



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 853 OF 1999

JULIUS KABUI MWANGI

TERESIA NJERI MWANGI (*suing as Heirs and Legal*)

Representative of the estate of MWANGI GICHUKA (deceased)
.....**PLAINTIFFS**

VERSUS

WANGUI GATUNDU

JOHN WANJANGI GATUNDU

JAMES MWANGI GATUNDU (*All sued as legal*)

Representative of the estate of Gatundu Wanjangi (deceased) & 10
OTHERS.....DEFENDANT

R U L I N G

Before the court for determination is the Notice of Motion dated 4/9/2013 brought under Order 8 Rule 3(1) Civil Procedure Rules, Section 1A and 1B of the Civil Procedure Act. The applicants are seeking:

- 1. Spent**
- 2. This honourable court be pleased to grant leave to the 5th and 3rd and 8th Defendant to file their written statement of defence and amended statement of defence, respectively in terms of hereto annexed draft defence and amended.**
- 3. In the alternative and without prejudice the 5th and 3rd and 8th Defendant be granted leave to file a written statement or defence out of time and amended statements of defence respectively, in terms of the hereto annexed draft statement of defence and draft amended statement of defence, respectively.**

The application is based on the ground that the 5th Defendant was not served with summons to enter appearance and with the further amended plaint filed herein and as the hearing is on, she should have her formal written statement of defence on record. She also states that they have also not admitted the Plaintiffs claim in any way. The surviving legal representative of the estate of the 3rd and 8th Defendant have belatedly appointed legal counsel, and also observed that there is a need to amend the defence to reflect their very true instructions contrary to the falsified written statement of defence(s) that have been

filed allegedly by the Plaintiffs.

The 3rd Defendant claims that the defence dated 13th August 1999 was procured fraudulently by the Plaintiff because at the material time the 3rd Defendant was old and sickly and there was no family to explain the content since she could not read and write in English. The 3rd Defendant also disowned the replying affidavit filed by the Plaintiffs in court on 22nd June 2007. She stated that the same was procured fraudulently when Julius Kabui Mwangi asked her to sign some documents to facilitate distribution of her shares in the business. The 8th Defendant also claims that the defence dated 16th July 1999 was procured fraudulently by the Plaintiffs who never informed his mother the content of the defence. He disowned the said defence and the replying affidavit filed by the Plaintiff.

The applicants state that the court has discretion to grant leave to file defence out of time to allow the defence to be amended so as to be in consonance with the correct, truthful and genuine lines of defences in issue. They claim that the intended amendments will not occasion prejudice to any party as the defence mounted hereof during the hearing has been on the same line. The applicants further claim that the Plaintiffs and the representatives of the estate of the 6th and 7th Defendants have entered into a fraudulent scheme to dispossess of other Defendants their share honestly earned and the investments made in the suit properties.

The application is opposed through the replying affidavit sworn by Julius Kabui Mwangi on behalf of the 2nd Plaintiff. They stated that the matter is part heard and the 1st Plaintiff had given his evidence in chief and cross examination was underway. They further stated that the Defendant seeking to amend their defence have all along been participating in the proceedings and therefore the new defence will introduce new matters at a late stage. The Plaintiffs claim that the 3rd Defendant was alive when the summons were entered and served upon him personally. Although the firm of C.S.Joshi & Joshi Advocates purported to file appearance and defence on his behalf, he allegedly rejected their representation and filed his own defence in which he personally admitted the claim.

The Plaintiffs further stated that the 8th Defendant was similarly served with suit papers and she filed a defence in which she allegedly admitted the claim on 16th July 1999, more than 12 years ago. That she also subsequently swore and filed an affidavit on 22nd June 2007, more than 5 years ago, in which she similarly admitted the claim herein. The Plaintiffs claim that the application is an afterthought and an act of dishonesty for the 3rd and 8th Defendant to allege that the defence was fraudulently procured. The 1st Plaintiff also denied the allegation that he asked the 8th Defendant to sign documents to facilitate distribution of her share in the partnership. Similarly the allegation that the Plaintiffs fraudulently procured the 3rd Defendant defence dated 13th August, 1999 was false. They stated that the 3rd Defendant drew and filed his defence willingly and was never influenced by anybody as can be seen from his letters dated 2nd August 1999.

