



**REPUBLIC OF KENYA**  
**COURT OF APPEAL AT KISUMU**  
**CIVIL APPEAL 200 OF 2011**

**ROBERT OMBASO NYARERU.....1<sup>ST</sup> APPELLANT**

**GUSII COUNTY COUNCIL.....2<sup>ND</sup> APPELLANT**

**AND**

**BELDINA MOKAYA.....RESPONDENT**

***(Being an appeal from a ruling and orders of the High Court of Kenya at Kisii (Muchelule, J.)  
delivered on 2<sup>nd</sup> November, 2009***

In

***HCCC NO. 90 OF 2007)***

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**JUDGMENT OF THE COURT**

***ROBERT OMBASO NYARERU*** and ***GUSII COUNTY COUNCIL*** are the appellants herein. ***BELDINA MOKAYA*** is the respondent.

Sometime in 2007, the respondent sued the two appellants claiming that they had trespassed on her property viz Plot ***LR No. KISII TOWN/BLOCK 111/491*** in Kisii Municipality. She sought orders of permanent injunction; eviction and also for general damages against them jointly and/or severally.

According to the respondent, the property in question was allocated to her in the year 2003 and she is the registered owner under the Registered Land Act.

Sometime in July 2007, the 1<sup>st</sup> appellant is said to have trespassed on the said land with the full permission of the 2<sup>nd</sup> appellant which was claiming ownership of the said property and erected a stone wall thereon. The said act of trespass formed the cause of action in the suit before the High Court.

The 2<sup>nd</sup> appellant's defence was that it still owned the said property and that if the respondent held a Title Deed for the property, then the same must have been obtained illegally and dubiously without following the correct procedure.

A copy of the certificate of lease which is part of the record of appeal indicates that the same was signed by one ***SAMMY SILAS KOMEN MWAITA*** the then Commissioner of Lands on behalf of the 2<sup>nd</sup> appellant. According to the appellants, these details were not in their possession when they filed their

defence. They therefore, moved to the High Court by way of chamber summons dated 23<sup>rd</sup> July 2009 seeking leave to amend their defence and also file a counterclaim. In their draft statement of defence and counterclaim, they sought to enjoin *Sammy Mwaita* in his personal capacity and Municipal Council of Kisii which had been collecting land rent from the respondent as defendants in the counterclaim.

The learned Judge (A. O. Muchelule J.) heard the application for amendment and dismissed it in his ruling dated 2<sup>nd</sup> November 2009. That ruling is the subject of this appeal in which the appellants have proffered eight grounds of appeal as hereunder:-

**(1) *The learned trial Judge, totally failed to consider and address his mind to the provisions of Order 8 of Cap 21 and, in particular, Rule 3(2) which deals with the issue of Limitation Period in amendments.***

**(2) *The learned trial Judge failed to recognise that the provisions of Section 2(3) of the Government Proceedings Act Cap 40 and Section 3(1) of the Public Authorities Limitation Act Cap 39 were not applicable to the appellants' Chamber Summons dated 22<sup>nd</sup> July 2009 in which they were seeking the Honourable Court's leave to amend their joint defence with a view of inter-alia, pleadings and counter-claim.***

**(3) *The learned trial Judge never exercised his discretion under Order 8 of Cap 21 in the best interest of Justice in High Court Civil Case No. 90 of 2007.***

**(4) *The learned trial Judge totally misdirected himself in law when he delved into matters that should have arisen during the viva voce hearing of evidence.***

**(5) *The learned trial Judge, substantially and gravely, erred in law and misdirected himself of the law of legal representation when he allowed counsel for the respondent to defend and litigate for Mr Sammy Silas Komen Mwaita and the Municipal Council of Kisii (albeit prematurely) who the appellants herein intended to add as defendants in their amended defence and counter-claim.***

**(6) *Though it was clear on the face of the appellants' chamber summons dated 22<sup>nd</sup> July 2009 that the same was filed under Order VIA Rule 3, 5(1), Order 1 Rule 10(2) and Section 100, 3 and 3A of the previous Cap 21, the learned trial Judge erroneously addressed his mind and considered the appellants' application, inter-alia under a non-existent Order VIII Rule 10(2).***

**(7) *By dismissing the chamber summons dated 22<sup>nd</sup> July 2009, the learned trial Judge denied the appellants (and the intended new defendants in the counter claim) their Fundamental Right of fair Hearing as enshrined in Article 50(1) of our Constitution.***

**(8) *The learned trial Judge, in the circumstances, gravely caused a miscarriage of justice in Kisii High Court Civil Case No. 90 of 2007.***

They have asked this Court to allow the appeal, reverse the ruling and/or orders of the High Court and substitute therefore an order allowing the appellants' chamber summons dated 22<sup>nd</sup> July 2009. They also seek costs of the appeal from the respondents.

Learned counsel **Mr Bigogo Onderi**, represented the appellants in the appeal while the respondent was represented by **Mr. Oguttu**.

According to *Mr Bigogo*, the learned Judge should have allowed the amendments so that all the relevant issues and parties could be brought on board to enable all of them ventilate the issues that were necessary for a just and fair determination of the suit. He submitted that the claim against the Commissioner of Lands and the Municipal Council of Kisii were not statutorily time barred and the application should therefore have been allowed. The amended draft also sought to introduce elements of fraud in the manner the transfer was done; and also a counterclaim in which the appellants have sought several reliefs.

On his part, *Mr Oguttu*, learned counsel for the respondent opposed the appeal. He submitted that the learned Judge appreciated the principles that underlie applications for amendment of pleadings and considered them carefully. He supported the learned Judge’s finding that the intended joinder of the Commissioner of Lands in his personal capacity for acts performed in his official capacity would be in vain. He also urged that the cause of action against the intended defendants in the counter claim was statutorily time barred and allowing the amendments sought would only confuse issues.

In response to the submissions, *Mr Bigogo* said the statute of limitation would not apply in these circumstances since the appellants had discovered the fraudulent acts of the intended parties only after the suit had been filed in court, and time started running then. He urged us to allow the appeal.

We have considered the grounds of appeal raised and the submissions of both counsel herein. We have also read and considered the impugned ruling and the principles of law that apply to amendments of pleadings.

One of the cardinal principles that has guided the courts in applications for amendment of pleadings is that amendments should be allowed freely at any stage of the proceedings with a *proviso*, however, 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 by way of costs. See **CENTRAL KENYA LTD VS TRUST BANK LTD & ORS, CA NO 222 OF 1998**.

The overriding consideration in such applications is whether the amendments are necessary for the just determination of the controversy between the parties. Where a party genuinely seeks to bring on board all relevant materials in order to aid the court to arrive at a fair decision, then such material should not be shut out.

The issue at hand here is whether the amendments sought in this matter are justified and whether the same will prejudice the respondent’s case. We note that serious allegations of fraud have been made against some of the intended parties. We also note that the appellants have raised some pertinent issues in their counter claim. For instance, did *Sammy Silas Mwaita* have the authority to dispose of the 2<sup>nd</sup> appellant’s land without its notice and authority? Further, Municipal Council

of Kisii has been collecting land rents from the respondent in respect of a property that belonged to the 1<sup>st</sup> appellant – as the certificate of lease clearly shows. Under what circumstances has it been collecting the said rent? Is the cause of action against the intended defendant’s time barred based on when the alleged fraud was discovered? These among others in our view, are issues that should be ventilated at the hearing.

In the circumstances, we are minded to allow this appeal as this will aid the determination of all the issues raised by the parties herein without causing prejudice to any party. For the foregoing reasons, we allow this appeal and reverse the Ruling of the High Court dated 2<sup>nd</sup> November, 2009, and allow the appellants’ chamber summons dated 23<sup>rd</sup> July, 2009. We order that the costs of this appeal abide the outcome of the suit before the High Court.

***Dated and delivered at Kisumu this 11th day of October, 2012.***

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**