IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M. KARIUKI & SICHALE, JJ.A)

CIVIL APPEAL NO. 17 OF 2007

BETWEEN NDERITU WACHIRA RECIEVER & RECIEVER & MANAGER OF BULLEYS

TANNERIES LTD. (UNDER RECEIVERSHIP) ……………..…. 1ST APPELLANT

BULLEYS TRADING (1988) CO. LTD. …………………… 2ND APPELLANT

DANCAN NDERITU NDEGWA ………………………..…….... 3RD APPELLANT

JAMES NJENGA KARUME …………………………….…. 4TH APPELLANT

JUDITH WANJIKU KIBAKI …....……………………..………. 5TH APPELLANT

AND

SIRAJI ENTERPRISES LTD. ………...……………...……. 1ST RESPONDENT

HUSSEIN A. AWALE ………………..…………….…….….. 2ND RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Ocheing, J.) dated 27th November, 2006 **In H.C.C.C No. 1721 of 1999)**

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JUDGMENT OF THE COURT

1. The genesis of this appeal is that between the years 1995 and 1998, the 1st respondent through the 2nd respondent acting as its agent delivered a consignment of skins for tanning to Bulleys Tanneries Ltd. (hereinafter referred to as “the company”). According to the respondents, despite paying for the tanning services, the company refused to release the tanned skins which were then valued at Kshs. 44,051,954/= and instead threatened to sell the same. Consequently, the respondents filed suit in the High Court on 24th November, 1999 being H.C.C.C No. 1721 of 1999 against the company claiming *inter alia* release of the tanned skins and/or in the alternative payment of the market value of the tanned skins. In its statement of defence, the company averred that it had released the tanned skins which the respondents had refused to pay for and counter-claimed for the outstanding amount.

2. Thereafter, in the year 2004, the company was placed under receivership and pursuant to leave granted on 19th July, 2005, the respondents’ amended their Plaint to reflect the Company’s status by substituting

the 1st appellant herein with the company. Subsequently, the respondents' filed yet another application dated 31st July, 2006 seeking leave to further amend the Plaint to implead or join the 2nd, 3rd, 4th and 5th appellants as defendants. The said application was premised on the grounds that the registration of a debenture of Kshs. 60 million in favour of the 2nd appellant over the company's assets in July, 2004 and the subsequent placement of the company under receivership a month later was fraudulent and calculated to defeat the respondents' interests. The respondents' maintained that the joinder of the said appellants was imperative for the determination of the real issues in dispute.

3. Naturally, the 2nd, 3rd, 4th and 5th appellants opposed the application on the grounds that the action against them was time barred and further, that they were not proper parties to the suit. The learned Judge (Ochieng, J.) by a ruling dated 27th November, 2006 exercised his discretion in the respondents' favour and granted them leave to further amend the Plaint. It is that decision that is the subject of this appeal. The appellants' complain that the learned Judge erred in allowing the further amendments without appreciating that firstly, the cause of action as against the 2nd, 3rd, 4th and 5th appellants was time barred; secondly, that the proposed amendments gave rise to a completely new cause of action which was inconsistent with the original cause; thirdly, that at the time the amendments' were sought the suit had partly been heard; and fourthly, that joining the 3rd, 4th and 5th appellants who were directors of the 2nd appellant amounted to lifting the corporate veil without any justification.

4. We note that this Court on 17th February, 2015 adjourned the hearing of the appeal to give an opportunity for the substitution of the 2nd respondent who was deceased. However, during the subsequent hearing of this appeal we were informed that he had still not been substituted and consequently, the appeal as against the 2nd respondent was marked as having abated.

5. M/s Kemunto, learned counsel for the appellants, submitted that the appellants were contesting the exercise of the learned Judge's discretion in allowing the amendments. She submitted that by the time the application for further amendment was filed three witnesses had already testified with regard to a contractual claim; and the amendments brought in a new issue of a debenture. M/s Kemunto argued that the said amendments were made after such an inordinate delay and were only meant to defeat the company's defence. According to her, the amendments introduced a new issue of a debenture which was not in the original plaint and ought not to have been allowed. In support of this line of argument she cited ***James Ochieng' Oduol t/a Ochieng Oduol & Co. Advocates –vs- Richard Kuloba (2008) eKLR.*** She also faulted the learned Judge for joining the 3rd, 4th and 5th appellants who were directors of the 2nd appellant and for lifting the corporate veil without following the prescribed procedure under the ***Companies Act***. M/s Kemunto urged us to allow the appeal.

6. Mr. Muchoki, holding brief for Mr. Lakicha for the 1st respondent, submitted that there was a contractual claim between the 1st appellant and the respondents; by the time the first amendment was done the respondent was not aware of the debenture and only learnt of it when the 1st appellant was relying on it to defeat its claim as a creditor. He submitted that the reason for impleading the 3rd, 4th and 5th appellants was because they were directors of both the company and the 2nd appellant, hence they were necessary for the determination of the issue of fraud. Mr. Muchoki submitted that the cause of action as against the 2nd, 3rd, 4th and 5th appellants was not time barred since the debenture in question was registered in July, 2004. He urged us to dismiss the appeal.

7. This appeal turns on whether the learned Judge exercised his discretion properly in allowing further amendment of the Plaint. Therefore, before we can interfere with the learned Judge's discretion, we must be satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or, that he misapprehended the law or failed to take into account some relevant matter. Sir Kenneth O'Connor P. in ***Eastern Bakery –vs-Castelino (1958) E.A. 461*** stated that,

> ***"Generally speaking this Court will not interfere with the discretion of a Judge in disallowing or allowing an amendment to a pleading, unless it appears that in reaching his decision he has***

proceeded on wrong materials or a wrong principle.”

8. Contrary to the appellants’ contention, it is trite that applications for leave to amend a pleading and/or to join a party can be done at any stage of the proceedings. This much was emphasized in the case of ***Central Kenya Ltd. – vs- Trust Bank Ltd. (2000) 2 EA 365*** thus:-

> ***“Hence 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 the 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.”***

Further, this Court while considering an application for joinder of a party and leave to amend in ***J M K –vs- M W M & another [2015] eKLR*** expressed thus,

> ***“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 P. 887), state that:***
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> ***“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.”***
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> **………..**
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> ***We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar’s Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage. Emphasis added.***

9. In ***Elijah Kipngeno Arap Bii –vs- Kenya Commercial Bank Limited [2013] eKLR*** this Court differently constituted observed,

> ***“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:-***
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> ***“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.”

10. Consequently, the fact that the application for leave to further amend the Plaint was made after three witnesses had testified did not bar the learned Judge from considering and/or allowing the said application. Moreover, following such an amendment parties are at liberty to recall the witnesses.

11. We are of the considered view that in as much as the said amendments introduced issues of a debenture and fraud, it neither changed the character of the respondents’ claim nor defeated the company’s defence.

12. With regard to the joinder of the 3rd, 4th and 5th appellants’, the respondents’ contention was that being directors in both the company under receivership and the 2nd appellant they had participated in the alleged fraud. In such a case the learned Judge only ought to have been satisfied, which he was that the said parties were necessary for the determination of the true and substantive merits of the case. We are also satisfied that they were necessary parties and in finding so we are guided by the decision of this Court in ***Central Kenya Ltd. –vs- Trust Bank Ltd. (Supra)*** wherein it was held,

> ***“The learned trial Judge did not think that Anthony Muiruri Gachoka should be made a party in the appellant's suit before prior compliance with rules for suing directors; in his view if Anthony Muiruri was joined as a defendant it would mean that since he is a director in the appellant company he would become both plaintiff and defendant, more so, in his view, because Anthony Muiruri Gachoka, is the main man in the appellant company. These issues were, in our view, prematurely raised. There are certainly several issues raised in the appellant's suit which, in absence of Anthony Muiruri Gachoka, might not be fully answered. Whether or not the appellant had complied with the requisite rules for suing a director, is not in our view a relevant factor in an application under O.1 rule 10(2) of the Civil Procedure Rules. The paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit. Anthony Gachoka released the title documents for the suit land to Trust Bank Ltd, or so we think. He probably negotiated and secured the loan from Trust Bank Ltd, in favour of Katka Islands Ltd. The other intended defendants are alleged to have participated in one way or another to facilitate the release of the loan, and/or the registration of charges against the suit land. They are therefore, prima facie, necessary for the effectual and complete adjudication of the appellant's case.*** (Emphasis added).

13. As to the contention that the cause of action as against the 2nd, 3rd, 4th and 5th appellants’ was time barred because the issue which gave rise to the allegations of fraud against them, that is, the registration of the debenture, occurred in July, 2004 while the application to amend was filed on 31st July, 2006, it is our view that it may well be raised in the defence. Nothing precludes the appellants from raising the issue.

14. As far as we are concerned we agree with the learned judge the said amendments were necessary for the determination of the issues in dispute in the respondents’ claim. Furthermore, we find that the appellants’ did not suffer any prejudice on account of the leave being granted. Consequently, we find no reason to interfere with the exercise of the learned Judge’s discretion and hereby dismiss the appeal with costs to the 1st respondent.

Dated and delivered at Nairobi this 8th day of July, 2016.

M. K. KOOME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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DEPUTY REGISTRAR