IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 72 OF 2014

GEORGE GIKUBU MBUTHIA.....APPELLANT

AND

CONSOLIDATED BANK OF KENYA LTD…….1STRESPONDENT

PETER NJERU MUGO…….2NDRESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi, (Gikonyo, J.) dated 18th March 2014

in

HCCC NO. 937 OF 1986)

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JUDGMENT OF THE COURT

Some 27 years, 7 months and 21 days after he filed ***High Court Civil Suit No. 937 of 1986*** against ***Jimba Credit Ltd***, the predecessor in title of***Consolidated Bank of Kenya Ltd (the 1st respondent)*** and ***Peter Njeru Mugo (the 2nd respondent)***, ***George Gikubu Mbuthia (the appellant)*** took out a Motion on Notice on 15th November 2013 seeking leave to amend his plaint filed on 25th March 1986. To contextualize the elapsed time, it may be pointed out that when the appellant filed his suit, the Union of Soviet Socialist Republics was still in existence, though tottering towards collapse; two months earlier Yoweri Kaguta Museveni had gunned his way into Kampala and ascended to power in Uganda, Nelson Mandela was still incarcerated at Roben Island, Javier Perez de Cuellar was the Secretary General of the United Nations, the venerable C.B. Madan was the Chief Justice of the Republic of Kenya and it was a whole 11 years before the birth of Malala Yousafzai, the 2014 Nobel Peace laureate.

Satisfied, among other things, that the delay in making the application for leave to amend was inordinate, **Gikonyo, J.** exercised his discretion on 8th March and declined to grant the applicant leave to amend the plaint. The same day, the appellant lodged a notice of appeal and is now before us contending that the exercise of discretion by the learned judge was wrong and that we should allow his appeal, set aside the order of the learned judge and allow his application for leave to amend the plaint.

The short background to this labyrinthine litigation is that at all material times, the appellant was the registered owner of a property known as ***Nairobi Block/73/225*** situate in Buru Buru, which he charged to the 1st respondent's predecessor in title to secure a loan. Upon the appellant's default in repayment, the

chargee exercised its statutory power of sale and sold the property to the 2nd respondent by public auction on 13th February 1986. At the hearing of this appeal, we were informed that the property has since been sold and transferred to a third partywho has not been joined to the proceedings in the High Court or this appeal. Claiming that the property was undersold and that he had paid to the chargee much more than was acknowledged, the appellant instituted HCCC No 937 of 1986 seeking nullification of the sale and restriction of the transfer of the property to the 2nd respondent.

In the period of more than 27 years that we have adverted to, instead of prosecuting the suit, the appellant was busy making application after application in both the High Court and this Court and filing other suits on the same dispute. In his affidavit sworn on 11th December 2013, the 2nd respondent depones in paragraph 5 that in total the appellant has filed 30 applications. Among those are three applications to amend the plaint, which were dismissed by ***Amin, J***. in 1981; ***Hewitt, Commissioner of Assize*** in 1999; and ***Lessit, J.*** in 2009.

It is not surprising therefore that both the High Court and thisCourt have had occasion to comment on the conduct of this litigation.

Nyamu, J. (as he then was) in a ruling dated 20th March 2003 stated:

> ***"The filing of the subsequent suit, including ignoring all past court orders made in respect of the same suit property since 1986 reveals an ugly face of vexatious litigation which the court process must frown upon at the earliest opportunity in order to enhance the credibility of the court orders and process. I feel constrained to invoke the inherent powers of this court to prevent abuse and oppressive litigation although the two defendants had not made any formal applications.***

For its part, in a ruling dated 26th July 2013, this Court noted that this litigation had virtually metamorphosed into a modern day version of ***Charles Dicken's Jandyce v. Jandyce*** in ***Bleak House*** and observed:

> ***"This question is still pending in the suit 27 years later.***
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> ***Instead the Court has been inundated with one application after the other for this whole period. We have counted no less than 24 applications on the record before us, although we were informed during the hearing of this application that there have been more than 33 applications. From our own assessment, the applicant has brought most of those applications."***

Although all the parties addressed us more on matters that have to do with the history of the litigation and the substance some of those myriad applications, the cut and dry issue in this appeal is simply whether in the circumstances of this case, Gikonyo, J. erred by declining to grant the appellant leave to amend the plaint. We intend to focus on that issue alone.

In his affidavit in support of the application for leave to amend the plaint, the appellant deponed that no new or inconsistent cause of action would be introduced; that no accrued rights of the respondents would be affected; and that no injustice to them would be occasioned by the intended amendments. The respondents vigorously opposed the application, the 1st respondent relying on a replying affidavit sworn by its advocate, ***Kevin McCourt*** on 6th December 2013 and the 2nd respondent on his affidavit sworn on 11th December 2013. After setting out the background and history of the litigation, the respondents contended that having previously filed applications for leave to amend the plaint which were dismissed, and having failed to appeal against those decisions, the appellant was precluded from bringing a further application for amendment; that the appellant was guilty of material non-disclosure; that some of the intended amendments were based on legislation that was enacted after the filing of the suit; that the delay was inordinate; and that the property was already sold and transferred to a person who was not a party to the suit.

In dismissing the application, the learned judge found that the intended amendments sought to introduce

new matters substantially altering the character of the original suit and introducing new causes of action; that the amendments were prejudicial to the administration of justice and to the respondents; and that the appellant was guilty of inordinate delay.

The appellant's memorandum of appeal contains 19 grounds of appeal that are roving, imprecise and repetitive. They dwell primarily on the history of the dispute rather than the precise issue of amendment that was decided by the High Court. In our estimation, the only issue that is germane to this appeal iswhether the learned judge exercised his discretion wrongly when he dismissed the appellant's application.

Prosecuting his appeal in *propria persona*, the appellant submitted that the intended amendments were minor and did not introduce anything new; that the amendments would not occasion the respondents any prejudice; that any loss suffered by the respondents could be compensated by award of costs and damages; that the delay in making the application for leave to amend was caused by the placing of the 1st respondent's predecessor under statutory management; and that the courts proceed on the principle that all amendments should be freely allowed at any stage of the proceedings if the do not result in prejudice or injustice which cannot be compensated by costs.

In a brief response, ***Mr. McCourt***, learned counsel for the 1st respondent opposed the appeal and supported the ruling of the High Court contending that it had correctly applied all the principles on amendment; that the appellant was guilty of inordinate delay; and that the intended amendments were utterly prejudicial to the respondents if they were to be allowed after such a long period.

Mr. Mugo, who also appeared in *propria persona*, but unlike the appellant is an advocate of the High Court of Kenya, joined the 1st respondent in opposing the appeal. He submitted that both the application for amendment and the appeal were overtaken by events because he had already sold and transferred the property to a third party who has not been joined in the suit. In his view, leave to amend in the circumstances of this case would serve no purpose.

The point of departure is that Gikonyo J.'s determination was an exercise of discretion. As this Court stated in ***James Ochieng Odoul v. Richard Kuloba, CA No 2 of 2002*** the power of the court to order amendment is a discretionary power. The Supreme Court of Uganda defined exercise of discretion as the faculty of deciding or determining in accordance with circumstances and what is deemed to be just fair, right, equitable and reasonable in those circumstances. (See ***Kiriisa v. AG & Another [1990-1994] EA 258).*** And in ***Nanyuki Equator Sacco Co-operative Society Ltd v. Nyeri Sacco Society & Another, CA. No. Nai. 86 of 2005,*** this Court explained that exercise of discretion necessarily involves a latitude of individual choice according to the particular circumstance of the case.

> Subject to the requirement that discretionary power must be exercised judiciously, this Court will be slow to interfere with the exercise of discretion by a judge of the High Court. In ***United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd [1985] E.A 898 Madan J.A (as he then was)*** adumbrated the principle as follows***:***
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> > ***"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."***

The rationale for that cautious and circumscribed approach by the appellate court was succinctly stated by ***Justice Ibrahim Tanko Mohammad*** of the Supreme Court of Nigeria in ***Abayomi Babatunde v. Pan Atlantic Shipping & Transport Agencies Ltd & Others S.C.154/2002*** as follows:

"The general law on exercise of discretion is that the discretion is always that of the trial court and not of the appellate court. Hence an appellate court cannot substitute its own discretion."

In its considered ruling, the High Court went to great length andset out all the intended amendments proposed by the appellant. The court then evaluated those amendments as against the case that the appellant had initially presented and concluded that the amendments would completely change the nature of the claim to the prejudice of the respondents. While initially the appellant had admitted receiving a loan, from the 1st appellant's predecessor, now he claimed that what he had received was only a friendly advance. In 24 new paragraphs, allegations of fraud were introduced against the 1st respondent's predecessor and its advocates and it was contended that the statutory power of sale was not exercisable. As against both respondents a new claim based on trespass was also made and a claim of aggravated damages of Kshs 200 million.

The High Court found that the intended amendment were substantial in quantity and quality; introduced new matters into the suit; substantially altered the original claim; introduced new causes of action; deprived the respondents of the benefit of admissions already made by the appellant; occasioned prejudice to the respondents and that the appellant was guilty of inordinate delay.

As regards the law, the High Court readily accepted that the court has unfettered discretion to allow amendment of pleadings, which discretion must be exercised judiciously. It accepted too as a general proposition that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments. However, he also noted situations when the court will refuse to exercise its discretion to allow amendments. Such cases include where a new or inconsistent cause of action is introduced; where vested interests or accrued legal rights will be adversely affected; where prejudice or injustice which cannot be properly compensated in costs is occasioned to the other party; and where the applicant is guilty of inordinate delay. The court cited a number of authorities as the foundation of those principles, among them ***Motokov v. Auto Garage Ltd & Others [1971] EA 353; Barclays Bank DCO v. Shamsudin [1973] EA 451*** and ***Central Kenya Ltd v. Trust Bank Ltd & 5 Others, CA. No. 222 of 1998.***

Having carefully considered this appeal and evaluated the manner in which the learned judge exercised his discretion, we are satisfied that he did not address any extraneous factors; that he considered all the relevant factors; and that he properly applied the relevant legal principles. We find therefore that there is no basis upon which we can interfere with that exercise of discretion. Accordingly, this appeal fails in its entirety and the same is dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Nairobi this 4th day of November, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR