



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CIVIL APPEAL NO. 115 OF 2016

BETWEEN

CATHERINE KORIKO.....1ST APPELLANT

BENJA KORIKO.....2ND APPELLANT

DANIEL KORIKO.....3RD APPELLANT

FELIX KORIKO.....4TH APPELLANT

AND

EVALINE ROSA.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya

at Kisii, (J. M. Mutungi, J) dated 28th October 2016 in Kisii ELC No. 171 of 2011)

JUDGMENT OF ASIKE-MAKHANDIA, JA.

This appeal relates to an application to amend the statement of defence and introduce a new counterclaim after close of the hearing of the plaintiff's case.

By a Plaintiff dated 26th July 2011, the respondent filed suit against the appellant seeking a declaration that she was the lawful owner of **LR No. Transmara/Oloibosoito/12; "the suit property"** General damages for trespass and a permanent injunction restraining the appellants from re-entering or trespassing onto the suit property was also sought.

The appellants filed a defence and counterclaim to the suit. In the counterclaim, the appellants averred that they were the lawful beneficiaries to the Estate of the Kimaiyo Ole Ntiira to the exclusion of the respondent. The appellants claimed that the respondent had unlawfully, fraudulently and unjustifiably petitioned the court for a grant of letters of administration intestate to the estate of the deceased and deprived the appellants off their interest in the suit property.

The suit between the parties proceeded for hearing.

In the meantime, parallel to the hearing of the suit between the parties before the Environment and Land Court, "ELC" the hearing of Kisii Succession Cause No. 105 of 2010 between the parties was going on. A judgment was delivered in the Succession Cause with a finding that the appellants were not beneficiaries of the estate of the deceased Kimaiyo Ole Ntiira.

Aggrieved and prompted by the judgment in the Succession Cause and subsequent to the closure of the respondent's case before the Environment and Land

Court, the appellants by an application dated 24th November 2015 sought to amend before the ELC their statement of defence and counterclaim. One of the grounds in support of the application to amend was that the High Court (**Hon. Sitati J.**)

in the Succession Cause had delivered a judgment to the effect that the appellants were not beneficiaries of the Estate of the deceased. Accordingly, the appellants sought to amend their statement of defence and counterclaim and claim the suit property on account of adverse possession.

The respondent filed grounds of objection to the application. The gist of the objection was that the appellants having contended to be heirs or beneficiaries of the estate of the deceased in Kisii HC Succession Cause No. 105 of 2010, could not be heard to contend and profess a claim for adverse possession over the suit property.

Upon hearing the parties by way of written submissions, the learned judge dismissed the appellants' application. In so doing, the judge stated as follows:

[10] The plaintiff has testified, has been cross-examined and re-examined and has closed his (sic) case on the basis of the original pleadings. The plaintiff closed his case on 12th March 2014.... The defendants having failed to establish they were in fact beneficiaries of the estate of the late Kimaiyo Ole Ntiira as they had claimed now seek to contest the ownership of the suit land on the basis that they are adverse possessors.....

[11] The defendants have no doubt come to realize that their case stands on shaky ground following the determination by the court that the defendants were not beneficiaries of the late Kimaiyo Ole Ntiira. The amendment of the defence and counterclaim proposed by the defendants quiet evidently introduces a new cause of action and for all intent and purposes constitutes a new action. If the amendments were to be admitted, the plaintiff would be faced with a fresh action arising from the counterclaim. The defendants as it were, wish to make a 360 degree turn and abandon their claim as beneficiaries entitled to the estate of the late Kimaiyo Ole Ntiira to one of being entitled as adverse possessors. The proposed amendment would totally change the character of the suit and in my view would not be without prejudice to the plaintiff who has had to battle claims in the Succession Cause(Kisii HC Succession Cause No. 105 of 2010) and now in the instant suit.....

[14] In the instant suit, it is apparent the decision that the defendants are not beneficiaries of the late Kimaiyo Ole Ntiira precipitated the filing of the instant application for amendment. I am not inclined to exercise my discretion in favour of granting the application. I accordingly decline to grant the application.

Aggrieved by the ruling of the learned judge, the appellants have lodged the instant appeal citing the following grounds in their memorandum of appeal.

- (i) The judge did not exercise his discretion properly and judiciously.
- (ii) The decision of the judge was manifestly wrong in the circumstances of the case.

At the hearing of the appeal, learned counsel **Mr. Nyamori Nyasimi** represented the appellants while learned counsel **Mr. Oguttu Mboya** appeared for the respondent. Both parties filed written submissions and cited authorities. Both counsel relied entirely on their written submissions and made brief oral highlights.

The appellants rehashed the background facts leading to the impugned ruling by the learned ELC judge. It was submitted that the judge erred in failing to exercise his discretion to allow amendment of the statement of defence and counterclaim. Counsel submitted that it is settled law that amendments should be freely allowed at any stage of the proceedings even if they introduce a new cause of action so long as they do not cause any injustice or prejudice to the other party. It was urged that even if a proposed amendment seeks to set up a new cause of action which is outside the limitation period, it should be allowed. That in the instant matter, the learned judge did not exercise caution in denying the appellants an opportunity to ventilate their claim for adverse possession. That the proposed amendment was sought in good faith. That the judge erred in holding that the respondent would be prejudiced since the plaintiff's case had been closed. That no prejudice will have been occasioned to the respondent as he could have been compensated by an award of costs.

For the respondent, counsel rehashed the proceedings before the trial court and emphasized that the respondent had closed her case when the application to amend the defence and counterclaim was filed. That at the time when the respondent's suit was heard, the appellants' passion and basis for cross-examination was anchored on the allegation that the respondent had fraudulently obtained letters of administration for the estate of the deceased. That the appellants could not now turn around and plead adverse possession when initially their claim was as beneficiaries of the estate of the deceased. It was urged that the proposed amendments to the defence and counterclaim were inconsistent with the previous cause of action and should not be allowed.

It was further urged that amendment of pleadings is at the discretion of the court. That in this matter, the learned judge properly exercised his discretion and declined to allow the proposed amendments. Citing the case of **Chemwolo & another -v- Kunende, (1986) KLR** it was submitted that this Court should not interfere with the exercise of discretion by the learned judge unless I am satisfied that the judge misdirected himself in some matter or that the decision arrived at was manifestly wrong. Counsel submitted that in this matter, the learned judge did not misdirect himself and did not arrive at a manifestly wrong decision.

I have considered the record of appeal, the grounds of appeal as well as submissions by counsel and the authorities cited. Being a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my own conclusions. In **Selle -vs- Associated Motor Boat Co. [1968] EA 123**, it was expressed:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such

an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -v- Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

The contestation in this appeal is that the learned judge erred in dismissing the application to amend the statement of defence and counterclaim. The general rule is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs. (See Eastern Bakery -v- Castolino (1958) EA 461). Nevertheless, an amendment should not be allowed if it causes injustice to the other side.

In Abdul Karim Khan -v- Mohamed Roshan (1965) EA.289, this Court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and which entirely alters the nature of the defence or plaintiff. This Court again in Ochieng and Others -v- First National Bank of Chicago, Civil Appeal Number 147 of 1991 set out as follows the principles under which Courts may grant leave to amend the pleadings:

- 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 plaintiff the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.*

Applying the foregoing principles to this appeal, in the original statement of defence and counterclaim, the appellants had anchored their defence on the basis that they were beneficiaries of the estate of the deceased. The High Court in Kisii Succession Cause No. 105 of 2010 determined that the appellants were not beneficiaries of the estate of the deceased. Counsel for the respondent informed me that no appeal has been proffered against the judgment in the Succession Cause.

In Haro Yonda Juaje -v- Sadaka Dzenge Mbauro & Kenya Commercial Bank (2014) eKLR it was stated:

[29] One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered Land Act and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property. The appellants' application to amend the statement of defence and counterclaim was nothing but an indirect attempt to re-open litigation over the suit property with a view to circumventing the substantive effect of, and the rights of the parties as had been determined in the Kisii High Court Succession Cause No. 105 of 2010. I cannot be blind to this attempt and I decline to condone the same. A party cannot be allowed to amend pleadings in one case in order to re-open litigation between the same parties in another case.

Further, it is not in dispute that in declining to allow amendment of the statement of defence and counterclaim, the learned ELC judge was exercising discretionary power. The Supreme Court in the case of Apungu Arthur Kibira -v- Independent Electoral & Boundaries Commission & 3 others [2019] eKLR expressed itself as follows:

[39] We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v. Bashir (2010) NZSC 112; (2011) 2 NZLR 1 (Kacem) where it was held [paragraph 32]:

"In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."

In this appeal, the appellants have not demonstrated to my satisfaction that the learned judge committed an error of law or took into account an irrelevant consideration or that the decision was plainly wrong. It has not been demonstrated to my satisfaction that the learned judge's decision to dismiss the application to amend was capricious or injudicious. Mere allegations of prejudice and an averment that the respondent can be compensated with costs is not proof that judicial discretion has not been exercised properly. Persuaded by the merits of the dicta from the case of Apungu Arthur Kibira -v- Independent Electoral & Boundaries Commission & 3 others [2019] eKLR, I find that the

learned judge did not err in exercising his discretion to dismiss the appellants' application to amend the statement of defence and counterclaim.

Comparatively, in the South African case of **Robinson –v- Randfontein Estates Gold Mining Company Limited, 1925 AD 173** Innes CJ, who delivered the judgment with which the majority of the court concurred, declined to interfere with the trial court's refusal to allow an amendment. The trial court had refused to allow the amendment on the ground of prejudice to the defendant. The amendment, if allowed, would have introduced a new factor into the case: it would, almost certainly have involved the calling of a witness who had not been called.

In the instant matter, in dismissing the appellants' application, I note that the learned judge aptly stated that if the amendment were to be allowed, it would change the character of the suit and the respondent would be prejudiced as she had battled claims in the Succession Cause and now in the instant suit. In this context, I am inclined to adopt the dicta by this Court in **Rubina Ahmed & 3 others v Guardian Bank Ltd, (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR** where the Court declined to interfere with the discretion of the trial judge to refuse amendment of pleadings. This Court observed:

In our view, in considering the various factors he did, the learned Judge was simply balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

In totality, I find that this appeal has no merit and I would dismiss with costs to the respondents

As Kiage, J.A. concurs, it is so ordered.

This Judgment is delivered pursuant to rule 32(3) of the Court of Appeal rules as Odek, J.A passed on before the Judgment could be delivered.

Dated and delivered at Nairobi this 10th day of July, 2020.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original. Signed

DEPUTY REGISTRAR

JUDGMENT OF KIAGE, JA.

I have had the benefit of reading in draft the Judgment of my learned brother Makhandia, J.A. I wholly agree with his analysis and concur in his conclusions with nothing useful to add.

Dated and delivered at Nairobi this 10th day of July, 2020.

P. O. KIAGE

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JUDGE OF APPEAL