IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M KARIUKI, AZANGALALA & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 114 OF 2014

BETWEEN

PERMANENT SECRETARY, MINISTRY OF ROADS..….. 1ST APPELLANT

THE ATTORNEY GENERAL……..2ND APPELLANT

AND

FLEUR INVESTMENTS LIMITED…….....RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Gacheru, J.) dated 23rd August, 2013

in

H.C.C.C. No. 596 of 2009)

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JUDGMENT OF THE COURT

[1] By a plaint dated 29th October, 2009, and filed in the High Court at Nairobi, ***Fleur Investments Limited***, the respondent in this appeal, impleaded the ***Permanent Secretary, Ministry of Roads and Public Works*** and the ***Attorney General***, the appellants, for damages *(general, special and exemplary),* for malicious demolition of its developments on ***LR No. 25535/1*** and ***LR No. 25535/2***, *("the suit properties").* Among the developments undertaken by the respondent were commercial buildings which the respondent claimed were valued in the excess of Kshs. 2,000,000,000/=. The special damages were particularized.

[2] The plaint was filed on 30th October, 2009, and thereafter, summons to enter appearance and the plaint were served upon the appellants. The 2nd appellant entered appearance and filed defence on 5th August, 2010. On 7th April, 2011, the respondents' first application for leave to amend its plaint was allowed by consent. The amendment removed *"Public Works"* from the description of the 1st appellant and elicited no change in the appellant's defence.

On 27th November, 2012, the respondent applied for leave to further amend its plaint. The application was allowed on 11th December, 2012. The re-amended plaint introduced a revised valuation of the

properties and losses allegedly occasioned by the 1st appellant.

[3] The parties then prepared the suit for hearing and the court allocated them 22nd January, 2013, as the hearing date. However, on 21st January, 2013, the appellants lodged a Notice of Motion seeking leave of the court to amend their statement of defence. Their proposed amendment sought to introduce two persons namely, ***Wilson Gachanja*** and ***Adeita Company Limited***, in the suit. The appellants alleged that properties known as ***LR No. 16510*** and ***16511*** purportedly registered as ***IR 59780/1*** and ***59781/1*** were purportedly created form ***LR No. 4921/2***, which in fact had been compulsorily acquired by the Government from an entity called ***Joreth Limited*** for construction of the present day Nairobi – Thika Road.

[4] The appellant further claimed that the said ***LR No. 16510*** and ***16511*** purportedly acquired by ***Adeita Company Limited*** were obtained by means of fraud and misrepresentation of which the respondent should have had knowledge and should not have, within that knowledge, purported to transfer the same to the respondent which transfer is accordingly null and void "*ab initio*". By reason of the said matters, the appellants claimed that the respondent became a party to the purported fraudulent transaction between it and the said ***Adeita Company Limited*** and was, therefore, non-suited. The appellants gave particulars of illegality knowledge, fraud and mis-representation on the part of the respondent, ***Adeita Company Limited*** and ***Wilson Gachanja***.

[5] The appellant further alleged that with the intention to conceal the invalid root of title to ***Adeita Company Limited***, the respondent applied to re-subdivide ***LR 4921/2*** into ***LR Nos. 25535/1*** and ***25535/2*** and purported to create new grants in respect thereof. By those transactions, the appellants alleged that the respondent hoped to obfuscate the true origins of its title to the suit properties.

[6] The appellants, therefore, claimed that the respondent knew or ought to have known that LR ***No. 4921/2*** was land which had been compulsorily acquired for a public purpose and was not available for alienation to private person(s). The allegations of invalid title root formed the basis of the rest of the averments in the proposed amended defence.

The appellants' application for leave to amend their defence was lodged under ***Sections 1A, 1B, 3*** and ***3A*** of the ***Civil Procedure Act***, ***Order 8 Rule 3*** and ***5*** and ***Order 51 Rule 1*** of the ***Civil Procedure Rules***. The appellants also invoked the inherent powers of the court and all other enabling provisions of the law.

[7] The respondent opposed the application and filed a replying affidavit sworn by ***Alex Tratchtenberg***, its General Manager. He averred, *inter alia*, that the appellants' application for leave to amend their defence was not filed in good faith and was intended to delay expeditious hearing and disposal of the suit and was in any event filed too late in the day. The said deponent chronicled the appellants' antecedent behavior in the suit which behavior, according to the dependant, was designed to scuttle the hearing of the suit. It was further deponed for the respondent, that there was no nexus between the proposed amendments and the suit especially as events stated in the proposed amendment happened before the respondent was incorporated and the respondent could not, therefore, have knowledge thereof.

The respondent was also of the further view that the cause of action disclosed in the proposed counter-claim was drastically different from the cause of action set out in its re-amended plaint and should be disposed of in separate proceedings.

The respondent then set out its view of the documents exhibited to the affidavit supporting the application for leave to amend the defence and stated that the said documents did not cast any doubt on the authenticity of its title which title it acquired for value without notice.

[8] The appellants' application was heard by ***L. N. Gacheru, J.***, who, in a reserved ruling, dismissed it with costs. The learned Judge found that the application was an abuse of the process of the court as a similar application had previously been withdrawn on the date the application she dismissed was filed. The learned Judge further held that the application was meant to delay the hearing of the case and had been lodged too late in the day. It was also the view of the learned Judge that the facts of the claims made

in the proposed amendments were different and did not arise out of the same transaction and that the respondent would suffer prejudice.

[9] The appellants were aggrieved by the said ruling and hence this appeal which is premised upon eight grounds of appeal. Learned counsel, ***Mr. Ng'ang'a,*** argued the appeal on behalf of the appellants. He submitted that the appellants' proposed amendments were deserved and that the parties intended to be joined, were necessary parties. In learned counsel's view, the causes of action in both the suit and the proposed counter-claim arose from the same transaction and that even if they were different, the law allows such amendments. With regard to delay involved, learned counsel submitted that the same was adequately explained

It was also learned counsel's view that the learned Judge improperly exercised her discretion as she failed to appreciate that the appellants were entitled to justice just like the respondent was but in this litigation, justice was not done to the appellants. Learned counsel expressed the further view that the learned Judge's decision violated the provisions of ***Order 8 Rule 3*** of the ***Civil Procedure Rules*** as the proposed amendments would in his view clarify the issues in dispute without occasioning prejudice to the respondent as it would adequately be compensated in costs. For those reasons, ***Mr. Ng'ang'a,*** urged that the decision of ***Gacheru, J***., be reversed.

[10] Learned counsel, ***Mr. Karori***, appeared for the respondent. In his submissions before us, he expressed the view that the application for leave to amend before the court below was incompetent as the cause of action in the proposed counter-claim was for indemnity which should have been sought under Order 1 which governs 3rd party proceedings against the proposed additional parties. Learned counsel also expressed the view that if ***Gachanja***, who was one of those sought to be joined committed the alleged fraud about 13 years earlier, the respondent could not be affected and certainly was not connected to the cause of action pleaded by the appellants.

Learned counsel further submitted that the respondent was an innocent purchaser for value and was in fact facilitated by Government officials in documentation of its title. In learned counsel's view, the ruling by ***Gacheru, J.,*** was impeccable and correctly set out the principles on amendment of pleadings and should not be disturbed as allowing the appeal will compromise the respondent's rights which compromise cannot be compensated by costs.

[11] We have considered the record, the grounds of appeal, the submissions of learned counsel and the law applicable. Notwithstanding the several grounds set out in the Memorandum of Appeal, in our view, the main issue canvassed before us is whether the amendment requested fell within the provisions of ***Rules 3*** and ***5*** of ***Order 8*** and ***Rule 1*** of ***Order 51*** of the ***Civil Procedure Rules***.

Rules 3 and ***5(1)*** provide as follows:

> ***"3 (1) subject to Order 1, Rules 9 and 1, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule the 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 his pleadings.***
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> ***(2) Where an application to the court for leave to make an amendment such as is mentioned in sub-rule (3),***
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> ***(4) or (5) is made after the relevant period of limitation current at the date of filing of the suit has expired, the court may, nevertheless, grant such leave in the circumstances mentioned in any such sub rule if it thinks just so to do.***
>
> *[(3) Power to correct and/or to substitute a party.]*
>
> *[(4) Power to alter capacity of suing].*

(5) An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment".

Rule 5(1) is in the following terms: -

> ***"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".***

[12] It is not in contention that the power of the court to order amendment is discretionary. The discretion is wide but is exercisable as circumscribed by the rules themselves and by the general principles on amendments. Under ***Rule 3***, that power may be exercised to substitute a party, to correct the names of parties or to allow the capacity of suing.

[13] As the power to allow amendment is discretionary, the general principles stated in the precedent setting case of ***Mbogo & Another –v- Shah, [1968] EA 93,*** are applicable. An appellate court, such as ours, has no jurisdiction to interfere with such exercise of discretion unless the lower court has acted on wrong principles; has misapprehended the law or has acted on no evidence or that it is demonstratively and plainly wrong. In the ***Mbogo & Another –v- Shah***, case (supra), ***Newbold***, the then President of the Court, stated:

> ***"We come to the second matter which arises in this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial Judge, where his discretion as in this case was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself, I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result, has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result, there has been misjustice".***

[14] Even where a plaint discloses no cause of action, the trial court has power to allow amendments. (See ***Motokov –v- Auto Garage Ltd. and Another, [1971] EA 353***, and in other circumstances, amendment of a plaint may be allowed notwithstanding that the effect will be to defeat a defence of limitation. (See ***Barclays Bank D.C.O. v Sahmsudin, [1973] EA 451)***. We appreciate, however, that such amendments should be allowed only in special circumstances.

[15] Legal treatises such as ***Chitaley P. 1313***; ***Odgers' Principles of Pleading and Practice, 19th Edition pages 164-168***, and ***Bullen and Leake & Jacobs,*** Precedents of Pleadings, ***12th – 19th Editions*** are in tandem with our rules. They show that the power of the court to allow amendments is to determine the true substantive merits of the case; the amendments should be timeonsly applied for; the power to allow amendment can be exercised by the court at any stage of proceedings and will, indeed, be allowed even at appeal stage; 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 exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be granted to the other side if necessary if the amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment, it ought not to be allowed; that the proposed amendment must be material and not useless or merely technical; that where the plaintiff's claim as originally framed is unsupportable, an amendment which would leave the claim equally unsupportable will not be allowed; that if the proposed amendment 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 would 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 amendment of the plaint, the defendant would be deprived of his right to rely on ***Limitation Acts*** but subject, however, to powers of the court to still allow such an amendment notwithstanding the expiry of the current period of limitation; that the court has powers in special circumstances to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of which relief has already been claimed in the action by the party applying for leave to seek the amendment. [See ***Joseph Ochieng & 2 Others***, ***Trading as Aquiline Agencies –v- First National Bank of Chicago [1995] eKLR***]. (Emphasis ours).

[16] The list is not and cannot be exhaustive and each application will be determined according to its own facts and circumstances. However, the principles are of general application and the court will apply them in allowing or disallowing any proposed amendments. ***Rule (3)*** of ***Order 8*** of the ***Civil Procedure Rules*** incorporates those principles which have been considered in numerous cases in our courts.

What are the circumstances in this case? The appellants pleaded, *inter alia*, as follows:

> ***"5. The defendant contends that the property supposedly known as LR No. 16510 and 16511 and registered as IR 59780/1 and 59781/1 is purportedly created upon Land Parcel LR 4921/2 which property was compulsorily acquired by the Government of Kenya from Joreth Limited in or around 1964 as shown on Deed Plan No. 80809 and reserved for the purposes of construction of a public through fare now commonly referred to as Thika Road and classified as Nairobi – Thika Road (A2) and the associated works"***.

The property mentioned in the above paragraph is the same one described in paragraph 4 of the re-amended plaint which reads as follows: -

> ***"4. On or about October, 2000, the plaintiff saw a notice placed on a parcel of land adjacent to Thika Road, advertising all those parcels of land known as LR No. 16510 and 16511 (hereinafter "the suit properties") for sale".***

The respondent further pleaded in paragraph 6 of the same re-amended plaint as follows: -

> ***"6. In response, the Commissioner of Lands Officers and/or employees confirmed that the properties were registered in the name of M/s Adeita Company Limited. The search also revealed that the suit properties were registered on 30th July, 1993, as IR 59780/1 and IR 59781/1"***.

The respondent further pleaded that it applied for amalgamation and re-subdivision of the properties which application was approved and new grants were issued namely; ***LR No. 25533/1*** and ***25535/2***. It is on these properties that the respondent claimed it carried out improvements thereon which were purportedly demolished. They are the same properties which the appellants claim were fraudulently obtained by ***Adeita Company Limited*** with the collusion of one ***Wilson Gachanja*** who had at some point been a director of the said company.

[18] In the Notice of Motion dated 18th January, 2013, seeking leave to amend their defence, and set up a counter-claim against the respondent and the said ***Adeita Company Limited*** and ***Wilson Gachanja***, the appellants claimed that the matters which they intended to introduce in the amended defence were not known to them when they filed their statement of defence and only came to light during discovery.

These facts plainly show that there is a nexus between the respondent's suit and the appellants' proposed counter-claim contrary to the finding of the learned Judge. The learned trial Judge, in dismissing the appellant's Notice of Motion also found that the same had been brought too late when the suit was set for hearing.

[19] The learned Judge of the High Court was peeved by the fact that the appellants had withdrawn a similar application before lodging the same Notice of Motion on the eve of the hearing the suit. The learned Judge indeed found the action of the appellants as an abuse of the process of the court.

[20] In ***Eastern Bakery –v- Castelino, [1958] EA 461 (CAK)***, it was held: -

> ***" (i) generally, an appellate court will not interfere with the discretion of a Judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching its decision he has proceeded upon a wrong principle,***
>
> ***(ii) 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,***
>
> ***(iii) the principles applicable to amendments of plaints are equally applicable to amendments of statements of defence".***

[21] Applying the above principles to the facts in the case, we observe the following: The appellants sought leave to amend their defence before the hearing. When their application was lodged no witness had testified. The appellants in their proposed amended defence sought to demonstrate that the respondent's claim had its root in property fraudulently and illegally acquired and was guilty of misrepresentation. They further sought to demonstrate that the proposed additional parties to the counter-claim facilitated the fraud, illegality and misrepresentation.

[22] In our view, the appellants' intended amendments and counter-claim were clearly intertwined with the respondent's cause of action and the finding by the learned Judge of the High Court to the contrary was not based on any analysis she had carried out.

[23] We observe further that although the learned Judge of the court below found that the proposed amendment would be prejudicial to the rights of the respondent, he did not specify the prejudice or the nature of the same nor did she identify the rights which would be prejudiced.

[24] It is preliminary that the court will not refuse to allow an amendment simply because it introduces a new case. (See ***Budding –v- Murduch, (3) [1975] T Ch. D. 42)***. This case was cited with approval in the ***Eastern Bakery*** case (supra) which was also cited by the learned Judge of the High Court. The learned Judge relied upon the following passage from the Eastern Bakery case:

> ***"Leave to amend will be refused where the character of the suit is changed or where it would be prejudicial to the rights of the parties existing at the date of the proposed amendments".***

That passage was itself a quotation from ***Raleigh –v- Goschen, (5) [1898], Ch 73, 8***1. As already observed, the learned Judge did not discuss how the character of the suit would be changed and which prejudice would be visited upon the respondent. In the matter before us, it was not the respondent who was setting out a new cause of action. The appellants in the proposed amended defence and counter-claim intended to demonstrate why the respondent's claim could not succeed. They were in our view, entitled to so demonstrate. They cannot be said to be abusing the court process as the learned Judge of the lower court found.

[25] The main principle as we have already observed and as was stated in the ***Eastern Bakery*** case (supra), is that an amendment will be allowed if it does not cause injustice to the other side. And there is no injustice if the other side can be compensated by costs.

[26] The learned Judge of the court below did not seem to appreciate the above principles when she

declined the appellants leave to amend their statement of defence which proposed amendment in our view, would help elucidate what did indeed happen. As ***Madan, J.A.,*** (as he then was), stated in ***D. T. Dobie –v-Muchina, (1982) KLR 1***, if a suit is capable of being breathed life into, it ought to be done provided the other side's legal rights are not unduly compromised.

[27] In ***Kettleman –v- Hansel Properties Limited, [1988] 1 ALL ER 3 5*** at page ***62, Lord Griffith*** stated:

> ***"Whether an amendment should be granted is a matter for the discretion of the trial Judge and should be guided in the exercise of the discretion by his assessment of where justice lies. Many and adverse factors will bear on the exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view, a Judge is entitled to weigh in balance the strain the litigation imposes on the litigants particularly if there are personal litigants rather than business corporations, the anxieties occasioned by facing new issues one way or the other. Besides, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence".*** (Emphasis ours).

[28] In the matter before us, we think the learned Judge of the court below failed to appreciate where justice lay. She, therefore, with all due respect to her, failed to exercise her discretion properly. Consequently, we think we should interfere. We allow the appeal, set aside the order refusing leave to amend the defence and substitute therefor an order allowing the appellants' application for leave to amend their defence dated 18th January, 2013. Leave is granted to the appellants to amend their statement of defence and set up a counter-claim within fourteen (14) days of today. Leave is additionally granted to join ***Wilson Gachanja and Adeita Company Limited*** as the 1st and 2nd defendants to the counter-claim respectively, within the same period. Reply and defence to counter-claim to be filed within fourteen (14) days of service thereof.

[29] We order that the proceedings before ***Gacheru, J***. be and are hereby set aside.

[30] Costs of this appeal and the application to abide the outcome of the suit in the High Court.

Dated and delivered at Nairobi this 19th day of May, 2016.

G.B. M. KARIUKI

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this a true copy to the original.