



## IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 233 OF 2017

BETWEEN

**WAB HOTELS LTD (IN RECEIVERSHIP).....1ST APPELLANT**

**JOSEPH WAMBUA MULUSYA.....2ND APPELLANT**

AND

**INDUSTRIAL DEVELOPMENT BANK LTD.....1ST RESPONDENT**

**LAWRENCE ODORI NABWANA.....2ND RESPONDENT**

**PONANGIPALLI VENKATA RAMANA RAO.....3RD RESPONDENT**

**KOLLURI VENKATA SUBBARAYA KAMA SASTRY....4TH RESPONDENT**

*(An appeal from the ruling No 2 of the High Court of Kenya at Nairobi*

*(Ochieng, J) dated 15th May 2017*

In

H.C.C.C. No 734 of 2002)

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### JUDGMENT OF THE COURT

#### BACKGROUND

1. This is an interlocutory appeal against the ruling of the High Court (**Ochieng, J.**) dated 15th May, 2017 wherein the learned Judge dismissed the application dated 28th March, 2016 filed by the appellants (as Plaintiffs in the High Court) seeking leave to further amend their amended plaint dated 16th September, 2005. The application was filed by **Wab Hotels Ltd** (In receivership), the 1st appellant herein and **Joseph Wambua Mulusya** (the 2nd appellant) and was supported by an affidavit sworn by the 2nd appellant, the Managing Director of the 1st appellant.

2. In a nutshell the background is that on 29th December, 1998, the appellants obtained a loan of Ksh 25,000,000 from **Industrial Development Bank** (the 1st respondent) secured by a debenture (the Debenture) and a first legal charge over **L.R No. Nairobi Block 75/1031** (the suit property) situated in Buruburu, Nairobi. Erected on the suit property is a hotel referred to as **Wab Hotel (the Hotel)**.

3. The appellants defaulted in repaying the loan and on 5th June 2002, the 2nd respondent served the directors of the 1st appellant with a notice that the security created by the Debenture had become enforceable and in pursuance of the powers conferred thereby had appointed **Lawrence Odori Nabwana** (the 2nd respondent) as Receiver and Manager of all the property and assets of the 1st appellant. On 6th April, 2014, the 2nd respondent's appointment as Receiver and Manager was revoked and **Ponangipalli Venkata Ramana Rao** (the 3rd respondent) and **Kolluri Venkata Subbaraya Kama Sastry** (the 4th respondent) were appointed by the 1st respondent as joint receivers of the 1st appellant's property and assets charged under the said Debenture.

4. Aggrieved by this decision, on 5th June, 2002 the appellants filed suit against the respondents in the High Court by way of plaint dated 14th June, 2002 challenging the appointment of the 2nd respondent as the Receiver of the 1st appellant while in exercise of the powers donated by the Debenture.

5. On 16th September, 2005 the High Court granted leave to the appellants to amend the plaint and the amended plaint was filed on 20th September, 2005.

6. On 30th May 2008, the appellants and the respondents recorded a consent in the High Court before **Kimaru, J.**, in the following terms:

***“That the plaintiffs/applicant be and is hereby granted ninety (90) days from today’s date within which to redeem the suit property in Title No NAIROBI/BLOCK 75/1031 by making payment of Ksh. 46,000,000 to the defendant/respondents. In default of the plaintiff’s payment as above, the defendants be at liberty to sell the security property by public auction or private treaty.”***  
The consent was adopted as an order of the Court.

7. The appellants defaulted in paying the sum agreed, and the 1st respondent exercised its statutory power of sale and sold the suit property to one **James Kaniya Gachiri** (the Purchaser) on 24th October, 2008 for the sum of Ksh 46,500,000. The Purchaser obtained vacant possession of the suit property and a Transfer in his favour was duly registered and a Certificate of Lease issued in his name on 12th May, 2009.

8. On 28th March 2016, the appellant *inter alia* sought the court’s leave to further amend the amended plaint to demonstrate that the only property which had been charged to the 1st respondent was the suit property and not **Land Parcel No 1036**; and that the suit property and Land Parcel No 1036 were sold without valuation.

9. The respondents, through the replying affidavit of **Priscilla Nduru Njuguna**, the 1st respondent’s Senior Legal Officer, sworn on 20th January 2017, opposed the application to amend and contended: that the application is an abuse of court process; that it has been made in bad faith; that it will prejudice the expeditious disposal of the matter; that it does not set out a legally valid claim; that it has departed from the original pleadings and introduced a totally new claim; that it is aimed at aiding a negligent pleader to defeat an accrued defence; and that if allowed, it will gravely prejudice the respondents.

10. The learned Judge found *inter alia* that the proposed amendments introduced new matters into the suit; introduced new parties to the suit; substantially altered the original claim; introduced new causes of action; and that the appellants were guilty of inordinate delay. The learned Judge further found that it would be wrong to allow the appellants to lodge claims which were already time-barred by dint of the provisions of the Limitation of Actions Act; and to make findings in respect to matters which were pending before the Employment and Labour Relations Court; and on claims of a criminal nature which the High Court has no jurisdiction to hear and determine as they were pending before courts of competent jurisdiction.

11. The learned Judge further observed that a large part of the Proposed Amended Plaint was in the nature of evidence which if allowed would violate the express rules governing pleadings.

12. The learned Judge therefore concluded as follows:

***“In the result, I find that the grant of leave to further amend the plaint would result in serious prejudice to the defendants; and a probable massive delay in the prosecution of the suit. In other words, the proposed amendments would not enhance the administration of justice; but would hamper the same. Accordingly, the application dated 28th March 2016 is dismissed, with costs to the defendants.”***

13. Aggrieved by that decision, the appellants filed the instant appeal raising twenty seven (27) grounds of appeal faulting the learned Judge *inter alia* for: dismissing the application which sought to bring to the court’s attention the respondents’ fraudulent conduct and mismanagement of the books of account; finding that the appellants sought for valuations in respect of the suit property in 2004 and 2006 while in actual fact the valuations were sought by the 1st and 3rd respondents; failing to find that the inclusion of Land Parcel No 1036 as a new item in the proposed amended plaint was necessary as this issue had not been pleaded in the amended plaint; making final determinations on several issues of fact at an interlocutory stage; and finding that the proposed amended plaint will not enhance the administration of justice while the proposed amended plaint would result in a disclosure of facts that would aid the court in making a fair determination of the issues in controversy between the parties.

#### **SUBMISSIONS**

14. The appeal was disposed through written submissions and oral highlights. The 2nd appellant was in person while learned counsel, **Mr. Maweu** appeared for the respondents.

15. The 2nd appellant elaborated on his written submissions faulting the learned Judge for failing to understand the gist of the proposed amendments. It was the 2nd appellant's contention: that the proposed amendments seek to bring out the real issues in controversy between the parties in this case; that no new facts will be introduced; that no prejudice will be caused to the respondents; and that if the proposed amendment is not allowed, the appellants will be occasioned substantial injustice. The 2nd appellant asserted that **Order 2 Rule 5 of the Civil Procedure Rules** allow for amendment of pleadings at any time before judgment.

16. Opposing the appeal, **Mr. Maweu** submitted that leave to amend is discretionary; that the delay by the appellants in seeking leave to further amend the amended plaint was inordinate, unexplained, unjustified and unreasonably oppressive; that the proposed amendments would blur and muddle the issues and cause delay in the hearing and determination of the suit; that the proposed amendments and fresh causes of actions are statute-barred; and that the proposed amendments sought to unfairly, oppressively and irregularly sneak in and bring on board non-parties, properties, causes of action and claims.

17. It was the respondents' further contention that it will be jurisdictionally impossible for the trial court to interrogate, investigate and determine issues relating to land, crimes and offences against third parties and non-parties; that there are some related criminal and land matters pending before courts of competent jurisdiction; and that if the proposed amendments were allowed, the respondents will *inter alia* suffer prejudicial and irreversible financial burden in legal fees in excess of Kshs. 135,606,891/40.

#### **DETERMINATION**

18. We have considered the record, the submissions, the authorities cited and the law. Granting or refusal of leave to amend any pleading is a discretionary power of the court. The discretion is a judicial one and like all judicial discretions should be exercised rationally and on well settled principles. The general principles stated in **Mbogo and another v Shah [1968] EA 93** are applicable. An appellate court has no jurisdiction to interfere with the exercise of such discretionary power by the trial court unless the court has acted on wrong principles, has misapprehended the law or has acted on no evidence or that the learned Judge was plainly wrong in arriving at the decision.

19. As succinctly stated by **Justice Ibrahim Tanko Mohammad** of the Supreme Court of Nigeria in **Abayomi Babatunde v Pan Atlantic Shipping & Transport Agencies Ltd & Others S.C. 154/2002**:

*“The general law on exercise of discretion is that the discretion is always that of the trial court and not of the appellate court. Hence an appellate court cannot substitute its own discretion.”*

20. This appeal turns on the issue whether the learned Judge exercised his discretion judiciously when he dismissed the appellants' application to further amend their amended plaint.

**Halsbury's Laws of England, 4th Edition (re-issue) Vol. 36 (1)** at Paragraph 76 lays down the purpose of amendments as follows:

*“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.”*

21. **Order 8 rule 1 (1)** of the **Civil Procedure Rules** stipulates that:

*“The court may 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, allow any party to amend his pleadings.”*

**Order 8 rule 5** provides that:

*“An amendment shall be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”*

22. Further, in **Abdul Karim Khan v Mohamed Roshan (1965) EA.289 (C.A)**, the Court laid down the principle that the courts will not permit an amendment that is inconsistent with the original pleading and entirely alters the nature of the defence or plaint.

23. A wider footage on the same issue was given in **Ochieng & Others v First National Bank of Chicago, Civil Appeal Number 147 of 1991** where this Court clearly set out the principles under which courts may grant leave

to amend the pleadings as follows:

*(a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;*

*(b) the amendments should be timeously applied for;*

*(c) power to amend can be exercised by the court at any stage of the proceedings;*

*(d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;*

*(e) 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 Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.*

24. From the record, the proposed amendments seek to bring in new parties to the suit including, **James Kaniya Gachiri** (the Purchaser), **Kinyua Koech Ltd**, **Lloyd Masika Ltd**, **Mulusiah Land Consultants Ltd**, the **Kenya Revenue Authority**, the **Catering & Tourism Levy Development Trustees** and **Adera & Co. Advocates** and the question we have to answer is whether this was going to alter the character and substance of the dispute.

26. In **Sanyu International Limited v Oriental Commercial Bank Limited [2017] eKLR** this Court stated as follows:

*“...the specific persons or entities...would require to be joined as separate parties to the suit, before any decree or order can be made against them. To attempt to make orders against persons or entities who are not party to the suit would be tantamount to condemning such persons or parties unheard, as they would not have been afforded an opportunity to defend their case. Simply put, it would be an exercise in futility.”*

27. Bringing in parties at a late stage as the appellants sought to do with this matter would affect the established principle of affording every party a hearing. It is trite that the right to be heard is a valued right and that no party should be condemned unheard. Accordingly, we find that the learned Judge exercised his discretion judiciously in finding that the third parties and non-parties named in the proposed amended plaint could not be introduced in the pleadings without being afforded an opportunity to be heard.

28. Are the proposed amendments, causes of action arising from the sale and transfer of the suit property, and joinder of the named third parties and non-parties time barred under the Limitation of Actions Act?

In **Gathoni vs Kenya Cooperative Creameries Limited (Civil Application No. 122 of 1981)**, **Potter, JA** observed that:

*“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”*

29. The proposed amended plaint raises causes of action that are premised *inter alia* on the alleged torts of fraudulent and malicious sale, undervaluation, fraudulent accounting, conversion, fraudulent sale of Land Parcel No 1036; mischief, misrepresentation and under sale. From the record, the fresh causes of action arose prior to or after the sale and transfer of the suit property spanning from 2002 to 2008 and are therefore statute barred.

30. It was the respondents' claim that the appellants' delay in seeking the proposed amendments was inordinate and therefore unjustified.

We note that the appellants filed suit vide a plaint dated 14th June, 2002; an amended plaint was filed with leave of the court on 20th September, 2005; and that the appellants applied to further amend the amended plaint vide their application dated 28th March, 2016 which was declined by the High Court and is the subject of the appeal before us. It is notable that the application to further amend the amended plaint was filed eleven (11) years after the amended plaint was filed and fourteen (14) years after the plaint was filed.

31. On the issue of prejudice, while the appellants claimed that the respondents will not be prejudiced by the proposed amendments, the respondents claimed that they would suffer great prejudice including having to suffer 'heavy, unforeseen, prejudicial and irreversible financial burden in legal fees (amounting to Kshs 135, 606,891/40 per scale) with little or no prospects of recovery.' The amount claimed in the proposed amended plaint is **Kshs 9,027,126,094/**. In the circumstances, we find that the learned Judge properly exercised his discretion in finding that the respondents will suffer prejudice which cannot properly be compensated for in costs if the application to further amend the plaint is granted.

32. In **Joseph trading as Aquiline Ochieng and 2 others Agencies v. First National Bank of Chicago [1995] eKLR**, **A. B. Shah, JA**, stated as follows:

***“I would add that allowing an amendment to include a fresh claim of approximately 9 million shillings plus interest from 1984 would cause injustice not only to an individual but also to a banking institution which institution has moneys belonging to the***

***ordinary people of this country. Even such institutions have to make provision for such claims and to ask them to make such a provision some more than 6 years after the alleged event would be doing injustice to such institutions. Justice works both ways. The defendant is entitled to as much protection by the court as the plaintiffs.”*** [Emphasis supplied].

33. Having carefully considered the appeal and evaluated the manner in which the learned Judge exercised his discretion, we are satisfied that he did so judiciously; that he did not address any extraneous factors; that he considered all the relevant factors; and that he properly applied the relevant legal principles. In the circumstances, we find that there is no basis upon which we can interfere with the exercise of that discretion. Accordingly, this appeal is devoid of merit and is dismissed with costs to the respondents.

It is so ordered.

**Dated and delivered at Nairobi this 24th day of April, 2020.**

***M. K. KOOME***

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***JUDGE OF APPEAL***

***F. SICHALE***

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***JUDGE OF APPEAL***

***J. MOHAMMED***

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***JUDGE OF APPEAL***

*I certify that this is a true copy of the original*

***Signed***

**DEPUTY REGISTRAR**