



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 75 OF 2013

(Formerly Hcc No. 102 of 2005)

FIDELIS MUSIKO OKONGA.....PLAINTIFF

VERSUS

RONALD INYANGALA.....1ST DEFENDANT

BETTY MUGANDA.....2ND DEFENDANT

EVERLYNE INYANGALA.....3RD DEFENDANT

BARCLAYS BANK OF KENYA.....4TH DEFENDANT

VIVA PHARMACEUTICALS LIMITED.....5TH DEFENDANT

RULING

Fidelis Musiko Okonga (*hereinafter referred to as the plaintiff/applicant*) commenced this suit by way of plaint on 27.10.2005 against Ronald Inyangala, Betty Muganda, Barclays Bank of Kenya Ltd (*hereinafter referred to as defendants*) claiming that in or about the months of April, 1997, the 1st defendant in the company of the then Branch Manager on the 4th defendant approached the plaintiff with the intent of persuading him to surrender his land certificate in respect of the said parcel of land to the 1st defendant for purposes of using the same to obtain a loan to start a business. Ultimately, the said land certificate was used by the 1st defendant to apply for a loan by gross misrepresentation and fraud according to the plaintiff.

It appears the loan was not paid and the property sold by a public auction. He claimed that he had not been served with any demand notice or the statutory notice. By plaint dated 27.10.2005, the plaintiff claimed mesne profits against the defendants in respect of the plaintiff's residential premises on parcel number Eldoret Municipality Block 5/428, from the 1st day of September, 2002 to the date of judgment or the date of possession and that possession of the said parcel be placed in the hands of the plaintiff and a declaration that the guarantee instrument between the plaintiff and VIVA Pharmaceutical Company and the 4th defendant is null and void for lack of proper execution and authentication/attestation. He prays that corporate veil on Viva pharmaceutical Company be lifted and the 1st, 2nd and 3rd defendants be ordered to clear the loan taken by the company from the 4th defendant or furnish adequate securities to the 4th defendant and a discharge of charge if any be issued to the plaintiff. He is prays for costs of the suit.

The 1st, 2nd and 3rd defendants filed a Memo of Appearance on the 5.1.2006 and also defence dated 23.12.2005 denying the allegation by the plaintiff. The 4th defendant filed defence on 16.5.2006 denying

the allegation by the plaintiff and asserted that the plaintiff executed the charge and guarantee and indemnity dated 15.5.1997 and 27.5.1997 respectively voluntarily and without any coercion provisions or representation on the part of the 4th defendant and it is upon the guarantee that the 4th defendant disbursed the loan upon failure by the honour (Viva Pharmaceuticals Ltd to pay the borrowed sum to 4th defendant sold to property on a public auction. On the 16.11.2007, the plaint was amended to enjoin the 5th and 6th defendants still claiming that the whole transaction was based on fraud.

The plaintiff/applicant has now approached this court by Notice of Motion dated 19.12.2014 again seeking for leave to amend the plaint to clarify the real issues in controversy between the parties. He claims that the application for amendment is made in good faith.

The application is supported by the affidavit of *Fidelis Musiko Okonga* who states that he instituted this suit against the defendants over his property being the land parcel known as **ELDORET MUNICIPALITY/BLOCK/5/428**. That upon instituting the suit, his erstwhile advocates failed to plead the value of the property which is a relevant fact in determining the suit. That he has a valuation of the property by M/s City Valuers and the same is relevant to the case. That he prays that he be granted leave to amend the plaint to incorporate the value of the property. That the value is a relevant matter for the sake of assisting the court in arriving at a just determination of the suit. He contends that no prejudice shall attend to the defendants. That the overriding objective of the civil process shall be attained by the amendment.

The application is opposed by 4th defendant who has filed grounds of opposition. The gist of the grounds of opposition is that the plaintiff was granted leave to amend his plaint within 14 days but failed to do so. The defendant further argues that the amendment sought was within the knowledge of the plaintiff when he made the first application and was granted leave to do so. It is contended that the plaintiff applicant is guilty of laches and that the draft amended plaint does not accord with the requirements of Order 8, Rule 7(2) of the Civil Procedure Rules, 2010. The defendant further contends that the plaintiff intends to introduce a new cause of action through an amendment. Lastly, that the amendment will irreparably prejudice the 4th defendant.

This court observes that the application dated 14.11.2007 was withdrawn on the 18.12.2014 and therefore the argument by the defendant that the plaintiff was granted leave by the court on 31.10.2007 to amend his pleadings within 14 days appears to be misplaced. I have perused the court file and have not seen this order. I do find as a fact that the application dated 14.11.2007 was never prosecuted but was withdrawn on 18.12.2014. From the foregoing, I do find that grounds No. 2 and 3 of the 4th defendant's grounds of opposition was based on misapprehension of facts.

The 4th defendant further argues that the plaintiff is guilty of laches and was offered no explanation for the same.

On this point, I do find that the plaintiff/applicant filed an application to amend the plaint on the 14.11.2007 but did not prosecute it until the 18.12.2014 when it was withdrawn by his new advocate and since there was an application to dismiss the suit for want of prosecution dated 21.10.2010 and filed on 28.10.2010 which was prosecuted before the application to amend dated 14.11.2007 and which was heard, and, determined on 7.11.2012 the applicant cannot be accused of delay.

This court finds that there is no inordinate delay between the period of filing the suit and the first application for amendment and also the period between withdrawal of the application dated 14.11.2007, thus on the 18.12.2014 and the filing of the current application on 18.12.2014.

On compliance with Order 8, Rule 7(2) of the Civil Procedure Rules, 2010 in the numbering and amendments. I do find that the plaintiff can correct these errors before filing the amended plaint.

On the issue of the amendment raising a new cause of action, I do hold that the claim for damages as sought to be amended arises out of the same facts as the initial cause of action for mesne profits that was claimed in the suit by the plaintiff.

I am inclined to exercise my discretion by granting the prayer sought. Leave is hereby granted to the plaintiff to amend his plaint. The amended plaint to be filed and served within 14 days.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF OCTOBER, 2015.

ANTONY OMBWAYO

JUDGE