IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 98 OF 2015

BETWEEN

SAMUEL KISANG CHEBOI ……………. 1ST APPELLANT

GILBERT KIPKOECH TOLGOS ……..... 2ND APPELLANT

DAVID YANO CHEBOI

(suing as trustees of Marakwet

Chepsiro Investment Group) **……………..... 3RD APPELLANT**

AND

ELISHA KIPLETING MUREI …………...1ST RESPONDENT

THOMAS KIPKORIR KOECH …...…. 2ND RESPONDENT

NOAH KIRWA CHUMA ……………. 3RD RESPONDENT

OBADIAH KIMUTAI SAINA …….…... 4TH RESPONDENT

WILSON KIPKEMOI BUSIENEI (sued in their personal capacity and on behalf of Loima Multipurpose Co-operative Society/Group **……………….................... 5TH RESPONDENT**

(An appeal from the ruling and decision of the Environment and Land Court at Kitale, (Hon. E. Obaga, J.) dated 22nd June, 2015

in

ELC NO. 110 OF 2013)

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JUDGMENT OF THE COURT

1. This is an appeal from a ruling of the Environment and Land Court at Kitale (E. Obaga, J) delivered on 22nd June 2015 in Environment and Land Case No. 110 of 2013 dismissing the appellants' application for leave to re-open its case before the trial court and for amendment of its plaint.

Background

2. In their plaint presented to the Environment and Land Court at Eldoret on 6th June 2013, the appellants sought a declaration that they are the legal owners of a property known as L.R. NO. 4366 situated in the South East of Kitale in Trans-Nzoia County measuring approximately 1282.01 hectares ("the property"); for an order for the eviction of the respondents from that property on the basis that they had trespassed on it and for a permanent injunction to restrain them from interfering with the property or trespassing upon it.

3. In their statement of defence filed on 13th November 2013, the respondents denied that the appellants are the registered owners of the property or that they or any of their members had trespassed on the same. They averred the dispute had been adjudicated in previous proceedings and that the suit was therefore res judicata; that there is no privity of contract or estate between the parties and that the suit should be dismissed.

4. The hearing commenced before the Environment and Land Court on 30th July 2014. Three witnesses testified on behalf of the appellants after which the appellants closed their case. At the close of the appellants' case, counsel for the respondents indicated that he did not have his witnesses and that he had not filed a list of the defence documents and defence witness statements. With the consent of counsel for the parties, the court granted the respondents leave "to put in a list of documents and witness statements" and the defence hearing was then scheduled for 9th December 2014. On that date the defence counsel had not filed the respondents' list of documents and witness statements and was granted an extension of time by the court to do so. When the hearing was scheduled to resume on 11th March 2015, counsel for the appellants indicated to the court that they were served with the respondents' documents on 6th January 2015 and requested for adjournment to enable them make a formal application to re-open the case and amend the plaint. When allowing that adjournment, the court stated:

> "**It is clear that this adjournment has been necessitated by the defendant's late service of documents. This case was filed at Eldoret in 2013. The defendants ought to have filed statements in time. This was not done. In the interest of justice, I allow the application for adjournment to enable the plaintiff's counsel to file a formal application seeking amendment and re-open of the case**."

5. On 17th March 2015 the appellants presented an application citing Article 159 of the Constitution, Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act and Order 8 rule 5 and Order 51 rule 1 of the Civil Procedure Rules seeking leave to reopen the appellants' case and to amend its plaint. That application was based on the grounds that the respondent filed its documents and statements after the close of the appellants' case; that the appellants are entitled to be heard on those documents; that the application was necessitated by the conduct of the respondents; that in order for the interests of justice to be met, all parties should be accorded an opportunity to be heard.

6. The proposed amendments to the plaint were set out in a draft-amended plaint that was attached to the application. The proposed amendments included averments that the respondents "have and/or appear to have" converted the title to the property from a title under the provisions of the Registration of Titles Act to the Registered Land Act; that the respondents had fraudulently subdivided or embarked on the process of subdividing the property and caused title deeds in respect of the property to be issued in their names; that the respondents had as a result prevented the appellants from fully utilizing the property; that the resultant titles obtained fraudulently should be cancelled; and that the Land Registrar should therefore be ordered to cancel the same and revert the property to its original registration status.

7. In their grounds of opposition, the respondents contended that the application was an abuse of the

process of the court; that the application was not made in good faith; that it was made to plug holes in the appellant's case, that the appellants were fishing for material for their case and that the application was against the principles of justice.

8. Dismissing the application, the learned Judge was of the view that documents introduced by the respondents after the close of the appellants' case were not new to the appellants; that the appellants' knew of the documents as the dispute regarding the property was "in existence since the early 70's" and the appellants had not been ambushed; and that there was "nothing new raised by the [respondents] which will necessitate reopening of their case."

9. As regards the application for amendment of the plaint, the Judge was of the view that to allow the amendment "would result in cancellation of titles which were obtained before the suit land was allocated to the [appellants]" and that would be prejudicial to the respondents.

10. Aggrieved by that decision, the appellants instituted the present appeal.

The appeal and submissions by counsel

11. During the hearing of the appeal, learned counsel for the appellants Mr. A. K. Nyairo referred to the grounds of appeal in the memorandum of appeal and submitted that the learned Judge erred in rejecting the appellants' application. According to Mr. Nyairo, the Judge did not give due consideration to the fact that it was the late service of the respondents documents and statements, served after the close of the appellants ' case, that necessitated the application. Counsel referred us to the decision of this Court in **Central Kenya Ltd v Trust Bank Ltd [2002] 2 EA365** for the proposition that "the guiding principle in applications for leave to amend is that all amendments should be freely allowed at any stage of the proceedings, provided that the amendment…will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."

12. According to counsel, although the application before the Judge called for exercise of discretion, the Judge failed to take into account relevant factors, namely that the appellants did not have the documents the respondent intended to rely upon until after the close of the appellant 's case; that the Judge failed to appreciate that although the documents in question may have been mentioned in a ruling that formed part of the appellants' documents, the documents themselves, were not part of the record. Furthermore, counsel argued, the Judge failed to appreciate that the relief that the appellants' sought to include for cancellation of titles related to the same property and that the proposed amendments would have brought out the real issues in controversy. Counsel went on to say that in addressing the question of validity of titles at that stage, the learned Judge wrongly prejudged the matter at an interlocutory stage.

13. Opposing the appeal learned counsel for the respondents Mr. O. H. Aseso referred us to the decision of the Court in **United India Insurance Co Ltd and 2 others v East African Underwriters (Kenya) Ltd [1985] eKLR** and submitted that this Court should not interfere with the decision of the Judge as it was made in exercise of discretion; that the grounds upon which the Court can interfere with the exercise of discretion do not exist in this case; that the documents served on the appellants were within the appellants ' knowledge and the application was tantamount to abuse of the process of the court; that the appellants were negligent in failing to plead at the outset to the matters they were seeking to introduce considering the same matters had been litigated in a previous case, namely, HCC 190 of 1999 and parties should not be allowed to re-litigate matters; that the Judge properly exercised his discretion in rejecting the application.

14. Whilst conceding that the respondents' documents were served late, counsel urged that the same documents had been informally supplied to the appellants earlier and were indeed part of the appellants' own documents.

Determination

15. We have considered the appeal and submissions by counsel. The question we have to determine is

whether the appellants have laid ground for this Court to interfere with the exercise of judicial discretion by the Judge when he declined to allow the appellants' application to amend their plaint and to re-open their case.

16. There is consensus that an application for amendment of pleadings and for the re-opening of a case involves the exercise of judicial discretion. There are limited circumstances when an appellate court can interfere with exercise of judicial discretion. As the Court stated in **United India Insurance Co Ltd and 2 others v East African Underwriters (Kenya) Ltd** (supra),

> "**The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.**
>
> **The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong**."

17. We have set out above, the background against which the appellants sought leave to amend their plaint and to re-open their case. As already mentioned, by the time the appellants closed their case on 30th July 2014, the respondents had neither filed their documents nor their witness statements. By the time the hearing was scheduled to resume on 9th December 2014, the respondents had still not done so, and the time for doing so was extended by the court for a further 7 days.

18. The respondents eventually served their statements and documents on the appellants' advocates on 6th January 2015. After reviewing the same counsel for the appellants considered it necessary for the appellants witnesses to have an opportunity to comment on them and to amend the plaint and hence the adjournment granted by the court to enable the appellants to make a formal application for that purpose.

19. There can be no doubt therefore that it was the omission by the respondents to timeously file and serve witness statements and their copies of documents that precipitated the state of affairs necessitating the application by the appellants.

20. Under Order 7 rule 5 of the Civil Procedure Rules, the respondents were required to file with their defence, the list of witnesses, written witness statements and copies of documents "to be relied on at the trial." For reasons that are not clear from the record, the respondents waited until after the appellants had already closed their case, to supply the statements and the documents. Those circumstances in our view justified the re-opening of the case to enable the court have the benefit of the appellants' reaction to those statements and documents. In other words, the appellants deserved an opportunity to be heard in relation to those statements and documents. We think the learned Judge erred in declining to allow the appellants' to re-open their case in those circumstances.

21. As regards the application for leave to amend the plaint, the applicable legal principle is that 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. There are many decisions in support of that proposition including the decision of the predecessor to this Court in **Eastern Bakery vs. Castellino [1958] EA 461** where 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**." The decisions in **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR** and **Kassam v Bank of Baroda (Kenya) Ltd [2002] 1KLR** to which counsel referred support the same proposition.

22. While it is clear from the impugned ruling that the learned Judge appreciated the legal principle applicable when dealing with an application for amendment of pleadings, his rejection of the appellants' application on grounds that allowing the amendments would "result in cancellation of titles" was clearly a misdirection. He was not at that stage being called upon to uphold the plea that the titles should be cancelled. He was being called upon to allow the appellants to plead that the titles were liable for cancellation. Whether or not that plea would succeed was for the trial court after a hearing, to determine. For those reasons, the decision by the court to reject the appellants' application was plainly wrong.

23. We accordingly allow the appeal. We hereby set aside the ruling of the court dated 22nd June 2015 and substitute the same with an order allowing the appellants' application dated 17th March 2015 with the result that the appellants have leave to file and serve an amended plaint in terms of the draft amended plaint attached to the application dated 17th March 2015. The appellants have leave to re-open their case. The trial shall be conducted before any judge of the Environment and Land Court other than the Honourable E. Obaga, J.

24. Each party shall bear its own costs of the application before the High Court. The appellants shall have the costs of the appeal.

Dated and delivered at Eldoret this 28th day of October, 2016

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

…………………………….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGSITRAR