

REPUBLIC OF KENYA

IN THE COURT OF APPEAL KISUMU

CIVIL DIVISION

CIVIL APPEAL 222 OF 2002

JAMES NANDASABA APPELLANT

AND

WILLIS WACHILONGA RESPONDENT

JUDGMENT OF THE COURT

This is an appeal from an Order of the Hon. Mr. Justice Ringera (as he then was) dated 18th June 2000 in HCCC No.93 of 1999 in which he declined to give leave to amend the plaint. That ruling was in the following terms:- “It is settled practice that amendments sought before trial should be granted unless it be shown that the adverse party would suffer an injustice (see Costelino v Eastern Baker Co (1958) EA). And it is generally perceived to be the case that no such injustice could arise unless the respondent could not be compensated by an order of costs. Such would be the case where for instance the applicant seeks to amend his plaint in such a manner as to defeat the respondent’s rights which may have vested in him as a result of any expiry of limitation or where it is otherwise shown that the application is not made in good faith. In the instant matter the second defendant’s objection to the proposed amendments is that they seek to revive matters which were adjudicated upon by this court sitting in Kakamega in civil suit no.55 of 1974. Reference has been made to the contents of paragraphs 6, 8, and 9 of the proposed amended plaint. The applicant’s response is that if that is so, the respondent will have an opportunity to state so in his amended defence. That may very well be so but to accede to that argument would be to entertain the notion that this court could serve as an academic forum. It cannot; in my opinion, the court is duty bound to ensure its process is not abused. Where, as here, the intended amendment would have the effect of re-opening matters already adjudicated upon, I cannot but find that the same are not sought in good faith. They do indeed amount to an abuse of the court process.

In the result, I must decline to allow the application. The same is dismissed with costs to the 2nd defendant.” The amendments sought were extensive and we agree with the superior court that they would have the effect of re-opening matters already adjudicated upon by the High Court. Sir Kenneth O’Connor P. in Eastern Bakery v. Castelino[1958]EA 461 stated that:- “Generally speaking this Court will not interfere with the discretion of a Judge in disallowing or allowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded on wrong materials or a wrong principle.”

The applicant has not shown that Ringera J. reached his decision to refuse leave to amend the plaint on the basis of wrong materials or by the application of a wrong principle and we see no reason to interfere with his exercise of his discretion. We therefore dismiss the appeal with costs.

Dated and delivered at Kisumu this 15th day of July, 2005.

R. S. C. OMOLO

.....

JUDGE OF APPEAL

E. O. O’KUBASU

.....

JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR