



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 23 OF 2019

(FORMERLY NAIROBI ELC NO.44 OF 2018)

PETER MBURU NGUGI (CHAIRMAN)

HOSES MUTHAMA MWIKA (TREASURER)

GEOFFREY NGANGA NYOIKE (SECRETARY

)

(Suing as the officials of KARAGITA SELF HELD MIXED GROUP).....**PLAINTIFFS**

VERSUS

THIKA RIVER ESTATE LIMITED.....DEFENDANTS

RULING

1. This suit filed way back in 1994 and has had quite some history. The suit was heard *ex parte* by Ang'awa J who rendered an *ex parte* judgment on 7th June 2000. An initial application to set aside the *ex parte* judgment made on 14th September 2007 was struck out by Ang'awa J on 20th February 2008 on the basis that the applicant had no authority of the defendant to bring the application. The defendant made a fresh application to set aside the *ex parte* judgment on 16th September, 2008. The application was heard by Nambuye J, **(as she then was)** who delivered a ruling on 24th September, 2010 allowing the application. She set aside the *ex parte* judgment entered on 7th June 2007, by Ang'awa, J. and all consequential orders. The plaintiff appealed the Ruling by Nambuye, J to the Court of Appeal and the Court of Appeal on 16th December, 2016 delivered a judgment dismissing the appeal. The plaintiff vide an application dated 29th December 2016 lodged in the Court of Appeal, sought leave to file an appeal to the Supreme Court. The Court of Appeal vide a ruling delivered on 29th September 2017 declined to certify the matter as suitable for appeal to the Supreme Court holding that no issue of general public interest was raised in the application.

2. Against the foregoing background the plaintiff reverted to this Court and filed the instant application by way of Notice of Motion dated 13th November 2017 on 17th November 2017. By the application the plaintiff sought leave to further amend the Re-Amended plaint dated 27th May 1998 and an order that the status quo be observed pending the determination of the suit. The application was supported on the grounds set out on the body of the application and the affidavit of Peter Mburu Ngugi sworn in support of the application. The plaintiff contended that the proposed amendments were intended to place before the Court the real matters and issues in controversy between the parties so that the same could be determined finally on merits. The plaintiff averred that the proposed amendments had been necessitated to some extent by the ruling rendered by the High Court and the judgment by the Court of Appeal. The plaintiff stated that the proposed amendments would not occasion any prejudice to the defendants.

3. The Defendant through one Brian Ngwiri Kabui a director swore a replying affidavit dated 4th July 2018 in opposition to the plaintiff's application which was filed on 12th October 2018. The plaintiff filed a supplementary affidavit on 15th March 2019 that prompted the defendant to file a further affidavit in reply in 12th July 2019.

4. The defendant vide the replying affidavit set out in considerable detail the history of the matter including the various applications the parties had made in the matter culminating to the appeal and ruling that were delivered by the Court of Appeal on 16th December 2016 and 29th September 2017 respectively. The defendant contend that the matters that the plaintiff wishes to introduce vide the amendment were canvassed before the Hon Lady Justice R N Nambuye (as she then was) in her ruling delivered on 24th September, 2010.

5. Both the plaintiff and the defendant filed written submission to canvass the application. The plaintiff's submissions were filed on 15th March 2019 and the defendant's on 12th July 2019. The parties referred the Court to several authorities in their submission which I have duly

considered and have made reference to some of them in the cause of this ruling .

6. The power of the Court to grant leave to amend pleadings is discretionally and is unfettered. The discretion however must be exercised in a judicious manner and not whimsically. The exercise of the discretion must be to enable the ends of justice to be met having regard to all the attendant circumstances.

Section 100 of the Civil Procedure Act, Cap 21 Laws of Kenya makes provisions for general Power to amend in the following terms.

Section 100:-

The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

7. Order 8 Rule 5 (1) of the Civil Procedure Rules,2010 makes provisions on how amendments may be made and provides as follows:-

Order 8 Rule 5(1) provides:-

(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.

8. The plaintiff by their submissions argue that the intended amendment is necessary for purposes of determining the real questions or issues in controversy between the parties; and that it is, just and in the interest of justice for the amendment to be allowed. The plaintiff contends no prejudice or injustice will be occasioned to the defendant if the amendment is allowed. The plaintiff placed reliance on the cases of *East Africa Portland Cement Ltd -vs- Capital Market Authority & 4 others (2014) eKLR*; *KCB Ltd -vs- Stage Coach Management Ltd (2014) eKLR*, *Central Kenya Ltd -vs- Trust Bank Ltd & 5 others (2000) eKLR*; *Printing Industries Ltd (Another -vs- Bank of Baroda (K) Ltd (2013) eKLR*. In all these cases the principles that govern amendment of pleadings were considered.

9. The general principle regarding applications for amendment is that leave to amend pleadings should be freely granted particularly where the suit has not been set down for hearing unless granting the leave would be prejudicial to the opposite party and such prejudice cannot be atoned by an award in monetary compensation. The general policy in applications for amendment was aptly captured by the Court of Appeal in the case of *Central Kenya Ltd -vs- Trust Bank Ltd & 5 others (2000) 2 EA365* which both parties have cited in support of their submissions. In the case the Court of Appeal stated:-

“The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise 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 be compensated for in costs”

10. The defendant in their filed submission argue that the amendments sought by the plaintiffs seeks to introduce new parties to the suit as plaintiffs replacing the original plaintiff. Further the proposed amendment would introduce new property being the resultant subdivisions following the execution of the Court judgment which was set aside together with the consequent orders flowing from that judgment. Further the amendment seeks to introduce a new cause of action founded on breach of contract and/or fraud respecting a contract that was supposedly entered into on 14th July,1993. The defendant contends that allowing such amendments would be prejudicial to the defendant as it would deprive the defendant of the defence that the plaintiff had no *locus standi* and would further allow the plaintiff to litigate on a cause of action that is otherwise barred by the Limitation of Actions Act, Cap 22 Laws of Kenya. The defendant additionally submits the application has not been brought in good faith and further the delay in bringing the same has been inordinate and is prejudicial to the defendant.

11. The defendant in support of his submissions relied on the cases of *Institute for Social Accountability & Another -vs- Parliament of Kenya & 3 Others (2014) eKLR*; *Central Kenya Ltd -vs- Trust Bank Ltd (2000) EA 365*; *Kassam -vs- Bank of Baroda (K) Ltd (2002) IKLR 294* and *Fredrick M Waweru & Another -Vs Peter Ngure Kimingi (2007) eKLR* among others.

12. The defendant in the application to set aside the *ex parte* judgment stated he had a good defence to the plaintiffs claims and amongst the grounds of defence he preferred was that :-

“the plaintiff was not a legal entity capable of suing and being sued and as such the suit herein was a non-

starter and the plaintiff was enjoying a judgment which could not have been legally granted, had the issue been raised at the hearing”

13. In her ruling Nambuye, J (as she then was) held that it was fundamental whether or not the plaintiff had capacity or *locus standi* to sue. She/further held that a Society registered under the Societies Act Cap 108 Laws of Kenya lacked the status to sue under its name as there was no provision in the Act that enabled it to do so. The judge’s view was that if the defence of lack of *locus standi* was upheld then the suit would be unsustainable. On that account the judge set aside the *ex parte* judgment to enable the defendant to defend the suit and ventilate the issues they had raised as constituting their defence to the suit. The plaintiff’s appeal against the ruling by Nambuye, J as earlier stated was dismissed by the Court of Appeal.

14. The proposed amendment whereby the plaintiff seeks to introduce the officials of the Society as the plaintiffs would amount to introducing a new party to the suit. If a suit is brought by a party who lacks *locus standi*/such a suit is incompetent and a *nullity ab initio*. I do not consider that *locus standi* can be gained by amendment. A suit brought by a party who lacks capacity in my view is fatally defective and cannot be cured by any amendment. There is infact no party that can properly move the amendment in Court. A Court can only be moved by a party that is competently before it. In the case of *Fredrick M Waweru & Another -vs- Peter Ngure Kimingi (2007) eKLR* Visram, J (as he then was) while dealing with a matter where an amendment sought to introduce a new party observed as follows:-

“It is clear that what the appellant sought to do before the Senior Principal Deputy Registrar was to “substitute” a party in the guise of an “amendment application” under O.6 R3. Of course, it was convenient to use O.6R3 and easier to argue that amendment sought arose out of the same cause of action. The appellants were wrong in invoking O.6A because what they were seeking went beyond a simple amendment of the plaint; they sought to introduce a new defendant who clearly had the defence of limitation available to him. He would have certainly invoked the defence if a whole, new suit had been filed against him, but instead the appellants sought to sneak him on through an amendment, in a round-about way”

15. The amendment sought by the plaintiff *inter alia* seeks to substitute the officials of the plaintiff which was described as a welfare society as the plaintiffs in the suit. This would not be an amended but the substitution of a new party altogether. The issue as highlighted above is whether there was a competent party with capacity to institute the suit as it is only such a party that can seek an amendment of the suit. If the amendment was to be allowed it would be prejudicial to the defendant as it would amount to depriving the defendant of the benefit of a defence that had accrued. To the extent that the plaintiff may be attempting to cure a fatal defect in its suit by way of amendment, it is my determination that the defendant stands to be prejudiced. I am not satisfied that the grant of leave to amend the plaint in the circumstances of this case is merited. The issue of *Locus standi* of the plaintiff was raised by the defendant in the application to set aside the *ex parte* judgment and even though, Nambuye, J devoted considerable space to the discussion of the issue in her ruling, the plaintiff did not take cue to make amends. As is evident, the plaintiff was prepared to litigate upto the Supreme Court on the basis that the parties before the Court were the appropriate and proper parties. The application is being made as an afterthought and I do not think there has been any explanation to the delay in making the application for amendment. The defendant made disclosure of its defence at the time of making the application to set aside the *ex parte* judgment and it would be prejudicial to allow the amendment sought.

16. The proposed amendment further under paragraph 8A attempts to introduce a new cause of action founded on breach of contract and fraud. This new cause of action in so far as a new plaintiff is being introduced would be outside the period of limitation under the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya. To allow the amendment would be to give life to a claim that is otherwise stale to the prejudice of the defendant.

17. Accordingly and for the reasons outlined above I am not persuaded to exercise my discretion infavour of the plaintiff. I find no merit in the plaintiffs application dated 13th March 2017 and the same is ordered dismissed with costs to the defendant.

RULING DATED SIGNED AND DELIVERED AT NAKURU THIS 21ST DAY OF NOVEMBER 2019.

J M MUNTUGI

JUDGE