. From the foregoing case law and legal texts cited, it goes without saying that the Court has wide discretion to allow any party to amend its pleadings 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 under Order 8 Rule 3 of the Civil Procedure Rules.
17. Thus, the overriding consideration in an application for leave for amendment is whether the amendments sought are necessary for determining the real question in controversy and whether any delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.
18. The Defendants have contended that the application before court is incompetent since there has been undue delay in making the application as the same is a mere afterthought. According to its written submissions, the instant suit was instituted on 19th December, 2013 under a certificate of urgency.
19. That further the application was made on 18th September, 2015 when the matter was coming up for mention. It was averred that the Plaintiff has not advanced any substantive reasons as to why the application for leave to amend was brought after the power of sale had been exercised and suit property transferred to the proposed 4th Defendant. In the Defendant's submission, the Plaintiff was merely reacting to the circumstances that had already occurred to try and revive its case.
20. I have considered the Defendants' submissions. There might have been a delay in filing the instant application since the case was constituted. However, the Defendants do not indicate what particular prejudice they are likely to suffer if the application for amendment is allowed.
21. In the case of **Central Kenya Limited –v- Trust Bank Limited (supra)** it was stated that mere delay is not a ground for declining leave to amend, but that such delay must be one likely to prejudice the other party beyond monetary compensation. In this particular case, I am of the view that there is no prejudice which cannot be compensated by an award of costs to the Defendant.
22. Likewise, I am of the opinion that if the application for amendment is allowed, the Defendants will have the opportunity to respond to the amendment if they so wish. In sum, the first ground for opposing the application for amendment must fail. Turning to the second issue, the 1st Defendant submitted that allowing the amendments in the manner proposed would be tantamount to introducing a new and inconsistent cause of action.
23. That in the amended Plaint, the Plaintiff prays for the court to cancel the title transferred to the proposed 4th Defendant. According to the submissions of the Defendants, since the Plaintiff alleges that the suit property had been disposed irregularly, then its remedy lay in damages under **section 99 and 104 of the Land Act, 2012**, which in its view constituted a new cause of action.
24. The case of **Twin Buffalo Safaris Limited –vs- Business Partners International Limited (2015) Eklr** was cited in support of this submission. The Plaintiff on its part argued that under Order 8, the court is allowed to grant leave to amend notwithstanding that its effect will be to add or substitute a new cause of action. I have considered the rival arguments on this particular issue.
25. **Order 8 Rule 3 (5)** provides that an amendment may be allowed notwithstanding that the effect would be to add or substitute a new cause of action provided such cause of action arises out of the same facts or substantially similar to the cause of action out of which relief has been claimed in the suit.
26. In my view, this objection must fail since the proposed amendments which intend to join the purchaser of the suit property as the 4th Defendant arise out of the similar facts and circumstances as the cause of action. I also note that the Defendants further contended that since the suit property had been sold and transferred to the proposed 4th Defendant, the Plaintiff's only remedy, if successful, was in an award of damages against the 1st Defendant.
27. That therefore the application for amendment sought to introduce parties who would not assist the court in determination of the issue of damages against the 1st Defendant if found culpable. The court also notes that the Plaintiff has made allegations of fraud against the Defendants and has further contended that the purported sale of the suit property was irregular, unlawful and null and void ab initio.
28. Bearing all these facts in mind, I find that a determination thereof and the remedies available to

- the Plaintiff can only be discerned after a full trial and not at this stage. Further, I note that the 1st Defendant argues that the proposed 4th Defendant is an innocent purchaser for value who is protected by Section 99 of the Land Act.
29. It is my finding that the aforementioned section does not offer protection to a purchaser where there is fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which the purchaser had actual or constructive notice.
 30. Because of the Plaintiff's contention that there was fraud involved in the sale of the suit property, I find that these issues can only be determined at the trial where the proposed 4th defendant is afforded an opportunity to participate and respond to the issues.
 31. Moreover, it is my opinion that the fact that the Plaintiff has not provided the particulars of fraud as alleged by the Defendants, cannot defeat the application to amend the Plaintiff. In the same vein, the joinder of Interstates Courier Express Limited is also necessary. I say so because, while examining the title document to the suit property of land, especially at entry number 8 made on 7th July, 2011, the said title was transferred to the aforesaid company.
 32. On examination of the Charge document dated 4th July, 2011 it is clear that the suit property was offered as collateral for the funds advanced to the Plaintiff by the 1st Defendant. The inclusion of Interstate Courier Express Limited is therefore necessary to determine the issues of sale of the suit property that have been pleaded by the Plaintiff viz-a-viz the transfer of the suit property to the proposed 4th Defendant by the 1st Defendant in exercise of its power of sale.
 33. This in effect will avoid a multiplicity of suits and will allow this court to effectively and effectually determine the issues. As was held by the Supreme Court of Uganda in **Gasu Transport Services (Bus) Ltd. -Vs- Obene (1990-1994) E.A 88**, courts should generally give leave to amend pleadings rather than give judgments in ignorance of the facts which ought to be known before rights are definitely decided.
 34. Equally, the sale of the Plaintiff's chattels, that is KBX No. 269X and KBS 302G was raised in the proposed amendments. It was averred that the said motor vehicles served as further collateral for the loan facility advanced to the Plaintiff.
 35. That the same were repossessed and sold by proposed 3rd Defendant, acting on the instructions of the Plaintiff. In my view, the sale of the chattels arise out of the similar facts and circumstances as the cause of action and enjoining the proposed Defendant is essential for a just determination of the case between the parties.
 36. In the result, it is my finding that it is only fair and just to join the proposed 2nd Plaintiff as well as the proposed 3rd and 4th Defendants to avert a situation where adverse orders affecting them would be issued without them being given an opportunity to be heard.
 37. The proposed 3rd and 4th Defendant's will not be prejudiced in any way since any defence available to them will be open to them as if the proceedings are being instituted at the time of allowing the amendment. See **Atieno vs. Omoro (1985) KLR 677**. The upshot of the foregoing is that the Plaintiff's chamber summons dated 26th March 2014 is allowed as prayed on the following terms;

- a. **That the amended plaintiff be filed and served within fourteen (14) days from the date of this ruling.**
- b. **That the 3rd and 4th Defendants be served with summons and the amended plaintiff within fourteen (14) days from the date of the ruling.**
- c. **That the Defendants have leave of fourteen (14) days from the date of service of the amended plaintiff upon them to file their amended statements of defence if need be.**

- d. **The Plaintiff shall pay the costs of the application to the 1st, and 2nd Defendants.**

Dated, signed and delivered in court at Nairobi this 4th day of March, 2016.

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C. KARIUKI

JUDGE