



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, OUKO & MURGOR, J.J.A)

CIVIL APPEAL NO.173 OF

2004

BETWEEN

STEPHEN BORO GITHUA.....APPELLANT

AND

FAMILY FINANCE BUILDING SOCIETY.....1ST RESPONDENT

GEORGE MWANGI HIUKI.....2ND RESPONDENT

MUIBAN AGENCIES.....3RD RESPONDENT

LAND REGISTRAR, NAIROBI.....4TH RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi (Kasango, J.) dated 21st June, 2004 inH. C. C. No.360 of 2003)

JUDGMENT OF THE COURT

The appeal about to be determined arose from the ruling in the High Court (*Kasango, J.*) delivered on 21st June, 2004. Before the learned Judge was an application brought under the old **Order VIA r.3(2) of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act**. The appellant sought leave to amend his plaint, as per the draft annexed to the application and also prayed that the *status quo* in the case be maintained. In essence, the appellant sought the amendment on the ground that since filing the suit he had discovered from the documents he had since obtained that he borrowed Sh.3.5 million from the 1st respondent, **Family Finance Building Society**, and not Sh.7.5 million as pleaded. Having presented the reasons to justify the leave sought and after the learned Judge heard the rival arguments, she made reference to the law and several authorities then declined to grant the leave. This appeal seeks a decision that the learned Judge fell into error by not granting the leave to amend the plaint which would have facilitated not only the true and proper facts of the suit to be determined, but also that, allowing the amendment would mean doing justice in the case. A parcel of land known as LR No.218/278, New Huruma Estate had been pledged as a security in the loan deal. Early in the application, the learned Judge dismissed the prayer for maintaining the *status quo* because that prayer was neither borne out in the supporting affidavit nor the grounds in the body of the application.

In dismissing the prayer to amend, the learned Judge referred to an affidavit the appellant swore in support of a chamber summons dated 23rd June, 2003 in which he stated that he borrowed a sum of Sh.7.5 million from the 1st respondent. Taking that deposition in the light of the provisions of **Order VI r.6(1) of the Civil Procedure Rules** which she reproduced, the learned Judge concluded that by permitting the appellant to amend his pleadings, he could be raising a new ground or claim inconsistent with the previous pleadings in the same suit. So as noted earlier, the application was dismissed hence this appeal.

The parties filed written submissions which they left to us to consider and render a decision. The appellant's side condensed the eleven grounds of appeal and argued them globally to the effect that the old **Order VIA r.5(1)** (now **Order 8 rule 5(1) of the Civil Procedure Rules**) was clear that amendments of pleadings could be done at any stage of the proceedings. And unless the intended amendment was likely to cause prejudice to the adverse party which prejudice costs could not compensate, then the leave to amend should be granted freely. The cases of **Eastern Bakery Ltd vs Castelino [1958] EA 461** and **Central Kenya Ltd vs Trust Bank Ltd & Others Civil Appeal 222/1998 (C.A.)** were cited in support.

On the other hand, the 1st and 2nd respondents submitted that the High Court was right in refusing leave to allow the appellant to amend his pleadings because he borrowed Sh.7.5 million with the said land parcel as security. He defaulted in the repayment. Attempts to realize the sale of the security or transfer of the same were resisted by the appellant at each and every stage until he came up with the application to amend the pleadings. The respondents supported the decision of **Kasango, J.** in refusing to allow amendment to the pleadings and cited the case of **Kyalo vs Bayusuf Brothers Ltd. C.A. No.38/1981 (C.A.)** where it was held that amendments that contain allegations completely inconsistent with previous pleadings could not be allowed, especially when they are late or would delay a fair trial or cause prejudice to the other party.

To determine this appeal we must begin by reiterating that amendments to pleadings which contradict previous pleadings in the same suit or are intended to delay a fair trial or are likely to prejudice the other party to an extent that damages cannot compensate that party, should not be allowed. There are cases where amendments to pleadings have been rejected because they came at a very late stage of the proceedings, or made in bad faith. All the above is intended to keep litigants on an even footing, so that prejudicial ambushes or other skirmishes do not spring up thereby delaying a fair and quick disposal of a trial, or cause prejudice to the other party. Such proposed amendments could not be said to contribute to the cause and course of justice and so the courts do properly reject those geared towards doing injustice. On the other hand, we reiterate that where intended amendments are geared to place a full and clear case before the court so that it is effectually and finally determined on its merits, ought to be allowed for that is the way to do justice.

In the **Eastern Bakery Case** (Supra) where amendments were made to the pleadings and only some allowed to the defence, this Court held, *inter alia*, that:

“Generally the appellate court will not interfere with the discretion of a Judge allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or upon a wrong principle.”

And that:

“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.”

From the history of the case in the High Court, it is apparent that it is still pending before the court even as we gleaned from the submissions that the security, a parcel of land, was sold and probably transferred.

The chamber summons filed by the appellant which **Kasango, J.** decided was dated 29th March, 2004 or thereabout. It was brought under the now repealed **Order VIA rule 3(3) of Civil Procedure Rules**, as alluded to earlier for orders, including, amending the amended pleadings. That provision of law (now **Order 8**) reads as follows:

“3.(1) ---

2. Where an application to the Court for leave to make an amendment such as mentioned in sub-rule (3), (4) or (5) is made after any 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 of such sub-rule if it thinks just to do so.

4. --- (5) ---.”

One of the grounds in the body of the application stated:

“1. That new material evidence that was not in the applicant’s knowledge at the time of filing suit and the subsequent amendment has emerged that has cause (sic) it vital for the applicant to amend the amended plaint.”

The learned Judge instead considered the provisions of **Order VI rule 6(1)** which she reproduced that:

“6. (1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with the previous pleading of his in the same suit.”

It is not quite clear to us why the learned Judge adopted a provision of law, apparently not related to the substance of the chamber summons before her in order to determine that application. Nonetheless, the other default we note is that the learned Judge took deposition in an affidavit in a chamber summons dated 23rd June, 2003 in which the appellant stated that he borrowed Sh.7.5 million from the 1st respondent, to constitute a pleading and thereby dismissed the chamber summons before her because the contents of an affidavit constituted a pleading. On this point, we find that the learned Judge erred to construe contents of an affidavit as a pleading even after she correctly reproduced the definition of a pleading as contained in **Section 2 of the Civil Procedure Rules**.

As is trite law the contents of an affidavit constitute evidence on oath. An affidavit does not constitute a pleading. A pleading includes a summons, petition, a statement of claim or demand or a defence, a reply to a defence or counterclaim, all of which are subject to amendment, unlike an affidavit, which is evidence.

In sum, we find that the learned Judge proceeded on a wrong provision of law or not as per the provision of law cited and also on what she considered constituted a pleading (plaint) intended to be amended. She should have considered the law and material placed before her to allow or disallow the application. The intended amendments were not inconsistent with the original claim. Accordingly for having considered the wrong law and assumed that contents of an affidavit constituted a pleading, which we have said is not correct, we allow this appeal, set aside the orders in question. The appellant prayed that he proceeds to amend his plaint further and that we grant. He will further amend his plaint in the next 30 days file and serve the same for the hearing of the suit in the High Court. The respondents, we think, will not be prejudiced because they too could apply to amend their defences. And at the trial, evidence will unravel the true state of affairs.

The respondents are ordered to pay the costs of this application to the applicant.

Dated and delivered at Nairobi this 23rd day of January, 2015.

J. W. MWERA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR