



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, J.J.A)

CIVIL APPEAL NO. 16 OF 2012

BETWEEN

ROSE KANDIE.....1ST APPELLANT

JACKSON KATTAM2ND APPELLANT

VERSUS

ESTHER JEPKEMBOI KIPLANGAT.....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Eldoret, (Azangalala, J.) dated 27th July, 2011

in

H.C.C.A. NO. 147 OF 2006)

JUDGMENT OF THE COURT

1. This is an appeal from a judgment of the High Court (Azangalala, J. (as he then was)) delivered on 27th July 2011, dismissing an appeal by the appellants from a ruling of a magistrate's court given on 31st October 2006 dismissing an application for leave to amend a statement of defence and counterclaim.

2. The appellants' complaints as captured in the memorandum of appeal are that both lower courts fell into error in disallowing the proposed amendments; that in light of Article 159 of the Constitution of Kenya, 2010 and Sections 1A and 1B of the Civil Procedure Act the proposed amendments ought to have been allowed; that to the extent that the proposed amendments were aimed at correcting mistakes of counsel, the lower courts should have approached the matter from the premise that mistakes of an advocate should not be visited on a client; and that the decision dismissing the motion for amendment was plainly wrong, was based on a misapprehension of the circumstances under which the amendments were sought, and manifested an erroneous exercise of discretion.

Background

3. Barnaba Kiplagat Chemnjo and Esther Jepkemboi Kiplagat (the respondent in this appeal) were the plaintiffs in a suit in the Magistrate's Court at Eldoret. (We will refer to them as "*the plaintiffs*"). That

suit was against Mathew Kosgei Kandie, Rose Kandie and Jackson Kattam. (We will refer to those three as “*the defendants*”). The substance of the plaintiffs’ claim as pleaded was that under a written agreement for sale entered into on or about 1st November 1995, the plaintiffs agreed to purchase from the 1st and 2nd defendants a property known as Plot No.16 in Moiben Township on which stood a commercial building. According to the plaintiffs, they paid the purchase price for that property in full and the 1st and 2nd defendants duly acknowledged payment.

4. The plaintiffs went on to plead that it was verbally agreed between the plaintiffs and the 1st and 2nd defendants that the plaintiffs would also purchase from the 1st and 2nd defendants Plot No. 15 for Kshs. 130,000.00 after it was discovered that the said commercial building straddled both Plot No. 16 and Plot No. 15. The plaintiffs asserted that they paid Kshs. 30,000.00 and that the balance of Kshs. 100,000.00 was payable to the 1st and 2nd defendants immediately upon the transfer of the two plots to the plaintiffs.

5. Instead of transferring the plots to them, the plaintiffs pleaded, the 1st and 2nd defendants sold or were preparing to sell both plots to Jackson Kattam, the 3rd defendant, who started trespassing thereon threatening the plaintiffs by forcefully collecting rent from the plaintiffs’ tenants and also threatening to evict the plaintiffs and their tenants from the premises. It was also the plaintiffs’ case that on 10th October 1998 the 3rd defendant threatened the plaintiffs’ employees and forcefully closed the plaintiffs’ shop whereupon the plaintiffs reported the matter to Moiben Police Station after which the 3rd defendant was ordered to re-open the premises.

6. Based on those pleas, the plaintiffs sought judgment for an order of specific performance for the 1st and 2nd defendants to be compelled to transfer both Plots Nos.15 and 16 to them; an order for general and special damages against the 3rd defendant for trespassing on the Plots; interest and costs.

7. Miyianda & Company advocates on behalf of the defendants filed a statement of defence on 6th January 1999. Those advocates blundered in the heading of that statement of defence, as it did not correspond with the heading of the plaint. In the statement of defence, Barnaba Kiplagat Chemnjo was named as the only plaintiff, while in the plaint he was the 1st plaintiff. Esther Jepkemboi Kiplagat, who in the plaint was the 2nd plaintiff, was named as the 1st defendant in the statement of defence. Jackson Kattam, the 3rd defendant, in the plaint, was named as the 2nd defendant in the statement of defence. The names of Mathew Kosgei Kandie and Rose Kandie were all together omitted from the heading of the statement of defence.

8. In the body of the statement of defence however, the defendants admitted the description of the parties as set out in the plaint; admitted that the 1st and 2nd defendants entered into an agreement for sale with the plaintiffs in respect of Plot No. 16; contended that the agreed price was Kshs.200, 000.00, half of which was paid on signing the agreement; denied that it was discovered that the commercial building occupied two plots, and that a further agreement was entered into for the purchase of Plot No. 15 by the plaintiffs for Kshs. 130,000.00 or that Kshs. 30,000.00 was paid pursuant thereto. The defendants averred that the plaintiffs failed to pay the balance of the purchase price of Kshs. 100,000.00 in respect of Plot No.16 as agreed and that the 1st and 2nd defendants thereafter disposed of that property to the 3rd defendant. The defendants denied that the 3rd defendant had trespassed on Plot No. 15 and 16.

9. In their counterclaim, the defendants asserted that the plaintiffs should have paid the balance of the purchase price of Kshs. 100,000.00 on Plot No. 15 as at 30th March 1996; that their failure to do so had occasioned the defendants loss of interest on that amount; that the defendants also lost rent benefits from 30th March 1996 “*till retaking over of the subject property which rent is claimed*”; that the defendants were put to strained operations as both the rent and purchase price were wrongfully held by the plaintiffs “*to which the defendants shall claim general damages on the same.*” The defendants concluded their pleas by praying for dismissal of the plaintiffs’ claim and for judgment to be entered for the defendants in terms of the counterclaim.

10. The heading in the plaintiffs' reply and defence to counterclaim dated 26th January 1999 avoided the blunder in the statement of defence, as it was consistent with the heading of the plaint. The plaintiffs reiterated the contents of the plaint and maintained that the balance of the purchase price was payable upon the transfer of both plots to the plaintiffs. In defence of the counterclaim, the plaintiffs denied that they ought to have paid Kshs. 100,000.00 as at 30th March 1996 or that their failure to do so had occasioned the defendants loss as alleged and prayed for the dismissal of the counterclaim with costs.

11. Although a full transcript of the proceedings before the magistrate's court is not part of the record before us, the pleadings closed in the state we have described above.

12. Almost eight years after the reply to defence and defence to counterclaim was filed by the plaintiffs and after the plaintiffs had presented their claim and closed their case and after the evidence in chief by the 2nd defendant before cross examination, the defendants, through the firm of C. F. Otieno & Co Advocates, moved the court by a chamber summons dated 10th July 2006 under Order VIA Rules 3,5,7 and 8 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act, seeking leave to amend the defence and counterclaim.

13. Having considered the application and the arguments advanced before him, the learned magistrate dismissed the application, being of the view that:

“The application dated 10/7/2006 is filed too late in the day. The case has already taken off for hearing. Even if the court has discretion to allow an amendment in terms of Order 6 a rule 3 Civil Procedure Rules this discretion must be exercised judiciously to avoid injustice to any party. In this case the plaintiffs and his witness have testified. The second defendant has also testified. The annexed defence purpose (sic) to introduce new facts. The plaintiff will not be in a position to challenge the new facts being introduced at this stage in the prepared (sic) amendment the defendant seeks to depart from the earlier pleadings and introduce new cause of action. This suit was filed in court eight years ago. The facts sought to be introduced were within the knowledge of the applicant.”

14. The court then concluded that the proposed amendments would be prejudicial to the plaintiffs “who will not be able to re-open his case and challenge the new fact (sic) being introduced in the pleadings.”

15. On appeal from that decision, the High Court, after reviewing the legal principles on the basis of which a court's discretion is exercised when considering an application for amendment of pleadings, took the view that the proposed amendments raised new facts. The learned Judge then posed:

“How were the respondents who had closed their case expected to challenge those facts. How would they have answered the new claims of interest, general damages for annoyance and eviction, given that their case and part of the defence had been taken? In all those premises, the Learned Principal Magistrate cannot be faulted when he concluded that the application for leave to amend would be prejudicial to the respondents.

I have come to the same conclusion. To have allowed the application for leave to amend would have caused injustice to the respondents which could not properly be compensated for in costs.”

16. That then precipitated the present appeal.

The appeal and submissions by counsel

17. During the hearing of the appeal before us, learned counsel for the appellants, Mr. C. F.

Otieno, submitted that the application for amendment before the Magistrate's court was necessary in order to rectify the anomaly in the heading of the defence caused by an advocate's mistake. In that regard, counsel argued that the circumstances in this case are different from those in the High Court case of **Charles Omwata Omwoyo vs. African Highlands & Produce Co. Ltd HCCC 308 of 2002, Nbi** where the court took the view that there are cases where advocates should take responsibility for their negligence; that this Court should emulate the approach taken by Madan, J.A. in **Belinda Murai and others vs. Amos Wainaina [1978] LLR 2782** that the court should not close the door to justice on account of a blunder by an advocate.

18. Mr. Otieno argued that the proposed amendments were also necessary to distinguish the pleas by the 1st and 2nd defendants from those of the 3rd defendant and to introduce a prayer for eviction; that had the lower courts looked keenly at the proposed amendments, they would have appreciated that the amendments were necessary to avoid duplication or multiplicity of suits.

19. Counsel concluded by pointing out that the 1st plaintiff and the 1st defendants are since deceased and are survived by their spouses and that the proposed amendments would not be prejudicial.

20. Opposing the appeal, Mr. D. O. Mbeja, learned counsel for the respondents, submitted that the decision of the High Court cannot be faulted; that there was inordinate delay of eight years in making the application; that having already closed their case, the plaintiffs would be prejudiced if the proposed amendments are allowed; that circumstances have changed as two of the litigants have since died; and that the proposed amendments would introduce different causes of action.

Analysis and determination

21. Under the provisions of the then Order VIA Rules 3,5,7 and 8 of the Civil Procedure Rules under which the defendants applied for leave to amend the statement of defence, the Magistrate's court was called upon to exercise judicial discretion. In the appeal from the decision of the Magistrate's court declining leave to amend, the High Court could only interfere with the decision of the Magistrate's court if satisfied that the decision was clearly wrong because the Magistrate's court misdirected itself, or because it acted on matters on which it should not have acted, or because it failed to take into consideration matters that it should have taken into account. [See **MBOGO vs. SHAH [1968] EA 93**]. In dealing with the appeal before it, the High Court was alive to the fact that the Magistrate "***was exercising a discretion in declining to grant leave to amend.***"

22. Both courts below were also alive to the legal principles upon which courts are called upon to base their judicial discretion when dealing with applications for leave to amend pleadings. On his part the learned Magistrate correctly expressed the view that:

"Even if the court has discretion to allow an amendment in terms of Order 6 rule 3 of the Civil Procedure Rules this discretion must be exercised judiciously to avoid injustice to any party."

23. The High Court on its part was more explicit. It said:

"It is settled that a party may be allowed to make such amendments to his pleading as may be necessary for determination of the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay; that no new or inconsistent cause of action is introduced; that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side."

(See AIR Commentaries on the Indian Civil Procedure code by Chittaley and Rao)

Put differently, the guiding principle in applications for leave to amend is that

all amendments should be freely allowed, and at any stage of the proceedings, provided that amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (See Beoco Ltd –V-Alfa Laval Company Limited [1994] 4 All E. R 464)”

24. In our view, both courts below correctly appreciated the legal principles governing applications for leave to amend pleadings. Going back to the decision of the predecessor to this Court in Eastern Bakery vs. Castellino [1958] EA 461, courts in this country have consistently held that amendments to pleadings should be freely allowed for purposes of determining the real matter in controversy between the parties, provided the amendment does not work injustice to the other side and that an injury that can be compensated by an award of costs is not to be treated as an injustice that would prevent the granting of leave to amend. In that case O'Connor, P. said: “**amendment to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.**”

25. Having correctly appreciated the legal principles, the question for our determination is whether the courts below correctly applied those principles to the circumstances of this case. According to the appellants, had both lower courts subjected the proposed amendments to adequate scrutiny they would have appreciated that no injustice would have been occasioned to the plaintiffs by allowing the amendments. Counsel for the appellants submitted that it is now the responsibility of this Court to subject the proposed amendments to adequate scrutiny. We have done so.

26. Apart from infusing elegance into the pleading, and distinguishing and clarifying the pleas pertinent to the 1st and 2nd defendants as distinct from those relating to the 3rd defendant, the significant amendments the defendants proposed to make to the statement of defence included: a correction of the blunder in the heading to accord with the plaint; a plea that the agreement for sale entered into between the 1st and 2nd defendants in respect of plot No. 16 was frustrated by the plaintiffs on account of their failure to pay the entire purchase price; an assertion that the 1st and 2nd defendants deposited the amount of Kshs. 100,000.00 that the plaintiffs had allegedly paid earlier with their advocates with instructions to refund it to the plaintiffs; a plea that the 3rd defendant purchased both plots 15 and 16 from the 1st and 2nd defendants on 1st November, 1998 for a consideration of Kshs.350,000.00 and is therefore not a trespasser; a plea that the purported sale to the plaintiffs was void for want of locus on the basis that the allotment of the parcels to the 1st and 2nd defendants was done on 16th and 18th September 1998 and it was therefore not possible to sell before such allotment; a plea that the remedy of specific performance is not available to the plaintiffs on the basis that the contract was not concluded; a plea that the plaintiffs be evicted from the suit lands together with their agents or servants and their personal belongings; and a prayer for general damages for persistent annoyance caused by the plaintiffs.

27. In our view, the proposed amendments fell into three categories. The first category relates to amendments that were intended to correct the obvious blunder in the heading of the pleading. The second category is the amendments that were aimed at giving elegance to the pleadings and those aimed at distinguishing the defence put forth by the 1st and 2nd defendants from that of the 3rd defendant. The third category of the proposed amendments, which in our view was objectionable, constituted new matters that had not been pleaded earlier.

28. Had the lower courts made that distinction, we believe it would have allowed the proposed amendments falling in the first two categories. In our view, the amendments that fell into the third category which the courts rightly rejected were: paragraphs 3A, 9A and 9C introducing the defence of frustration; paragraph 10C introducing the cause of action in trespass; paragraph 10D introducing the defence of lack of capacity to contract; paragraph 12C asserting unavailability of the remedy of specific performance; and paragraphs 20 and 21 introducing for the first time claims for the remedies of eviction and damages for persistent annoyance. Considering that the plaintiffs' case was already closed and that the defence case had already commenced, and considering further that the proposed amendments were being introduced over eight years after the pleadings had closed, we think that the amendments in the

third category would have occasioned injustice to the plaintiffs. The situation is further exacerbated by the death of some to the parties to the suit.

29. We allow the appeal, to that extent, set aside the judgment of the High Court dated and delivered on 27th July 2011 as well as the ruling of the Magistrate's court given on 31st October 2006 and substitute therewith an order allowing the defendants' application before the Magistrate's court dated 10th July 2006 with the qualification that the amended defence shall exclude paragraphs 3A, 9A, 9C, 10C, 10D, 12C, 20 and 21. The defendants shall within 14 days from the date of delivery of this judgment file and serve an amended defence in terms of the draft amended defence excluding paragraphs 3A, 9A, 9C, 10C, 10D, 12C, 20 and 21 thereof. The plaintiffs shall have thrown away costs that may be occasioned by the amendments and shall also have the costs of the appeal in this Court and in the High Court.

Orders accordingly.

Dated at Kisumu this 21st day of April, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR