



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: GATEMBU, MURGOR & SICHALE JJ,A)**

**CIVIL APPEAL NO. 319 OF 2014**

**BETWEEN**

**LUCIA KIBUI MUCHIRI.....APPELLANT**

**AND**

**KOTTON MWANDABE.....1<sup>ST</sup> RESPONDENT**

**RAYMOND NYERIS PLAL.....2<sup>ND</sup> RESPONDENT**

*(Appeal from the judgment and decree and order of the Env & Land Court at Kitale, Obaga , J.) dated 13<sup>th</sup> March 2014*

**in**

**H.C.Env & L C.C. NO. 136 of 2007)**

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**JUDGMENT OF THE COURT**

This is an appeal from the ruling of Obaga, J. *The appellant, Lucia Kibui Muchiri* requests that her application for further amendment of her plaint which was dismissed by the High Court, be allowed.

By a Notice of Motion dated 7<sup>th</sup> January 2014, the appellant filed an application seeking leave of the High Court to further amend her plaint, so that the correct land parcel number would be indicated. It was her contention that the land parcel (*the disputed parcel*) which was initially indicated as Land Parcel No. West Pokot/Siyoi/1633, had been changed to Land Parcel No. West Pokot/Siyoi/2728 owing to subsequent subdivisions.

The dispute as can be discerned from the record concerns the purchase of 3½ acres of the original Land Parcel Siyoi/28 by the appellant's late husband, John Githua Muchiri from the 1<sup>st</sup> respondent's late father, Kongelei Rotaruk. The appellant claimed that the 1<sup>st</sup> respondent refused to transfer the disputed parcel to her, and instead transferred it to the 2<sup>nd</sup> respondent under a different land parcel number. The appellant sought orders for eviction of the 2<sup>nd</sup> respondent from the disputed land, a permanent injunction restraining the respondents from dealing in any way with the disputed land, and an order requiring the 2<sup>nd</sup>

respondent to transfer the disputed land to the appellant.

The learned judge declined to grant leave to amend the plaint for reasons that suit was filed 15 years after a consent order of 18<sup>th</sup> June, 1992 granted John Githua Muchiri the 3 ½ acres; that the amendment of the plaint was sought 22 years later, and targeted a portion of land held by the 2<sup>nd</sup> respondent who was not privy to the contract with the appellant; the amendment was not only time barred but would greatly prejudice the 2<sup>nd</sup> respondent, and that no amount of costs could compensate him.

It is this decision that has provoked this appeal. The appellant was aggrieved and filed several grounds of appeal, which were that, the trial judge wrongly exercised his jurisdiction; that the court disregarded the law applicable to amendment of pleadings; that by failing to grant leave to amend, the court prevented the appellant from the effective prosecution of her case; that the court misunderstood the Limitation of Actions Act where fraud is alleged, and when the cause of action arose; that the trial court failed to appreciate that the appellant was a victim of the tribal clashes; and that the court fell into error when it held that the intended amendment introduced a new cause of action.

**Mr. Kiarie**, learned counsel for the appellant submitted that in her application, the appellant sought to amend the plaint so as to incorporate the correct land parcel number of the disputed parcel, which had arisen from different numbering of the plots in the subdivision scheme.

According to counsel, it was the appellant's case that the land parcel was the same, save for the difference in numbering of the land parcels; that the learned judge wrongly declined to grant leave to amend the plaint on the basis that it introduced a new cause of action which was time barred; that the 12 year period had yet to expire and the case had not been heard and that no prejudice would accrue to the respondent. Counsel cited **Central Kenya Limited vs Trust Bank Limited & 4 others [2000] eKLR** and **Eastern Bakery vs Castelino (1958) EA 461** for the position that amendment of pleadings should be allowed at any stage of the proceedings, provided that the amendment will not prejudice or cause an injustice to the other party.

**Mr. Ngeiywa**, learned counsel for the respondent relied on the written submissions, but argued that, no supporting documentation was attached to the application to show the relationship between Land Parcel No. West Pokot/Siyoi/1633 and Land Parcel No. West Pokot/Siyoi/2728. In addition, there was nothing on the Land register to support this contention; and that the learned judge rightly declined to grant leave to amend the application.

Counsel further argued that the *Nakuru Chief Magistrate's Court Civil Suit No 706 of 1998* between the late John Muchiri and the 1<sup>st</sup> respondent had effectively concluded the matter, and therefore this suit was *res judicata*. Furthermore, an action could not have been brought under the Limitation of Actions Act, particularly where a decision had already been rendered by court. Counsel also cited **Central Bank of Kenya Limited vs Trust Bank Limited (supra)**, but this time from the standpoint that amendments should only be allowed within the parameters of the law.

We have considered the application, the parties' submissions and the law, and find that the issue turns on whether the learned judge rightly declined to grant leave for the appellant to amend the plaint.

The recent decision of **Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited [2013] eKLR** upheld the prerequisites for amending pleadings specified in **Bullen and Leake & Jacob's Precedents of Pleading, 12<sup>th</sup> Edition** that were cited in **Joseph Ochieng & 2 Others vs First National Bank of Chicago Civil Appeal No 149 of 1991**. Providing guidance on the issue, it was stated thus;

***"...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 amendment introduces a new case or a new ground of defence it can be allowed unless it would***

***change the action into one substantially different character which could more conveniently be made the subject of a fresh action..”***

The appellant’s case is that at the time the disputed parcel was sold to the appellant’s husband, the land had yet to be subdivided, and that owing to subsequent subdivisions the parcel number of the land changed from Land Parcel No. West Pokot/Siyoi/1633 to Land Parcel No. West Pokot/Siyoi/2728, but remained 3 ½ acres.

The draft amended plaint seeks several amendments, but of pertinence are the following clauses;

***“11. The plaintiff indeed subdivided the land comprised in title no. 1274 in terms of the Court Order but instead of transferring the 3 ½ acre portion (and whose number now became WEST POKOT/SIYOI/2728 measuring 1.4 hectares) to the original plaintiff herein who had already moved out of the land, sold and transferred the same to the 2<sup>nd</sup> Defendant.***

***11A. It is the plaintiffs case that in view of the Court Order of 18/6/1922, the 1<sup>st</sup> defendant had no land to sell to the 2<sup>nd</sup> defendant and the transfer of the same to the 2<sup>nd</sup> defendant was perfected in clear breach of a subsisting order, and for which reason the sale and transfer should be nullified, and the 2<sup>nd</sup> defendant ordered to vacate and transfer the same to the plaintiff herein”.***

The amendments sought clearly concern a change in the description of the dispute parcel, which according to the appellant is central to the resolution of the dispute, the object of which is intended to create a direct nexus between the disputed parcel as previously known, and the disputed parcel as currently described. Without determining the issue substantially, as this will be the preserve of the trial court, we consider that, such an amendment should be allowed as it will make way for the just and effective determination of the case in the trial court.

By declining to exercise his discretion to grant the amendment, and to instead delve into the substantive suit at this stage of the proceedings, which reasons formed the basis upon which leave was declined, we are of the view that the learned judge misapprehended the nature of the amendment sought, and the applicable law on amendment of pleadings. In the circumstances, we consider it necessary to interfere with the decision of the High Court and allow the appeal.

Accordingly, we order that the appellant file and serve the amended plaint in the High Court within the next 14 days from the date hereof, and the 1<sup>st</sup> and 2<sup>nd</sup> respondents shall thereafter be at liberty to file and serve their amended defences within 14 days of service of the amended plaint. The appellant shall have the costs of the application in the High Court as well as the cost of this appeal.

***It is so ordered.***

***Dated and delivered at Kisumu this 29<sup>th</sup> day of July, 2016.***

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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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**