The Plaintiffs further claim that the application for amendments or leave to file the defence out of time has come too late in the day and no explanation for the delay has been rendered. The application amounts to total departure from their earlier pleadings which is not permissible in the circumstance of this case. The Plaintiffs accused the Defendants of departing from their earlier pleaded admission at this stage.

The application was prosecuted by way of written submissions which were filed and exchanged. The applicants submitted that the 5th Defendant was seeking leave to file the defence out of time in response to the Plaintiff amended plaint dated 4th October 2005. The 5th Defendant claims that she has a right conferred by the law to file a defence in response to the claim against her. She submitted that her counsel came into the matter when there was an unresolved interlocutory application before the hearing commenced. The 3rd Defendant also submitted that she was seeking leave to amend the defence dated 13th August 1999 which stated that the Plaintiffs claim is admitted. The 8th Defendant also submitted that she wants to amend the defence which was irregularly procured when the Plaintiff dishonestly asked her to sign the document that would facilitate the distribution of her husband's share in the partnership

business.

On the Plaintiffs' contention that he had already given evidence and cross examination is underway, the Defendants submitted that it is permissible under the law for a witness to be recalled to give evidence should the circumstances permit. The Defendant also argued that the Plaintiffs will not suffer any prejudice or inconvenience should the said defence be amended. The Defendants further submitted that the pleadings are clear that the error on the face of the record, a grave error if not remedied, will occasion a miscarriage of justice. The 3rd Defendant swore an affidavit to the effect that the Plaintiffs' took advantage of her old age and illiteracy and deceived her to sign the replying affidavit under the pretext that it was to enable the distribution of her husband's share in the business. The same position was also taken by the legal representatives of the estate of the 8th and 3rd Defendant.

The Defendants also submitted that the affidavits on record must be struck out as they are aimed at misleading this honorable court and are in essence an illegality and thus the 3rd and 8th Defendants be allowed to amend their defense and set the record straight. The Defendant relied on the Court of Appeal decision in the case of **Uhuru Highway Development Ltd Vs Central Bank of Kenya & 2 Others** Civil Application No. 140 of 1995 where the court held that once the court was satisfied that a party had obtained the order by concealing other relevant material, it was entitled not to consider the application any further; for the courts must protect themselves from parties who prepare to deceive, whatever their motives for doing so may be and whatever the merits of the case might be.

The Defendants take cognizance the fact that granting of leave is not as of right but an exercise of the court's discretion. The Defendants also relied on the case of **Njagi Kanyunguti alias Karingi Kanyunguti & Others Vs David Njeru Karingi** CA No. 181 of 1994 where the Court of Appeal held that the discretion being judicial is exercised on the basis of evidence and sound legal principles.

On the issue of service of summons, the Defendant submitted that the practice is not a technicality but it is essential for proper administration of justice. The Defendants cited the court of appeal case of **John Akasiriwa Vs Alfred Inai Kimuso** Civil Appeal No. 164 of 1999 UR. Where the court held that there is need for strict compliance with Order 5 Rule 9 (1) since proper service of summons to enter appearance in litigation is crucial matter in the process whereby the court satisfied itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not. The Defendants submitted that the Plaintiff did not comply with the law on this requirement and cannot be heard to oppose the 5th Defendant's application for leave to file a defence out of time when it is the Plaintiffs who occasioned the delay and therefore cannot deny the Defendants and opportunity to defend themselves.

The Plaintiffs also submitted that it is the general principle of the law that an application for amendment to pleadings before the hearing are normally granted if the opposing party will not suffer any injustices. The Plaintiffs submitted that an application for amendments will be disallowed if the amendments sought contain allegations completely inconsistent with the previous pleadings in the same suit, where also the amendments is sought late and the amendments will delay the fair trial and prejudice the other party. The Plaintiffs relied on the Court of Appeal decision in **Kyalo vs Bayusuf Brothers Ltd (1983) KLR, 299.**

The Plaintiffs on the other hand submitted that the amendments sought seek to introduce inconsistent pleadings. The legal representatives of the 3rd Defendant now seek to deny the Plaintiffs claim, yet the 3rd Defendant had himself expressly admitted the claim in his defence which he signed in person 15 years before. The Plaintiffs further stated that the amendments are being sought late since the case is heard and the Plaintiff has already given evidence. The Plaintiffs state that by allowing the amendments which are totally inconsistent with the 3rd Defendant previous pleadings in this case will not only delay the fair trial of the suit but will also be prejudicial to the Plaintiff who have already given evidence. The Plaintiff added that the 3rd Defendant defence has also been produced by the Plaintiffs as an exhibit in support of their case. The Plaintiffs relied on the case of **Kihoni Vs Gakunga & Another (1986) KLR 572, First National Finance Bank Ltd Vs Shriti Manufacturer Ltd & 3 Others**, HCCC No. 1428 of 2001.

The Plaintiffs further submitted that there is no explanation as to why the amendments are being sought

after so many years and after the case has already been heard substantially. The Plaintiffs maintain that the amendments are only being sought as an afterthought, to delay the fair trial of this claim and to prejudice the Plaintiff's case and is clear abuse of the court process.

On the 5th Defendant application to file the defence out of time, the Plaintiffs submitted that the allegation that the 5th Defendant was not served with summons to enter appearance is false. The 5th Defendant filed a Memorandum of Appearance after 11 years through her advocates M/S C.N Kihara & Company Advocates. The Plaintiffs stated that the 5th Defendant waited for 4 years after filling the memorandum of appearance to make false allegation that she was never served with summons to enter appearance. The Plaintiff further submitted that the conduct of the 5th Defendant in filling an appearance on 4th May 2010 and then continuing to participate in the proceedings and hearing for the last 4 years, including cross examining the Plaintiff on his evidence, and further making a false allegation at this stage that she was never served with summons to enter appearance, is an abuse of the court process. The Plaintiff further stated that the 5th Defendant has not given any explanation why they did not file the defence in good time.

The Plaintiff submitted that the 3rd, 5th and 8th Defendants are not entitled to the orders sought. The Plaintiff explained that the suit herein is seeking liquidation of a partnership which was dissolved automatically by operation of law on the death of partners, beginning with the death of Mwangi Gichuka whose estate the Plaintiffs herein represent. The estate of all the deceased partners stand to benefit from a speedy hearing and conclusion of the suit so that they can each get their entitlement from the partnership assets, some of which are now in the hands of third parties, the same people who are seeking to delay this case by asking for the amendments whose main purpose is to drag this case backwards. By its nature none of the Defendants stand to suffer any prejudice even if they do not defend the case because all the Plaintiff are seeking in this case is liquidation of the partnership and a fair distribution of the net assets of the partnership amongst the deceased partners of their estate.

I have considered the rival arguments by both parties. The issues for determination by the court are the following:

- 1. Whether the court can allow the amendment of the 3rd and 8th Defendant statement of defence.*
- 2. Whether the 5th Defendant can be allowed to file a defence out of time at this stage.*

On the 1st issue, the purpose of amending pleadings as provided under **Order 8 of the Civil Procedure Rules, 2010** is to allow parties to include all issues of contention between them to enable the court determine the real issues which are in controversy or contention. Courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. Amendments are also to be allowed even if the affect would be to introduce a new cause of action. The courts in doing so will be exercising the unfettered discretion; this power has to be exercised judiciously. See generally, **Co-operative Insurance Company of Kenya Limited v Paem Agencies Company Limited** Civil Suit No 362 of 2009, [2014] eKLR, **Rogers Mogaka Mogusu v George Onyango Oloo & 2 Others**, Petition No. 96 of 2014 [2014] eKLR.

In the instant case, the 3rd and 8th Defendant are seeking leave to amend their defence statement date 13th August 1999 and 16th July 1999. The reasons given for amendments is the 3rd and 8th Defendant admitted the Plaintiffs claim which is not the position. They claim that they have never admitted the Plaintiffs claim and that the defence statements on record were fraudulently procured. On the other hand the Plaintiffs maintain that the amendments are inconsistent with their previous pleadings in this case and the same will not only delay the fair trial of this case but also prejudice the Plaintiff.

I do not find that this is an appropriate case for the court to exercise its discretion. In the case of

Central Kenya Limited vs. Trust Bank Limited and 5 Others, Civil Appeal NO. 222 OF 1998, Gicheru JA (as he then was) stated:

“...that a party is allowed to make such amendments as maybe 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”.

There has been undue delay in bringing the application for amendment. The plaint herein was filed in February 1999, amended on 18th October 2004 and further amended on 4th October 2005. The statements of defence the Defendant seek to amend were filed 13th August 1999 and 16th July 1999 respectively. **Order 8 rule 1** allows the Defendants to amend a filed defence where the plaint has been amended and served upon them. The 3rd and 5th Defendant had an opportunity to amend their defence then. The Defendants did not do so at that time and no satisfactory explanation has been given to the court as to why they should be allowed to amend their statements 16 years later. In the case of **Kyalo – v – Bayusuf Brothers Limited (supra)** the Court of Appeal held that applications for leave to amend pleadings should be allowed if they are brought within reasonable time because to allow a late amendment would amount to an abuse of the court process. The defence sought to be amended was not with respect brought within reasonable time.

The Defendants amended defence statement will also, in my view introduce new issues which are inconsistent with the pleadings in this case. The Defendants have raised a preliminary objection which ought to be heard before the suit is heard. It is not disputed that this suit is part heard, the record shows that the Plaintiff has given his evidence in chief, the defence counsel are underway with the cross examination. By allowing proposed amendment the court will require to roll back all the steps so far taken in this matter to ensure justice is done. This court is enjoined by the constitution under article 159 to do justice to all without any delay.

On the second issue, the law on extension of time where the period is fixed is found under **Section 95 of the Civil Procedure Act and Order 50 Rule 6 of Civil Procedure Rules**. The court has power to enlarge time or period which has been fixed by or granted by the court for doing of any act prescribed or allowed by Civil Procedure Act , even if the original period fixed or granted may have expired. The power is discretionary and not fettered at all, except it should be exercised judiciously and upon defined principles of the law.

In the case of **Aviation Cargo Support Limited v St. Mark Freight Services Limited, Civil Application 98 of 2013, [2014] eKLR**, the Court of Appeal in determining an application to file and serve record of appeal out of time stated:

The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.

The principles emanating from the case cited above also apply in this case. The 5th Defendant alleges that she was never served with summon to enter appearance. The 5th Defendant submitted she has a right conferred under the law to file a defence in response to the claim against her. She explained that counsel came into the matter when the same had unresolved interlocutory application and the hearing commenced

and counsel believed that the defence on record covered all people. The Plaintiffs also submitted that the delay is almost 11 years, the 5th Defendant filed a memorandum of appearance and participated in the proceedings for the last 4 years therefore the application is an abuse of court process. I agree with Plaintiffs submissions that the current application to extend time to file a defence out of time does not amount to an abuse of the court process. The supreme court in the case of **Hassan Nyanje Charo v Khatib Mwashetani & 3 others** Civil Application No. 14 of 2014 [2014] eKLR in determining whether the case was an abuse of court process stated:

“[29]The Black’s Law Dictionary defines ‘abuse of process’ at page 11 as:

“The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process’s scope”

It includes the deliberate use of the court and court process to settle vendetta, to intimidate, to inflict fear and involves the bringing of matters to Court that have no justiciable cause of action.”

The Defendants here are using the court process unlawfully. The record shows that the 5th Defendant herein appointed the firm of C.N. Kihara & Company Advocates on 5th May 2008 to represent her in the matter, the 5th Defendant has also participated in this matter. I therefore do not find it satisfactory for the 5th Defendant to state that counsel, for 4 years just believed that the defence on record covered all persons including his client. In my view the 5th Defendant is indolent and the court will not aid her at this stage. Once a civil case has been filed it is upon the litigant to ensure the matter is being prosecuted in accordance with rules of the same as required under the law. I agree with the decision of Kimaru J in **Alice Mumbi Nganga Vs Danson Chege Nganga & Another** Civil Case 394B of 2001 [2006] eKLR where the court faced with an application to set aside an order dismissing the suit for want of prosecution stated:

“This court has ruled in several cases that a civil case once filed, is owned by a litigant and not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not, per se, make this court to exercise its discretion in favour of an aggrieved litigant. This court will exercise its discretion in favour of such a litigant after taking into consideration all the factors that are applicable in the case.

The 5th Defendant cannot be heard to say that counsel came in when the parties were prosecuting interlocutory applications and believed the defence on record represented her; that in my view could not stop her in any way from filing a defence. The court cannot therefore favourably exercise its discretion in this matter and accordingly dismisses this application with costs in the cause. Orders accordingly.

Dated and delivered in Nairobi this 6th day of May, 2015.

.....

D A ONYANCHA

JUDGE