IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, OKWENGU & KANTAI, JJA.)

CIVIL APPEAL NO. 55 OF 2010

BETWEEN

SAMUEL O. TIMA &ANOTHER …….…… APPELLANTS

AND

HOUSING FINANCE COMPANY OF KENYA ……...……1ST RESPONDENT

JOSEPH KARIUKI WANYUNGI ……..……2ND RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Lesiit, J.) dated 17th July, 2009

in

HCCC. No. 660 of 2002)

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JUDGMENT OF THE COURT

This is a first appeal from the ruling and order of Lessit, J. given on 17th July, 2009 on an interlocutory application to amend a defence. The learned judge allowed the application. Because the suit in the High Court has not been heard on merits we have to chart a careful path so that we do not make comment or make findings that could embarrass the trial court.

The history of the matter in the High Court is long and winded and we set out the facts here only as are necessary to determine the appeal before us.

The appellants **Samuel O. Tima** and **Lydia Nyambonyi** who are husband and wife took a loan from the 1st respondent Housing Finance Company of Kenya and offered as security their property known as **L.R. No. 36/111/948 Eastleigh**, Nairobi. There were problems in paying the installments due from the appellants to the 1st respondent and in consequence after various efforts to recover the loan the 1st respondent in exercise of its statutory power of sale sold the said property to the 2nd respondent **Joseph Kariuki Wanyugi**. Various applications were made in the High Court one of which was an application for injunction where interim orders were made to maintain *status quo*. We do not need to go into that application as what is relevant here and which provoked this appeal is an application by 2nd respondent to

amend his defence. That application was by way of chamber summon brought under the then **Order VIA Rules 3, 5 and 8** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. By that application the 2nd respondent applied for leave to amend his defence and counter claim. The grounds stated in support of the application and also in a supporting affidavit were that the 2nd respondent had purchased the said property from the 1st respondent and that subsequently the 2nd respondent had appointed a new firm of advocates who upon consideration had found it necessary to amend statement of defence and counterclaim so as to bring out all the facts and issues for determination by the Court. It was also said that the appellants had filed an amended plaint but that the 2nd respondent's previous advocates had not amended the defence. That application was opposed by the appellants and in a considered ruling the learned Judge allowed the application and parties were given timelines to amend pleadings accordingly. It is those orders that provoked this appeal which is premised on a memorandum of appeal where ten grounds of appeal are set out. The said grounds can be condensed into an attack by the appellant on the findings of the learned Judge as the appellants contend that the learned judge exercised her discretion wrongly in allowing amendments. The appellants contend that it was wrong for the learned Judge to allow the amendment when the application was brought 2 years after the said property had been sold. It is also said that the application for amendment was made in bad faith.

We heard the appeal on 27th February, 2017 when learned counsel **Mr. Erick Masese** appeared for the appellants while **Mr. Kenneth Wilson** appeared for the 1st respondent and **Mr. J. P Machira** appeared for the 2nd respondent. All counsel relied on written submissions that had been filed earlier. In a brief highlight Mr. Masese submitted that the learned Judge was wrong to allow amendment when according to counsel there was inordinate delay to bring the application. Mr. Wilson for the 1st respondent submitted that the relevant law allowed a judge to grant leave to amend pleadings at any time before judgment.

Learned Counsel reminded us that we should not interfere with the discretion of a trial judge unless the discretion has not been exercised according to law.

Mr. Machira for the 2nd respondent was of similar view and submitted that the appellant had filed amended pleadings after leave had been granted and therefore there was no prejudice to any party on leave having been granted to amend pleadings. Learned counsel submitted further that thrown away costs granted to the appellants by the learned judge had been paid and accepted. According to learned counsel, all formalities had been undertaken to prepare the suit in the High Court for trial and parties had agreed on issues for trial.

We have considered the whole record, the submissions made and the law and have taken the following view of this appeal.**Order 8 Civil Procedure Rules** which is a renumbered version of the earlier **Order VIA** of **Civil Procedure Rules** is concerned with amendments of pleadings. By **Rule 1** thereof a party may amend a pleading without leave at any time before closure of pleadings. By **Rule 3** a 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 its pleadings. **Order 8(5)** provides that:

> ***"5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of 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 application that was presented before the learned Judge the 2nd respondent sought leave to amend his defence and counter claim and it was explained that new lawyers who had taken over conduct of the matter on behalf of the 2nd respondent had advised that it was necessary to amend the defence that had been filed for the 2nd respondent through a firm of lawyers previously on record.

What was the nature of the amendment for which leave was sought?

In the draft amended statement of defence and counter claim the 2nd respondent stated amongst other

things that he was the registered proprietor of the suit property which he had purchased from the 1st respondent in a private treaty; that he purchased the property on 21st December, 2006 but not on 31st December, 2006 as earlier stated in the defence and that he had paid the agreed purchase price. The main issue taken by the appellants before the learned trial judge was that by allowing an amendment on the date of purchase of the suit property the appellants would lose an advantage because their case was essentially that the sale of the suit property on 31st December, 2006 which fell on a Sunday was fraudulent and illegal as the law did not allow such a transaction to take place on a Sunday. The learned judge considered that objection and reviewed several cases on the issue and held that she was entitled to grant leave to the 2nd respondent to amend his defence. The learned Judge did so after hearing and considering submissions made by all parties in the case that was before her and in the event that was a use of discretion which we should only interfere with if we were to find that there was an abuse of the principles that obtain when a Judge is entitled to a use of discretion – see the case of **Strong v Strong [2002] 2KLR 631** where this Court had this to say of the exercise of discretion by a Judge:

> ***"The decision of the High Court was in exercise of a discretionary power which the appellate court cannot interfere with unless grounds for doing so are shown to the court."***

As already stated the relevant provision of the Civil Procedure Rules gives a wide discretion to a trial Judge to allow amendment of pleadings so that all relevant issues that may have been left out or omitted in the original pleadings are brought forth before the court for a hearing and determination by the Court so that all issues in contention between parties are finally determined. That discretion is very wide and has been considered in various cases that have been decided by this Court.

In **Central Kenya Limited v Trust Bank Limited [2002] 2 EA 356** we stated:

> ***"The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (i) there had been no undue delay, (ii) no new or inconsistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected, and (iv) the amendment could be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs; Beoco Ltd v Alfa Laval Co. Ltd (1994) 4 All ER 464 adopted. Neither the length of the proposed amendments nor mere delay were sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs ……"***

In **Mwakio v Kenya Commercial Bank Limited [1987] KLR 513** we said:

> ***"1. Leave to amend should not normally be declined unless it would occasion injustice to the other side.***
>
> ***2. Leave to amend should always be granted unless the court is convinced that the party applying is acting mala fides or that it will cause an injury to the opponent which could not be compensated for by way of costs or otherwise.***
>
> ***3. On the facts of this case, there was no basis for saying that in seeking to amend, the appellant was acting mala fides or that his omission to include the additional grounds in the memorandum of appeal caused any injury to the respondent, still less any that cannot be compensated in costs."***

Therefore leave to amend will freely be given as the intention of the law is to allow parties to ventilate their issues for a judicial determination. In **Coffee Board of Kenya v Thika Coffee Mills Limited and 2 Others [2014] eKLR –**

> ***"On an interlocutory application for leave to amend, the court should rarely seek to evaluate the strength of the case sought to be argued, as to do so would anticipate the trial of the issues."***

The appellants argument before the trial Judge and before us that allowing amendment to change a date in the 2nd respondent's defence would take away an advantage in favour of the appellants is without merit because neither the trial court nor this court was entitled to look to the horizon to anticipate the trial that was yet to take place before the trial court. The law allowed the trial Judge to grant leave to amend a defence. After leave was granted we are told that the 2nd respondent filed an amended defence and there was a reply thereto by the appellants. Thrown away costs granted by the learned Judge were paid to the appellants and they freely accepted the same. The appellants were not prejudiced in any way by the grant of leave to amend the defence and the learned Judge was right in the use of her discretion to allow amendment of a pleading. There is no merit in this appeal which we now dismiss with costs to the respondents.

Dated and Delivered at Nairobi this 12th day of May, 2017.

ALNASHIR VISRAM

……..……..

JUDGE OF APPEAL

H. M. OKWENGU

……..……

JUDGE OF APPEAL

S. ole KANTAI

…….……..……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR