



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, BOSIRE & OWUOR, J.J.A)
CIVIL APPEAL NO.222 OF 1998
BETWEEN**

**CENTRAL KENYA LTD APPELLANT
AND
TRUST BANK LTD 1ST RESPONDENT
TRUST FINANCE LTD 2ND RESPONDENT
FLORICULTURE INTERNATIONAL LTD 3RD RESPONDENT
FIRST NATIONAL FINANCE LTD 4TH RESPONDENT
REGISTRAR OF TITLES 5TH RESPONDENT**

**(Being an appeal from the Ruling of the High Court of Kenya at Nairobi
delivered in the High Court Civil Case No.3590 of 1995 at Nairobi
(Hon. Mr Justice Richard Kuloba delivered on the 12th day of March,
1998**

in

H.C.C.C. NO.3590 of 1995)

JUDGMENT OF THE COURT

The parties in this appeal are here again. The appellant, Central Kenya Limited, as Plaintiff in High Court Civil Case No.3590 of 1995, was originally the registered owner of among other property, Land Reference No.7705/2, Thika Municipality. In Civil Appeal No.121 of 1995, it was the first respondent with Trust Bank Limited, Trust Finance Limited and First National Finance Limited, as the other respondents, in that order. Floriculture International Limited (Floriculture), was the appellant. The appeal arose from a decision of the superior court (Hayanga J.) in its civil case No.1597 of 1994(OS), in which he granted leave to Central Kenya Limited (Central Kenya), to amend its originating summons, ordered the consolidation of three pending interlocutory applications, and ordered the joinder of Floriculture and First National Finance (First National), as additional defendants in the originating summons. Floriculture was aggrieved and filed the aforementioned appeal.

This court, differently constituted, after hearing the appeal, came to the conclusion that Central Kenya's suit was improperly commenced by originating summons, which was not a manner prescribed in the Civil Procedure Rules for seeking the aid of the court for the reliefs it had claimed, and ordered it to be struck out. Central Kenya had, in its originating summons, sought orders, inter alia, that the superior court cancel the charges which had been registered against the aforementioned parcel of land in favour of Trust Bank Limited (Trust Bank) and Trust Finance, respectively, to secure repayment of two loans which had been made to Katka Islands Limited (Katka), a company in which one Anthony Muiruri Gachoka was one of the directors. He was also a director of Central Kenya, along with his brother Joseph Muiruri Gachoka, and their mother Margaret Njeri Muiruri.

It would appear to us that Civil Case No.3590 of 1995, aforementioned, which was instituted by plaintiff Central Kenya, was instituted, after the striking out of the aforesaid originating summons. Apart from Trust Bank and Trust Finance, Floriculture, First National Finance and the Registrar of Titles, were included as defendants. In that suit Central Kenya seeks declaratory orders that the two charges we alluded to earlier were invalid allegedly because it did not, as registered proprietor, execute them, that they should be recalled for cancellation and that a sale of the charged property to Floriculture in purported exercise of a statutory power of sale was null and void. There was also a prayer for special and general damages but against the first two defendants only. So Floriculture was made a party because as at the date of the suit it was the registered owner of the aforementioned parcel of land.

The Registrar of Titles was joined as a defendant because he had registered the two aforementioned charges, the transfer of the subject land to Floriculture and thereafter a charge over the property in favour of First National Finance, which had lent money to Floriculture for the purchase of the property. The appellant alleges that the transfer of the property to Floriculture and the registration of a charge over it in favour of First National Finance, were effected fraudulently and in flagrant violation of the Provisions of section 52 of the Transfer of Property Act, and blames the chief executive of Trust Bank and Trust Finance, the principal shareholder of Floriculture, the liquidator of Katka Islands Ltd, and its director, Anthony Muiruri Gachoka, for it.

The second time the parties were before this court, is when the appellant unsuccessfully appealed against the refusal by the superior court (Msagha, J.) to grant it an interlocutory injunction to restrain the defendants from dealing with the subject property. In the course of its judgment in that appeal, to wit Civil Appeal No.215 of 1996, the court, differently constituted from the earlier appeal, made remarks, to the effect inter alia, that the suit as presented raised issues which touched on certain parties who had not been joined in the suit and against whom orders would not be made unless they had been given an opportunity to be heard on the matter. The appellant must have taken a cue from those remarks as it thereafter moved the superior court by Chamber Summons under O.1 rule 10(2) and O.VIA rules 3 and 8 of the Civil Procedure Rules, for leave, firstly, to join in the suit as defendants, Anthony Muiruri Gachoka, Shaun Warren Barretto, Kuldeep Singh Chawla, an advocate of the High Court who drew the first two charges, Ajay Indravavadan Shah (the Chief Executive Officer of Trust Bank and Trust Finance), Satish Chandra Venilal Naker (the principal shareholder of Floriculture), The Commissioner of Lands, and the Attorney General.

Secondly, the appellant wanted leave to amend its plaint in order to fully spell out its claim against the original and the intended defendants and to plead the relevant law. On this last aspect we believe the appellant had in mind the provisions of O.VI rule 7 of the Civil Procedure Rules, which provides that a party may by his pleadings raise any point of law.

The application was heard by Kuloba J, who, after hearing submissions from counsel from both sides, declined to grant the leave, and made certain remarks in his ruling which the appellant and its counsel, and also counsel for First National Finance, Mr Oduol, contend show the learned trial Judge was not dispassionate in his handling of the matter. The issue has been raised as the first ground of appeal. The other grounds may concisely be stated as follows:-

(2)The Learned Judge in arriving at his decision considered extraneous matters.

(3)The learned Judge ignored decisions of this court by failing to consider that the defendants (respondents) did not plead that they would suffer any loss not compensatable by damages, if the proposed amendments to the plaint were allowed.

(4)The decision was capricious and unjust.

The crux of submissions by Mr Mwangi for the appellants, is that the trial Judge did not address his mind to the real issues under O.1 rule 10 and O.VI rule 3 of the Civil Procedure Rules, under which the appellant's application was brought.

Mr Billing for Trust Bank and Trust Finance does not think the trial Judge manifested any bias in his ruling. In his view if consideration is given to the proposed amendments and the record of the superior court respecting civil suit No.3590 of 1995, the court would arrive at an inescapable conclusion that the trial Judge's alleged biased remarks were well founded.

Mr Ochieng Oduol for the 3rd and 4th respondents, while in effect conceding the appeal, did not think that the appellant's proposed plaint could be accepted in its totality, more so because in it the appellant has improperly pleaded evidence and made extensive averments on case law.

The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

"that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

And at page 2248, they continue to say that an amendment merely clarifying the position put forward in the plaint or written statement of defence must be allowed. This is an interlocutory appeal in which the appellant challenges the exercise of discretionary jurisdiction of the trial court. It is trite law that an appellate court will not lightly interfere with the exercise of a court's discretion unless it is satisfied that the discretion was wrongly exercised or there is an error in principle.

It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the court will not later permit him to reopen the same subject of litigation (see O.II rule 1 of the Civil Procedure Rule) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided 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 for in costs (see, Beoco Ltd v. Alfa Laval Co. Ltd [1994]4 ALL ER. 464).

In declining to grant leave, Kuloba J. held, inter alia, that although the proposed amendments in a way clarified the averments in the plaint, they were too lengthy, the new facts were all along within the knowledge and possession of the appellants even as at the date of the suit; that the failure to incorporate them in the plaint was not an oversight but a calculated move by the appellant to litigate by instalments the various issues raised by the suit after getting the gist of the opposite side's case; the proposed amendments were in any case argumentative and did not raise any new points; that the appellant was seeking to plead legal arguments; that the application for leave was belated and if allowed it would offend the provisions of section 77(9) of the Constitution and section 3(2) of the Judicature Act, both of which enact that civil proceedings should be concluded without unreasonable delay, and that in all the circumstances, the application was intended to delay the expeditious finalization of the suit; and considering the various previous proceedings the appellant had been involved in over the suit property, the application was mala fide.

In the course of his ruling the learned Judge made various remarks which, in our view, considering that he was handling an interlocutory matter, were inappropriate and tended to prejudge the merits of the appellant's case, more so because the parties had yet to adduce evidence in support of their respective cases. For instance he remarked that the proposed amendments were nothing but "... a wheeling and peddling of wild accusations of imaginary fraud..."; that the appellant was taking advantage of the hindsight of a fool to repeat the story it had pleaded in the plaint, and that in doing so it was seeking a further opportunity to taunt the hapless defendants; and that it was playing the clever dick, too clever by half. Our view is that averments in the plaint are merely allegations (see O.1 rule 3 of the Civil Procedure Rules). Except in clear cases, this not being one, until a party has been given an opportunity to prove the

truth thereof, it is our view that remarks as the ones we have alluded to above are uncalled for, they tend to prejudice the case of the party affected by them and, they also, tend to suggest that the trial Judge was not dispassionate. It is no wonder that in a later application to the same court, the appellant accused the said Judge of bias.

The jurisdiction of the court under O.1 rule 10(2) and O.VI rule 3(1) of the Civil Procedure Rules, respectively, is specific. The decision as to who to sue is essentially that of the plaintiff, and the court's duty thereafter, is to consider the allegations made against the named defendants and if it considers that there are other parties who should have been joined or were improperly joined give appropriate directions under O.1 rule 10(2), above. In Civil Appeal No. 215 of 1996, aforementioned this court made observations which suggested that some of the proposed defendants should have been made parties, to facilitate the effectual, complete and just adjudication of the appellant's suit. The learned trial Judge should have but did not take a cue from them and granted the leave the appellant had sought in its application.

Likewise, the learned trial Judge having come to the conclusion that the appellant's proposed amendments to the plaint did in a way clarify the appellant's case, he should have granted leave as by doing so the other parties would neither be prejudiced nor would the amendments lead to undue delay in resolving the matters in controversy between the parties.

As we stated earlier the learned trial Judge took issue with the length of the proposed amendments. In his view they were too long. Mere length of proposed amendments is not a ground for declining leave to amend. The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.

Before we wind up this judgment there is an aspect which the learned trial Judge, in a rather strong and inappropriate language, said showed lack of good faith on the part of the appellant. It may be recalled that Anthony Muiruri Gachoka, as director of both the appellant company and Katka Islands Co. Ltd, was the beneficiary of the loan from Trust Bank Ltd, using the aforementioned land as security. It is apparent that Anthony Muiruri used his position as director of the appellant company to get access to the title documents for the suit parcel of land from it. The learned trial Judge did not think that Anthony Muiruri Gachoka should be made a party in the appellant's suit before prior compliance with rules for suing directors; in his view if Anthony Muiruri was joined as a defendant it would mean that since he is a director in the appellant company he would become both plaintiff and defendant, more so, in his view, because Anthony Muiruri Gachoka, is the main man in the appellant company. These issues were, in our view, prematurely raised. There are certainly several issues raised in the appellant's suit which, in absence of Anthony Muiruri Gachoka, might not be fully answered. Whether or not the appellant had complied with the requisite rules for suing a director, is not in our view a relevant factor in an application under O.1 rule 10(2) of the Civil Procedure Rules. The paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit. Anthony Gachoka released the title documents for the suit land to Trust Bank Ltd, or so we think. He probably negotiated and secured the loan from Trust Bank Ltd, in favour of Katka Islands Ltd. The other intended defendants are alleged to have participated in one way or another to facilitate the release of the loan, and/or the registration of charges against the suit land. They are therefore, prima facie, necessary for the effectual and complete adjudication of the appellant's case.

For the foregoing reasons the appeal is not without merits. We therefore allow it, set aside the superior court's order made on 12th March 1998 refusing the appellant leave to join other parties as defendants and to amend its plaint, and in place therefor substitute an order granting the leave prayed for in prayers (1) and (2) of the appellant's chamber summons dated 4th February, 1998 and allow the appellant 14 days from the date hereof to file a proper amended plaint. The costs of the appeal are awarded to the appellant against all the Respondents.

Dated and delivered at Nairobi this 18th day of February 2000.

J.E. GICHERU

JUDGE OF APPEAL

S.E.O. BOSIRE

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR