



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & SICHALE, JJ.A)

CIVIL APPEAL NO. 96 OF 2015

BETWEEN

ANDERS BRUEL T/A QUEENSCROSS AVIATION.....APPELLANT

AND

NYAMBURA MUSYIMI.....1ST RESPONDENT

ANNE N. MBUGUA.....2ND RESPONDENT

LEAH KIGUATHA MUTERU.....3RD RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Gikonyo, J.) dated 13th October, 2014

in

H.C.C.C No. 374 of 2012)

JUDGMENT OF THE COURT

1. This appeal is in respect of a decision dated 13th October, 2014 wherein the learned Judge (Gikonyo, J.) declined to grant the appellant leave to amend his plaint. In doing so, the learned Judge exercised his discretion which ideally, we ought not to interfere with unless it appears that in reaching his decision he had misdirected himself or proceeded on a wrong principle. See *Mbogo vs. Shah [1968] EA 93*.

2. Generally speaking amendments to pleadings ought to be allowed where such amendments facilitate the determination of the issue in dispute. This much was appreciated in *Eastern Bakery vs. Castelino (1958) E.A. 461*. The learned authors of *Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1)* in restating the same at paragraph 76 said,

"...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."

3. A brief background of this matter will help to place this appeal in perspective. Moses Wachira and Niels Bruel entered into a sale agreement wherein Niels agreed to sell to Moses two aircraft bearing registration numbers 5Y-NBB and 5Y- BMC. According to Moses, Niels misrepresented the actual condition and the extent of repairs required for aircraft registration number 5Y-NBB. Despite paying the entire purchase price, Neils fraudulently refused/neglected to deliver and register the aircraft in his favour. Neils also cancelled the sale agreement of the second aircraft and declined to refund the amount already paid for the same. The foregoing provoked Moses to file suit against Neils, Helmuth Rame and Airtraffic Limited being H.C.C.C No. 16 of 2006 seeking damages. He was represented in the said suit by the firm of Musyimi and Co. Advocates.

4. Pursuant to an application filed in H.C.C.C No. 16 of 2006 by Moses, the court issued interlocutory orders dated 8th February, 2006 which *inter alia*, restrained Neils and his co-defendants from removing from the court's jurisdiction, selling, giving in exchange, encumbering, charging, trading in or in any other way alienating or limiting or prejudicing their title and possession of aircrafts registration numbers 5Y-BMA, 5Y-EKO, 5Y-NBB and 5Y- BMC pending the hearing and determination of the suit. Subsequently, the suit was determined on 30th March, 2011 and a decree was issued in the following terms:-

- ***Judgment be and is entered for the plaintiff against the 1st defendant for US Dollars 110,000 together with costs and interest from the date of filing suit.***
- ***Judgment be and is hereby entered against the 3rd defendant for the sum of Kshs. 129,500 together with costs and interest from the date of filing suit.***
- ***The 3rd defendant is ordered to return all the spare parts forwarded to it by the plaintiff within thirty (30) days from the date hereof.***
- ***The 3rd defendant's counterclaim is hereby dismissed with costs.***

5. Apparently after the above mentioned decision was rendered, Neils sold two aircrafts namely, 5Y-EKO and 5Y-BMA to Anders Bruel, the appellant herein. The appellant was registered as the owner of the two aircraft on 4th April, 2011 by the Kenya Civil Aviation Authority (herein after referred to as KCAA).

6. By a letter dated 8th March, 2012 which was copied to the Director General of KCAA among others, Musyimi & Co. Advocates indicated that the interlocutory orders dated 8th February, 2006 in H.C.C.C No. 16 of 2006 were still in force. As far as the appellant was concerned, the same amounted to a misrepresentation since the orders lapsed once the said suit was determined on 30th March, 2011. It was on account of the misrepresentation that KCAA proceeded not only to cancel the appellant's certificates of registration for the two aircraft but also a lease agreement which it had previously approved between the appellant and Capital Airlines Limited in respect of aircraft registration number 5Y-EKO. Furthermore, the misrepresentation hampered an intended sale of aircraft 5Y-BMA. Convinced that the perceived misrepresentation by Musyimi & Co. Advocates occasioned him loss, the appellant filed suit against the respondents who are partners in the said firm being H.C.C.C No. 96 of 2015 seeking damages.

7. In their defence, the respondents averred that in writing the letter in question they were acting on the instructions of their client, Moses. They owed no duty of care to the appellant thus the appellant had no cause of action against them.

8. Thereafter, the appellant vide an application dated 4th November, 2013 sought leave to amend his plaint. The gist of the intended amendment was to enjoin KCAA as a defendant in the suit. The application was premised on the grounds that; KCAA unilaterally and without any colour of right cancelled the appellant's certificate of registration in respect of the two aircraft and a lease agreement in respect of 5Y-EKO; the appellant had a cause of action as against KCAA; the conduct by the respondents and KCAA formed the same subject matter; KCAA was a necessary party which would enable the proper determination of the issues in controversy and lastly, that the respondents would not suffer any prejudice.

9. Naturally, the respondents opposed the application by filing grounds of opposition. To them, the

proposed amendment would have introduced a different cause of action against different parties resulting in embarrassment and delay the trial. Moreover, the issues sought to be raised against KCAA were already subject of Constitutional Petition No. 243 of 2012 which had been determined.

10. The learned Judge in his ruling dated 13th October, 2014 found that the issues proposed to be raised against KCAA had been directly in issue in Constitutional Petition 243 of 2012 which had been determined. Accordingly, the issues were *res judicata*. He declined to grant the leave sought. It is that decision that has instigated the appeal before us which is predicated on the grounds that the learned Judge erred-

- ***By failing to consider the principles on joinder of parties and amendment of pleadings.***
- ***By failing to find that the appellant had a cause of action against KACC.***
- ***By failing to appreciate that the joinder and amendment sought was necessary to enable the court to properly adjudicate over the issues in controversy.***
- ***By finding that the doctrine of res judicata was applicable.***

11. Mr. P.M. Kahonge, appeared for the appellant while Mr. K.A. Fraser appeared for the respondent. Counsel agreed for the appeal to be disposed of by way of written submissions which were on record.

12. On the appellant's part, the learned Judge erred in finding that the issues sought to be raised against KCAA were *res judicata*. Citing **Section 7** of the **Civil Procedure Act** the appellant argued that on one hand, the substratum of the constitutional petition was alleged violation of the appellant's rights and in particular the right to property. On the other hand, the substantive reliefs sought in the suit which is subject of this appeal, are commercial in nature. The proposed amendment sought revocation of the cancellation of the appellant's certificates of registration of the two aircrafts. For that reason, the issues in the two suits were not the same. In the alternative, the appellant urged that there were exceptions to the doctrine of *res judicata*. One exception was where fraud is raised such as in the case before us.

13. It was submitted that the paramount consideration in an application for joinder of a party is whether the party concerned is necessary for the effectual and complete adjudication of all the issues in dispute. In maintaining that KCAA was a necessary party, reliance was placed on this Court's decision in ***Meme vs. Republic [2004] KLR 637***. The appellant also contended that the learned Judge in declining to grant the leave sought denied him of his proprietary rights as well as a fair hearing.

14. The respondents maintained that the appellant was seeking revocation of the cancellation of the certificates of registration by KCAA through the proposed amendments. The question of revocation had been finally determined in the constitutional petition hence, it was *res judicata*. In the respondents' view the learned Judge properly exercised his discretion in refusing to allow the appellant to amend his plaint.

15. We have considered the record, submissions made on behalf of the parties and the law. ***Mulla, The Code of Civil Procedure, 18th Ed, Vol.2 at pages 1751-1752*** sets out the following useful guide when dealing with amendments of pleadings:-

“On the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings-

i. All amendments should be allowed which are necessary for determination of the real controversies in the suit;

ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;

iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;

iv. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;

v. Amendment of a claim or relief barred by time should not be allowed;

vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;

vii. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;

viii. The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;

ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”

16. In addition, the court should not consider the merits of the proposed amendment in allowing or rejecting an amendment. This is because the merits are to be determined at the hearing of the suit. *In Sajjan Kumar –vs.–Ram Kishan, (2005) 13 SCC 89*, the Supreme Court of India aptly held,

“As to the submission made on behalf of the respondents that the amendments will render the suit non-maintainable because it would not only materially change the suit property but also change the cause of action it has only to be pointed out that in order to allow the prayer for amendment the merit of the amendment is hardly a relevant consideration and will be open to the defendants-respondents to raise their objection in regard to the amended plaint by making any corresponding amendment on their written statement.”

17. As noted herein above, the essence of the proposed amendments was the joinder of KCAA as a defendant. **Order 1 Rule (10) (2)** of the **Civil Procedure Rules** empowers the court, at any stage of the proceedings, upon application by either party or *suo motu*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of *Sarkar’s Code of Civil Procedure, 11th Ed. Reprint, 2011, Vol. 1 at page 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.”

18. This Court while discussing the issue of joinder of a party in *Mohammed Salim Balala & another vs. Tor Allan Safaris Limited [2015] eKLR* expressed itself *inter lia* thus:-

“In considering an application for joinder, the following are paramount:-

- *It will not cause injustice to the other parties.*
- *It does not seek to substitute or introduce an entirely new cause of action.*
- *It will not bring in distinct causes of action against different defendants over distinct transaction(s).”*

19. In this case, the appellant’s cause of action against KCAA in the proposed amendment is based on the allegation that the cancellation of the certificates of registration for the two aircraft by KCAA was unprocedural and illegal. Basically, the appellant intended to challenge the manner in which KCAA exercised its statutory duty. In our view, the same could not be properly adjudicated in the present suit wherein the appellant’s cause of action as against the respondents was based on alleged misrepresentation. Ideally, the appellant ought to have challenged the conduct of KCAA which was

administrative in nature in judicial review proceedings. In *Elijah Kipngeno Arap Bii –vs- Kenya Commercial Bank Limited [2013] eKLR* this Court in its own words held:-

"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.

20. In any event, the relief sought by the appellant as against KCAA in the proposed amendment was revocation of the cancellation of the certificates of registration for the two aircrafts in question. It is instructive to note that the appellant had also sought a similar relief in Constitutional Petition No. 243 of 2013 which has since been determined. The appellant had instituted the constitutional petition against KCAA challenging the cancellation of the certificates of registration. Consequently, we concur with the learned Judge that the issues which the appellant intended to raise in the proposed amendments were *res judicata*.

21. The totality of the foregoing is that we see no reason for interfering with the exercise of the learned Judge's discretion. The appeal herein lacks merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 10th day of March, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR