



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & ODEK, J.J.A)

CIVIL APPEAL NO. 203 OF 2013

BETWEEN

RUBINA AHMED.....1ST APPELLANT
AHMED AFTAB.....2ND APPELLANT
TEXTILE INVESTMENTS LIMITED.....3RD APPELLANT
MAVIN M. MEHTA.....4TH APPELLANT

AND

GUARDIAN BANK LTD (Sued in its capacity as a
successor in Title to First National Finance Bank Ltd).....RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (Mabeya, J) dated on 28th November, 2012

in

H. C. C. No. 1129 of 2013)

JUDGMENT OF THE COURT

This is an interlocutory appeal. The parties are still locked up in a suit before the High Court which has been pending for the last 22 years! The appeal relates to the refusal by the High Court (**Mabeya, J**) to grant two of three orders sought by the appellants in their motion dated 26th March, 2012. The motion sought leave of the court to enjoin a Company known as **UNIVERSAL APPARELS (EPZ) LTD** as a plaintiff in the suit; an order for substitution of the original defendant with GUARDIAN BANK LIMITED; and leave to further amend their already amended plaint. Only the order for substitution of the original defendant was granted. As the **grant, or refusal to grant, such orders entails the exercise of judicial discretion, the only issue before us is to determine whether such discretion was exercised judiciously.**

A short background to the appeal will suffice.

The appellants were shareholders and Directors of **UNIVERSAL APPARELS (EPZ) LTD (the company)** in 1996 when the company sought from the respondent bank, and was granted credit facilities to the tune of USD 400,000 (about Ksh.25 million). As security for the financing, the company issued a debenture over its present and future assets. The Directors also issued personal guarantees for the facility. As fate would have it, the company defaulted in repayments and the bank, in May 1997, recalled the facility, and in default of settlement, appointed a receiver to run the business of the company. The bank also filed **HCCC No. 2496 of 1997 - *First National Finance Bank Limited vs Universal Apparels (EPZ) Ltd, Rubina Ahmed and Ahmed Aftab***. The latter two defendants are the 1st and 2nd appellants before us. The three defendants in that suit did not file any defence and

therefore final judgment was entered for the liquidated sum of USD 319,401.04. The Directors thereafter entered into a consent to pay the decretal amount by agreed installments to avert execution and indeed made one installment payment. But the other payments never came. Instead they applied to have the consent set aside and also sought an order for consolidation of the suit with **HCCC No. 1129 of 1997**, the suit which gave rise to this appeal, which had already been filed. In the suit they are seeking an order to stop the appointment of the receiver; the annulment of the debenture; and general as well as special damages. There were other skirmishes in HCCC No. 2496 of 1997, but in the end the company and the Directors did not succeed in overturning the court decree or obtaining the orders they sought. However, the decree could not be executed because the company had no attachable assets.

The bank then turned to the insurance company that had issued the Performance Bond and sued it for recovery of the sum of Ksh.24,208,710, together with interest thereon. **HCCC No. 874 of 2002 - First National Finance Bank Limited vs Kenindia Assurance Company Limited** was filed and judgment was obtained against the Insurance company.

In those previous cases, the appellants here, especially the 1st and 2nd, took a decidedly active role.

After a 15 year lull of inactivity, the appellants filed the motion decided on by Mabeya, J. on 28th November, 2012, which decision provoked this appeal. In rejecting the prayer for joinder of the company in the suit, the learned Judge appreciated that the court had the power under **Order 1 Rule 10 (2)** of the **Civil Procedure Rules** to, enjoin a party whose presence before the court may be necessary in order to enable the court to effectually and completely adjudicate upon and settle the questions involved in the suit. This may be done at any time, whether on application or *suo motu*. The Judge also appreciated that the question of addition or striking out of parties is a discretionary one, before he reasoned as follows:

"8. The Plaintiffs have indicated that Universal Apparels (EPZ) Limited is a necessary party to this suit by virtue of the fact that it suffered consequential losses out of the Receivership that was sanctioned by the Defendant. That by virtue of the Plaintiffs' being subscribers and shareholders of the aforesaid company, they too suffered losses due to the receivership. This by all means seems to be a credible argument for seeking the addition of Universal Apparels (EPZ) Limited as a Plaintiff. However, having said this, it is not lost to this court that this application has been brought fifteen (15) years after the institution of the suit. The Plaintiffs have not attempted to explain this delay. I note that this court has previously given leave to the Plaintiffs to amend their Complaint and even then, they did not move the court on the addition of Universal Apparels (EPZ) Limited as a Plaintiff. Further, it was also denied that it was within the knowledge of the Plaintiffs concerning the litigations between the Universal Apparels (EPZ) Limited in both HCCC No. 2496 of 1997 - First National Finance Bank Limited vs Universal Apparels (EPZ) Ltd and HCCC No. 874 of 2002 - First National Finance Bank Limited vs Kenindia Assurance Company Limited wherein the Plaintiffs are said to have sworn some affidavits on behalf of the said Universal Apparels (EPZ) Limited. That even with this knowledge, the Plaintiffs did not deem it necessary to enjoin the said company to the suit until now - fifteen years later. Given this knowledge, the Plaintiffs ought to have included the Universal Apparels (EPZ) Limited as a Plaintiff at the institution of the case or in the alternative, move this Court to enjoin the Universal Apparels (EPZ) Limited as a Plaintiff at the earliest opportune time. I am aware that order 10 Rule 2 allows an application of this nature to be made at any stage of the proceedings. It has not restricted the time for the bringing of such an application. But to wait for 15 years since the commencement of the suit and seek to invoke that provision in my view is not proper. In addition, the fact that there have been previous proceedings involving that company and the Defendant and decisions have been made therein, of which the Plaintiffs are aware, does not appeal to this court's discretion. To my mind therefore, presenting this application at this juncture is synonymous to requesting the court to aid a negligent pleader. I hold true to the maxim that "Equity does not aid the indolent" and that "delay defeats justice."

The Judge observed that there was no contention made that it was not possible to adjudicate the claim effectively without enjoining the company, and in his view, it was possible to do so.

On the second prayer for further amendment of the plaint, the learned Judge rejected it on the following grounds:

"13. As indicated earlier in this ruling, I note that this matter has been ongoing since 1997. The only activity that took place between that time and now was in 2002 when the Firm of Rachier & Co. Advocates took over the Plaintiffs' case through a Notice of Change dated 9th December 2002. Leave had in the past also been granted to the Plaintiffs to amend the Complaint which they did in 1997. The proposed further amendments are now being sought fifteen years after the institution of the case. Surely, I

must say, fifteen years goes beyond the phrase “mere delay”. The Plaintiffs herein have been in a deep slumber and this court cannot and shall not aid such indolence. I am inclined to agree with the Defendant’s arguments that it will be prejudiced as the issues that are now sought to be added happened several years ago and the Defendant shall be hard pressed to trace some witnesses or even find vital evidence in respect thereof. I find that such a prejudice cannot be compensated by way of costs. In the Central Kenya Limited case (supra) [Central Kenya Limited vs Trust Bank Limited (2000) EALR 365], the learned judges did state;

“...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 properly be compensated for in costs.”

In the case at hand, not only the application is being brought after a long delay, but there is also the issue of the possible prejudice by the Defendant on the rights that have been enured to it by virtue of the decision already made in its favour. Further, it was not disclosed in the Affidavits filed in support of the application when the particulars sought to be pleaded came to the knowledge of the Plaintiff. This court cannot speculate on that. I am therefore of the view that the amendments sought are not made in good faith, and that if they are allowed they will be prejudicial to the Defendant which prejudice cannot be compensated by way of costs.”

Challenging those findings, the appellants raised some 15 grounds in their memorandum of appeal. Despite an order made for the parties to file written submissions, none complied. Learned counsel for the appellant, **Mr. F. G. Thuita** urged the appeal orally submitting on the issue of joinder that the learned judge erred in focussing on the issue of delay even after making the finding that the company was a necessary party to the claim. In his view, such delay must be shown to prejudice the other party, and there was no prejudice in this case since the respondent could be compensated with costs. Counsel castigated the trial court for speculating about availability of witnesses after 15 years when there was no evidence from the respondent to that effect. He cited the case of Central Kenya Limited vs Trust Bank Limited (2000) EALR 365, for the proposition that mere delay is not a ground for refusal to grant the application. He also cited the case of Nderitu Wachira Receiver & Receiver & Manager of Bulleys Tanneries Ltd. (Under Receivership) & 4 Others vs Siraji Enterprises Ltd & Another [2016] eKLR on the principle that joinder of parties and amendment of pleadings are freely and liberally granted.

As for the prayer for further amendment of the plaint, counsel observed that the appellants wanted to plead special damages which they had not, and also provide particulars for bad faith on the part of the respondent. In his view, the appellants cannot succeed on the basis of the original pleadings and it was necessary therefore to allow them to plead their whole case. He relied on the case of Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited [2013] eKLR, and Coffee Board of Kenya vs Thika Coffee Mills Limited & 2 Others [2014] eKLR on the principles applicable in amendment of pleadings.

On the other hand, learned counsel for the respondent **Mr. Justus Obuya**, submitted orally that the intended joinder of the company and consequent further amendment of the plaint would seriously prejudice the respondent. That is because the respondent has a vested right to two judgments obtained against the company and two of the appellants in HCCC No. 2496 of 1999 and HCCC No. 847 of 2002. The intention of the appellants was to re-litigate the same issues which are already determined. In his view, the orders would be prejudicial to the respondent and the trial Judge was right to state so. In addition, counsel submitted, the appellants were guilty of laches and therefore not deserving of equitable remedies.

We have considered the matter fully. As stated earlier, this appeal turns on whether the learned Judge exercised his discretion properly in rejecting the two prayers made by the appellants. Before we can interfere with such discretion, we must be satisfied that the learned Judge misdirected himself in some matter and as a result arrived at a wrong decision or that he misapprehended the law or failed to take into account some relevant matter. **Madan, JA** (as he then was) captured the principle more succinctly in United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd (1985) EA 898 as follows:

"The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

Was the decision to reject the joinder of the company as a plaintiff in the appellants' suit judiciously arrived at? Quite plainly, the court had the power under **Rule 10 (2) of Order 1** of the **Civil Procedure Rules (CPR)** to grant the order sought. It provides that:

"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck

out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added." (Emphasis supplied)

Numerous court decisions have construed the application of that Rule and we need only refer, for emphasis, to this Court's decision in **J M K vs M W M & Another [2015] eKLR** where it stated thus:-

"Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

"The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties"

.....

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10 (2) of our Civil Procedure Rules, in Tang Gas Distributors Ltd vs Said & Others [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.

The trial judge in this matter was alive to those principles and stated them. That is how he reached the conclusion that the company may well be a necessary party for the effectual and complete adjudication of the claim. He also found, correctly in our view, that the issue of *res judicata* which was urged by the respondent, was not a relevant consideration at that stage as the parties would have the opportunity to agitate it once the joinder issue was resolved. The learned Judge was rather disturbed by the 15-year delay which had no explanation, and the gravity of the prejudice which he believed the respondent would be exposed to, that is, the unchallenged right to final judgments against the company in previous litigation, which would be torpedoed through re-litigation. Would the latter considerations outweigh the liberal principles on joinder of parties under the rule?

As aptly cautioned in the **United India Insurance Co. Ltd case (supra)**, this Court will not simply interfere with judicial discretion on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The factors of delay and prejudice were relevant for consideration and we have no reason to fault the learned judge in the manner he considered them, even if we could have given them different weight. The decision to reject the joinder of the company was sufficiently explained by the trial Judge and was not capricious. We so find.

What about the refusal to amend the amended plaint? Amendment of pleadings is another discretionary power, liberally exercised, which is donated under **Order 8 rule 5 (1)** of CPR. It provides:-

"For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either on 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."

In the case of **Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited [2013] eKLR**, which was relied on by the appellants, this Court differently constituted observed:-

"The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 Others vs First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-

"The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that 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 Limitation Acts."

See also **Eastern Bakery vs Castelino (1958) E. A. 461** per Sir. Kenneth O'Connor P. Once again, the learned Judge was fully aware of the principles applicable and referred to several authorities expounding them. He noted that the appellants had been granted leave in 1997 to amend their pleadings and in fact did so. Then they went

into 'deep slumber' for a period of 15 years. No explanation was given for the delay. The Judge considered such conduct against the possibility that the quality of the respondent's documentary evidence and availability of witnesses would be compromised. The Judge further questioned the failure by the appellants to explain when the information used in the intended amendments came to their knowledge, and in the absence of any explanation, concluded that the amendments sought were not in good faith. Such conclusions were assailed by the appellants as being speculative, and we are asked to infer an improper exercise of discretion.

We are afraid we cannot accept that invitation. The issues of delay, good faith and prejudice were certainly relevant for consideration and the trial Judge did not err in considering them. The learned authors of *Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1)* at *paragraph 76*, state the following about amendments of pleadings:-

“...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. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”. [Emphasis added].

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. See the case of *Selkent Bus Co Ltd v/a Stagecoach Selkent vs Moore [1996] IRLR 661*. In any event, the intended amendments lost much of their force and relevance once the decision not to enjoin the company became inevitable. We find no good reason to disturb the Judge's exercise of the discretion to reject the further amendment.

For the reasons given above, this appeal has no merits and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 22nd day of March, 2019.

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR