IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 155 OF 2009

BETWEEN

GEORGE GIKUBU MBUTHIA..APPELLANT

AND

CONSOLIDATED BANK OF KENYA.................................1ST RESPONDENT

PETER NJERU MUGO.. 2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Milimani Commercial Court Nairobi (Lesiit, J.) given on 30th April, 2009

in

H.C.C.C NO. 937 OF 1986)

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JUDGMENT OF THE COURT

[1] This is an interlocutory appeal by George Gikubu Mbuthia (Appellant) against the ruling and order of the High Court (Lesiit J.), of 30th April 2009. In that ruling the appellant's application by way of chamber summons dated the **25th November, 2008** was dismissed. A brief summary of this matter is as follows; the appellant filed a plaint dated **25th March 1986**, in the High Court Nairobi in Civil Suit No. 937 of 1986, against the respondents. It is necessary to point out that the substantive suit which must now be 28 years old in the court system has never been heard and determined conclusively partly perhaps because of this interlocutory appeal.

[2] In the application that provoked the instant appeal, the appellant had sought leave to amend the plaint and, according to him, on 13th December 1991, Waweru J., granted him leave to do so. He consequently amended plaint and filed it on **17th December, 1991**; by then the 1st respondent had been placed under statutory management on the **11th August, 1986.** The appellant contended that since no leave was obtained under **section 228** of the Companies Act to nullify the amended plaint, the subsequent proceedings and orders given by the courts in reliance of the said amended plaint, amended defences and

counter-claim were a nullity. He argued that in law, amendments of pleadings sought before the hearing are freely allowed unless they were prejudicial to the opposite side; it was clear in the case that no injustice was to be caused if the amendments sought were to be allowed on the ground that the contract which the respondents relied on in their transactions of **13th February, 1986** was a nullity *ab initio* having been ousted by **section 35 (1)** and **(3)** of the Advocates Act; further due to special circumstances amendments of a plaint are allowable notwithstanding defence of limitation of time; lastly the overriding consideration in an application for leave is whether the amendments were necessary for the just determination of the controversy between the parties and delay is not a ground for declining to grant leave. The applicant contended that the suit property had been sold by the 1st respondent to the 2nd respondent based on a null and void charge and thus he should have been allowed to amend his plaint.

[3] The application was opposed by the respondents. On the part of the 1st respondent it was submitted that the proposed further amendments to the plaint that was filed 22 years later, contravened Order VIA rule 7(2) and (3) and that the proposed amendments sought to introduce new causes of action which were statute barred. The 2nd respondent also opposed the amendments and contended that a totally new cause of action was being sought to be introduced. He also argued that the issues sought to be introduced were adjudicated upon by the Court of Appeal which dismissed a similar application.

[4] Upon considering all the arguments, the learned judge (**Lesiit, J**.) dismissed appellant's application with costs. In so doing, the learned judge found that the amendments sought, if allowed, would prejudice the respondents and change the character of the entire suit. Further, that the application having been made after a long lapse of time and after the suit property had changed hands and was registered to parties not privy to the suit, would be prejudicial not only to the respondents but also to such third parties.

[5] This is the summary of the ruling that aggrieved the appellant, thereby provoking him to file this appeal which is based on 19 grounds of appeal. To avoid repetition, we highlight the following grounds:-

The learned Judge erred in law and fact by;

1. ***Denying the appellant a chance to orally address the court on all the grounds in the Notice of Motion dated the 28th November,***
2. ***Finding that the interest of justice and fairness will not be served if the application was allowed without considering that by filing Civil Application No NAI 18 of 1991 and several others subsequently in the superior court in defiance of this court's Order of 12th July, 1988, the respondents sought to unlawfully benefit from an auction which was not supported by a valid charge over Nairobi Block 73/225.***
3. ***Failing to find that orders made on 30th April 2009 in pursuance to the order of 1st August, 1991, were of no legal effect and a nullity in law for want of jurisdiction.***
4. ***Failing to consider that in view of lack of locus by the respondents, her jurisdiction to grant her orders of 30th April, 2009 was equally ousted.***

[6] When this appeal came up for hearing before us on the **21st July, 2015** the appellant appeared in person. Mr. Wanyoike held brief for Mr. K.D McCourt, learned counsel for the 1st respondent, while the 2nd respondent represented himself. The appellant drew our attention to the charge document, which was the contract between him and the 1st respondent and he submitted that the charge was not endorsed by the 1st respondent. It therefore offends **section 35 (1)** of the Advocates Act, he said. Further he contended that the said charge document being in breach of **section 35 (1)** was consequently an illegal contract. According to the appellant, the Registrar of titles should not have accepted the said charge document; it should have been rejected by the registrar of title. He made reference to the case of; - **Mapis Investments (K) Ltd vs Kenya Railways Corporation (2006) eKLR.** In that case, it was observed that where a contract is illegal, it cannot be enforced. According to the appellant, having brought to the attention of the

court the illegality of the charge document and notwithstanding that it was registered the fact that it was the core of the transaction, and as long as the illegality was not addressed, the invalidity will persist; and no one can hold a good title to the property. The applicant stated that although he has made a total of 25 applications, the courts have not resolved this matter, to its logical conclusion.

[7] Miss Wanyoike opposed the appeal on behalf of the 1st respondent and reiterated the entire submissions that were made on behalf of her client before the High Court. She supported the ruling of the judge and urged the reasoning and the grounds for the dismissal of the appellant's application were sound in law. In her opinion, this appeal should be dismissed and the appellant directed to set the suit down for hearing. Mr Mugo, who is the 2nd respondent and represents himself also opposed this appeal and dismissed the appellant as a vexatious litigant. He pointed out that he bought thesuit property in February, 1986 and the same has been sold to many other third parties who are not parties in the matter and therefore orders that may affect them cannot issue without their participation. He submitted that the appellant has been filing a multiplicity of suits, applications and appeals as the record will show and that he has been abusing the court process.

[8] From the foregoing submissions, the record of appeal and the authorities cited by the respective parties, we have analyzed the ruling by the High Court. As stated in the opening paragraph of this ruling, this is an interlocutory appeal against a ruling seeking to amend the plaint. The main suit which is almost 28 years old is still pending before the High Court for hearing and determination.

[9] Our task is to establish whether the judge erred by dismissing the appellant's application seeking to further amend the plaint. Firstly, the Judge found that the issues being introduced by the proposed further amendments were already adjudicated upon in previous rulings and orders by the same court; thus the issues were *res judicata.* The judge was persuaded that the appellant had unsuccessfully filed similar applications in the High Court and Court of Appeal. The appellant did not deny that by a preliminary decree issued by **A.B Shah J.,** (as he then was) on 18th October 1994, the claim against the 2nd respondent was dismissed with costs. He also filed **HCCC No. 1260 of 2002** against the same parties, seeking similar remedies and that suit was struck out on 20th March 2003. The appellant made numerousunsuccessful attempts to appeal against the said orders. In addition, the appellant had amended the same suit on 27th July 2009.

[10] R*es judicata* is a legal principle which is provided for under Section 7 of Civil Procedure Act, Cap 21, Laws of Kenya as follows:-

> ***"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

[11] See also the case of; - **Kenya Hotel Properties Ltd vs Willisden Investments Ltd & 4 others {2013} eKLR**. The Court of Appeal expounded on situations when the doctrine of *res judicata* can apply, to wit; - the matter must be directly and substantially in issue in the two suits; the parties must be the same or the parties be litigating under the same title and lastly the matter must have been finally decided in the previous suit. The doctrine of *res judicata* is founded on public policy, which is aimed at achieving two objectives namely, that there must be a finality to litigation and that a party should not be vexed twice on account of the same litigation. It is indisputable that the applicant readily accepted that he has filed a number of cases against the respondents herein claiming the same suit property as in the High Court which is also the dispute before this Court.

[12] Besides the issue being res judicata, the learned Judge addressed the substantive issues of amendments and found that the same, if allowed, would put the respondents in a most invidious position in that the amendments would allow the appellant to change the direction and character of his case. In so holding, the judge was guided by the leading authority of **Eastern Bakery v Castelino [1958] EA 461**

which states that an amendment that contravenes the period of limitation and tends to deprive the opposite party a defence of limitation should not be allowed. See ***Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1)*** at ***paragraph 76, where the learned authors*** state as follows regarding amendments of pleadings:-

> ***"…The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. ….The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side…"***

[13] The Court of Appeal, differently constituted has also set out some guiding principles in the case of; ***Wareham t/a AF Wareham & 2 others –vs- Kenya Post Office Savings Bank- Civil Appeal Nos. 5& 48 of 2002. Mulla, The Code of Civil Procedure, 18th Ed, Vol.2*** at pages 1751-1752 states :-

> ***"On the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings-***

i. ***All amendments should be allowed which are necessary for determination of the real controversies in the suit;***

ii. ***The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;***

iii. ***Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;***

iv. ***Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;***

v. ***Amendment of a claim or relief barred by time should not be allowed;***

vi. ***No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;***

vii. ***No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;***

viii. ***The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;***

ix. ***Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings."***

0. The appellant's suit was filed in March 1986, and the application for further amendment was made in November 2008 that is after 12 years. We have re-evaluated the ruling appealed against and find ourselves agreeing with the learned judge that allowing the further amendment in the circumstances of the matter that was before the court, would cause an injustice to the respondents as the amendments were meant to introduce a new cause of action that was time barred. For the foregoing reasons, we find no merit in this appeal which is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 31st day of July, 2015.

M. K. KOOME …..

JUDGE OF APPEAL

M. WARSAME …..

JUDGE OF APPEAL

G.B.M. KARIUKI …..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR