



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KANTAL, J.J.A)

CIVIL APPEAL NO. 59 OF 2016

BETWEEN

PETER OPANDE.....APPELLANT

AND

NGAGA ENTERPRISES LIMITED.....RESPONDENT

*(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Ogola, J) dated on 11th February, 2016*

*in*

*H.C.C.C. No. 796 of 2009)*

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**JUDGMENT OF THE COURT**

[1] This is an interlocutory appeal against the ruling delivered by **Ogola, J** in which he dismissed a notice of motion dated 15th June, 2015 that was filed by **Peter Opande** (the appellant herein) seeking leave to further amend his defence and counterclaim.

[2] **Ngaga Enterprises Limited** (respondent herein) had initiated the suit in the High Court against the appellant through a plaint dated 26th October, 2009. In the suit, the respondent sought several orders against the appellant, including, an order that it is entitled to property known as **LR. No. 9230/06, (original No. 9230/3)** (herein the suit property). The respondent sought a declaration that the sale agreement signed on 12th July, 2005 between it and the appellant was illegal, null and void, and an order that the appellant unconditionally and with immediate effect vacate the suit property.

[3] In a defence and counterclaim, the appellant denied the respondent's claim, maintaining that the agreement entered into between him and the respondent was not void, and that he had paid Kshs.1,200,000/- leaving a balance of Kshs.1,800,000/-which he has not paid as the respondent has not fulfilled some material terms of the agreement. The appellant therefore, counterclaimed for specific performance of the agreement and urged the court to dismiss the respondent's suit

[4] On the 29th October, 2010, the respondent filed an amended plaint in which it sought an order against the appellant for eviction and/or vacant possession of the suit property. By an amended defence and counterclaim dated 29th November, 2010, the appellant responded to the amended plaint by denying the existence of any sale agreement dated 12th June, 2005 between himself and the respondent, and in the alternative pleading that if there was any such agreement, the breach of the contract was occasioned by the respondent who failed to comply with the terms of the sale agreement.

[5] By a notice of motion dated 15th June, 2015, filed on 17th June, 2015, the appellant moved the court under Order 8 rule 3 & 5 and Order 51(1) of the Civil Procedure Rules; and section 63 & 100 of the Civil Procedure Act, for leave to further amend his amended defence and counterclaim. The grounds upon which the application was anchored was the fact that the appellant had changed advocates and upon review, the new advocates had deemed it necessary to modify the defence and counterclaim, to accord

with the facts, documents and the law, and to bring clarity to the pleadings, so as to have the real question in controversy determined.

[6] In a supporting affidavit sworn on 15th June 2015, the appellant reiterated that it was necessary for him to amend his defence and counterclaim and urged that in the interest of justice, and in line with the overriding objective of the court, his application be granted.

[7] A copy of the draft Further Amended Defence and Counterclaim was availed and amongst the amendments sought to be introduced, was that the land sold to the appellant was 50 acres, which was a subdivision of the suit property and not the entire parcel. The appellant also proposed several amendments in regard to the counterclaim and prayers to include several declarations as well as an order for injunction.

[8] By grounds of opposition dated 13th July, 2015, the respondent opposed the appellant's motion contending that it had not been brought timeously; that the proposed amendments incorporated new causes of action; and that the application is an abuse of the court process considering that the appellant previously sought to have the respondent's suit dismissed for want of prosecution.

[9] **Anthony Gathiuni**, a director of the respondent also swore a replying affidavit in which he swore, *inter alia*, that the proposed counterclaim had been intertwined with the proposed further Amended Defence so as to form an entirely new claim, and that the amendment being brought six years after filing the first defence, the respondent would be highly prejudiced.

[10] On 1st October, 2015, following consultations with the party's advocates, the court gave directions for the parties to file and exchange written submissions, which both parties did. In his submissions, the appellant reiterated that the proposed amendments were necessary to clarify key and important matters central to his defence; to consolidate all his defences and/or possible causes of action; and to introduce alternative defences and/or prayers. The reasons for the delay in filing the motion was explained as the respondent's indolence; the appellant's change of advocates; and mistakes, oversights, errors and omissions by the appellant's previous counsel.

[11] In regard to the contention that the proposed amendments amount to a new cause of action, the appellant maintained that the alternative prayers introduced regarding the equitable doctrine of estoppel and constructive trust were necessary to avoid a mutation of law suits purporting to claim different reliefs under the same facts. The appellant relied on order 8, rule 3(5) of the Civil Procedure Rules, the Law of Contract, Limitation of Actions Act, and the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR**. The appellant urged that the rejection of his application for further amendment of the defence and counterclaim, would result in injustice to him as he would be prevented from relying on key pillars of his defence and the bedrock to his substantive counterclaim. He therefore urged the Court to allow the application.

[12] In its written submissions, the respondent reiterated that it was relying on the grounds of opposition that it had filed and the replying affidavit sworn by Anthony Gathiuni.

[13] In dismissing the appellant's motion, the learned Judge reasoned *inter alia* as follows:

***“While the law allows an application for amendment of pleadings at any time before the judgment, the parties must still show legal justification for amendment. Proposed amendments to pleadings must on the face show clarity and purpose. Any proposed amendments which appear to blur or muddle the issues cannot be allowed. An amendment which on the face thereof appears to be so extensive and risks blurring the original issues cannot be allowed. Such an amendment will cause prejudice to the respondent and the court must be careful to distinguish an acceptable proposal for amendments form (sic) those that blur the original issues and causes the matter to delay.*”**

***I have considered the application against the law and against the parameters I have set up at paragraph 7 above. In my view this application is brought rather too (sic) in the day. The defendant filed an amended defence and counterclaim on 26th January 2011. It took the defendant a further four years to realize that he needed to amend his defence and counter-claim. While the delay herein alone is not a bar to the grant of the orders, it is also my view that the application is an afterthought, and is brought primarily to blur the issues and to possibly delay the hearing and finalization of this matter. I say this because the proposed amendments are so extensive including the prayers sought as to amount to a fresh suit. Fresh averments have been added throughout the draft Further Amended Defence and Counterclaim thereby changing the original defence from mere denials. Further the proposed counterclaim is intertwined with the proposed further amended defence so as to form***

***an entirely new claim. The court gets the impression that the true intension (sic) of the defendant/applicant is to rewrite the original defence and improve his case as the matter progresses. The draft Further Amended Defence and counterclaim has brought in new prayers that are so substantial as to form an entirely new suit.***

***In my view, the proposed amendments, being filed six years after the defence was filed, if allowed, will be highly prejudicial and unjust to the plaintiff as the original tenor of the suit and the defence would be entirely lost to the detriment of the plaintiff.”***

[14] The appellant has challenged the ruling on 13 grounds that are stated in his memorandum of appeal. Essentially, the appellant contends that the learned Judge erred in failing to allow the further amendment of his defence and counterclaim, when amendment of pleadings can be done at any time during trial; that the learned Judge erred in finding that the proposed amendments sought to introduce new causes of action; that the learned Judge failed to consider the principles governing amendment of pleadings and thus wrongly exercised his discretion.

[15] At the hearing of the appeal, learned counsel, **Mr. Maweu** appeared for the appellant and highlighted the appellant’s written submissions. In brief the appellant identified four issues for determination in the appeal. These were: what are the principles governing an application for amendment of pleadings? And in dismissing the appellant’s motion did the learned Judge apply these principles correctly? Should the Court interfere with the exercise of discretion by the learned Judge?

[16] The appellant submitted that the learned Judge wrongly exercised his discretion in denying him leave to further amend his defence and counterclaim. In this regard, the appellant relied on the principles that guide the exercise of discretion in amendment of pleadings as set out by this Court in **Central Kenya Ltd –vs- Trust Bank Ltd & 5 Others [2000] eKLR**; and argued that the proposed amendments sought to expound the circumstances surrounding the execution of the sale agreement upon which the respondent’s suit was anchored.

[17] In addition, the appellant argued that the proposed amendments were necessary to correct the mistakes of his previous counsel, who filed an amended defence constituting mere denials. In support of his submission, counsel relied on the case of **Patel –vs- Joshi (1952) 19 E.A.C.A 42**, where the Court observed, that applications for leave to amend even if necessitated by negligence or carelessness, will be granted so as to enable the right question to go to trial, unless the party applying was acting *mala fide* or by his blunder, had done some injury to his opponent which could not be compensated by costs or otherwise.

[18] The appellant asserted that Order 8 Rule 3(5) of the Civil Procedure Rules, allows for amendment of pleadings at any time during the subsistence of the suit, and that no irreparable prejudice would be caused to the respondent that cannot be compensated for by costs. The appellant relied on **Eastern Bakery –vs- Castelino (1958) E.A 461**, where it was held 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 side can be compensated by costs.

[19] Urging the Court to interfere with the exercise of discretion by the learned Judge because the same was not judiciously exercised, the appellant also cited **United India Insurance Co. Ltd –vs – East African Underwriters (Kenya) Ltd [1985] KLR 898**, where Madan, JA stated:

***“The Court of Appeal is only entitled to interfere (with the discretionary decision of the Judge appealed from) 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.”***

[20] The respondent also filed written submissions and a list of authorities. The submissions were highlighted by the respondent’s counsel, **Mr. Mirie**. In brief, the respondent submitted that the learned Judge exercised powers under Order 8 Rule 3 & 5 of the Civil Procedure Rules, which were discretionary powers, and that in accordance with the principle stated in **Mbogo & Anor vs. Shah [1968] EA 93**, this Court can only interfere with the exercise of discretion by the learned Judge, if it is satisfied that he/she proceeded on wrong principles or misapprehended the law, or acted on no evidence.

[21] The respondent argued that generally, an amendment sought before judgment ought to be allowed if it does not raise a new cause of action, but even where it raises a new cause of action, it can be allowed with limitations. The respondent submitted that the appellant’s amendments sought to introduce claims in constructive trust and estoppel in agricultural land, when the requirements of section 6 of the Land Control Act had not been met. Secondly, the dispute was purely contractual, within section 4 of Limitation of Actions Act, and the

amendment seeking to introduce estoppel and constructive trust were an attempt to defeat the defence of limitation.

[22] The respondent relied on **Eastern Bakery –vs- Castelino** (supra) for the proposition that the court had no power to enable one distinct cause of action to be substituted for another, or to change by means of amendment, the subject matter of the suit. The respondent maintained that the amendments were so extensive and risked blurring the original issues, rather than clarifying the real issues. In addition, that the amendments were intended to delay the hearing and finalization of the matter, to the detriment of the respondent, as the appellant remains in possession of the suit property.

[23] We have considered this appeal, the submissions made by the parties, and the authorities cited. The appeal arises from an application that was brought under Order 8 rule 3 & 5 of the Civil Procedure Rules which gives the Court discretion to allow any party to amend his pleadings. What is in issue is whether the learned Judge properly exercised his discretion under those rules in dismissing the appellant's motion for further amendment of his defence and counterclaim.

[24] We concur with the appellant that the circumstances under which this Court can interfere with the discretion of the trial court are as stated by **Madan, JA** (as he then was) in **United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd** (supra). It bears repeating that this Court can only interfere with the exercise of discretion by the trial Judge, if it satisfied that the learned Judge misdirected himself in law, or misapprehended the facts, or took into account irrelevant considerations, or failed to take into account some relevant matter, or that his decision is plainly wrong.

[25] In **Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited** [2013] eKLR, which was relied on by the appellant, this Court held that:-

***“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.”***

*(Emphasis added)*

[26] Of relevance also is **Central Kenya Ltd. v Trust Bank Ltd & 5 Others** (supra), in which the Court 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 properly be compensated for in costs.***

***The paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit...”***

[27] It is evident from the above, that while delay in bringing an application for amendment is a relevant factor, it cannot be the sole reason for refusing an application for amendment of pleadings, unless it is demonstrated that as a result of the delay, the opposite party will suffer prejudice that cannot be atoned for in costs. The proposed amendments must also be brought in good faith and be relevant in identifying the real issues in controversy between the parties. The proposed amendments must also not prejudice the respondent by denying it a defence that has accrued to it. An amendment that introduces a new cause of action will not be allowed, if the respondent will be denied a defence of limitation.

[28] From the draft further amended defence and counterclaim that was attached to the appellant's motion, it is evident that the proposed amendments, sought not only to clarify the appellant's defence, but also to substantially change the counterclaim. This is evident from the

many additional paragraphs proposed, giving the particulars of the counterclaim. It is also apparent in the prayers. While the main original prayer in the appellant's amended defence that was dated 29th November, 2010, was specific performance, the proposed further amended defence and counterclaim that was filed with the appellant's motion on 17th June, 2015, has a plethora of prayers in the counterclaim as follows:

**“a) a declaration that the plaintiff's action of knowingly obtaining purchase moneys from the defendant and willfully granting actual possession and occupation of the demarcated fifty (50) acres of the subject L.R. No. 9230/6 (orig.9230/3) Kitale to the defendant as bona fide purchaser for value created a constructive trust and/or proprietary estoppel entitling the defendant to registration of the said land, and which creation of a Trust does not require the consent of the Land Control Board.**

**(b) An order that the plaintiff to avail and/or execute, as the case may be, within the next ninety (90) days all consents, certificates, approvals, clearances, deeds, documents and transfer necessary or the registration of the trust property being the subject fifty (50) acres in LR. No. 9230/6 (Orig. 9230/3) Kitale in the name of the defendant, failing which the defendant be at liberty to execute/enforce compliance.**

**(c) In the alternative, and without prejudice to a) and b) above, the court be pleased to grant the following reliefs:-**

**(i) A declaration that the completion period for the agreement of sale dated 12/07/2005 was extended indefinitely by necessary implication and/or estoppel;**

**(ii) a declaration that the plaintiff is in breach of the contract dated 12/07/2005 which is valid and binding**

**(iii) An order that the period for obtaining the Land Control Board consent of the subdivision and transfer of the suit property be renewed for six (6) months**

**(iv) An order for specific performance as per paragraphs 5 above.**

**(d) an order that any increment in stamp duty fees for the transfer, caused by the appreciation of the worth of the suit property from the mutually agreed/contracted Kshs. 6,000,000/- of the year 2005 to a current valuation to be assessed, be paid by the plaintiff and be recoverable by the defendant from the balance of the purchase price in priority before releasing any surplus of the purchase moneys to the plaintiff.**

**(e) an injunction to prevent the plaintiff and its servants, agents, directors and shareholders from evicting the defendant and/or otherwise howsoever harassing, intimidating him and/or interfering with his quiet possession and enjoyment of the suit 50-acre parcel of land in LR. No. 9230/6 (Orig. 9230/3) Kitale”.**

[29] It is clear that the proposed amendments introduce a new cause of action for the appellant against the respondent anchored on a constructive trust and/or proprietary estoppel, on the basis of which the appellant claims to be a beneficiary of the suit property. This new cause of action is pleaded as an alternative to and without prejudice to the appellant's original claim for specific performance based on the contract.

[30] As disclosed in the extract of the judgment of the trial court that is quoted at paragraph 13 of this judgment, the learned Judge found that the proposed amendments were so extensive and brought primarily to blur the issues and possibly delay the finalization of the matter. In addition, the learned Judge held that the proposed counterclaim was intertwined with the proposed further amended defence, so as to form an entirely new claim, and the amendments were likely to prejudice the respondent.

[31] The learned Judge was alive to the principles for allowing an application for amendments, but nevertheless, thought that the circumstances before him did not justify his allowing the application. We have on our part examined the proposed amendments and do concur with the learned Judge that the appellant introduced a new cause of action. Nevertheless, the proposed new cause of action was substantially arising from the same facts as the original cause of action pleaded in the amended plaint and amended defence. The additional facts in the proposed amendments merely clarified the facts earlier given and brought out the new claim.

[32] Section 7 of the Civil Procedure Act provides the application of the doctrine of *res judicata*, which requires that a party filing a suit should make sure that all matters directly and substantially in issue, between him and the party sued are raised in the same suit. This is because once the suit filed is determined, the party will be barred by the doctrine of *res judicata* from raising in another suit any matter which might or ought to have been raised in the determined suit. This means that in the case of the appellant, should the suit in the High Court be finalized on the pleadings as they are, the appellant will not be able to raise his new claim as pleaded in the proposed further amended defence and counterclaim in another suit, as he will be caught up with the doctrine of *res judicata* the new claim being based on substantially the same facts as the earlier suit.

[33] Given the facts as pleaded in the respondent's amended plaint, and the appellant's amended defence and counterclaim, it is common ground that there was an agreement of sale between the parties but the legality of the agreement is in contention. It is also not disputed that pursuant to that agreement, the appellant has been in possession of the suit property. The issues of trust and estoppel that have been raised by the appellant may be an

afterthought, but they cannot be dismissed as *mala fide*, as they raise legal issues that can only be determined after fully hearing the parties. In our view therefore, the amendments are necessary to enable the court address all the issues arising between the parties.

[34] The learned Judge appears to have placed a lot of emphasis on the delay in bringing the application for amendment. The appellant has however explained the delay and it would neither be fair nor just to deny him the opportunity to amend his pleadings because of tardiness on the part of his former advocate. Order 8 rule 3(1) of the Civil Procedure Rules gives the Court the discretion to allow any party to amend its pleadings at any stage of the proceedings subject to costs. The key objective is to facilitate the just determination of the dispute. The issue of the defence of limitation is one that will have to be determined by the court in addressing the counterclaim.

[35] For these reasons, we find that the learned Judge did not exercise his discretion properly and our intervention is called for. Accordingly, we set aside the ruling of the learned Judge and allow the appellant's motion dated 15th June, 2015. The respondent shall be at liberty to file an amended defence to the amended counterclaim within twenty one (21) days from the date hereof. The respondent shall also have costs of the application.

Orders accordingly.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of December, 2019.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**