



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**HCCC NO. 407 OF 2008**

**ELECON DEVELOPERS LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....DEFENDANT**

**RULING**

1. In the Notice of Motion dated 5<sup>th</sup> October 2020 Elecon Developers Limited (Elecon or the Plaintiff) craves leave of Court to amend its Plaintiff.
2. Elecon seeks to introduce a claim for refund of Kshs.5,600,000/= together with compound interest thereon at commercial rates and mesne profits for Kshs.2,423,030,316.00 for the period 1<sup>st</sup> January 2008 to 30<sup>th</sup> June 2020 with compound interest at commercial rates until payment in full.
3. Kenya Commercial Bank Limited (KCB or the Defendant) opposes the application on four grounds. First, that the Plaintiff has not established sufficient cause for the grant of the orders as provided under Order 8 Rule 3 of the Civil Procedure Code; that the application is an attempt by Elecon to achieve what it has previously failed; third, that the amendments are an afterthought and an overreach by or introducing a fresh claim of approximately Kshs.2,000,000,000/=; last, that it is brought late.
4. Elecon cites Order 8 Rules 3 and 5 (1) of the Civil Procedure Rules as providing the anchor for the application before Court. The Rules read:-

“[Order 8, rule 3.] Amendment of pleading with leave.

- (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
- (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (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 such subrule if it thinks just so to do.
- (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

“[Order 8, rule 5.] General power to amend.

5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

5. It is common knowledge that leave to amend pleadings may be granted at any stage of the proceedings and, ordinarily, should be freely granted. This matter has evolved in a manner that Elecon may be justified in seeking the amendments.

6. The case for Elecon is that by a written agreement of sale dated 10<sup>th</sup> February 2006, KCB entered a contract to sell to its land known and described as L.R No. 12467 situated at Enterprise Road Nairobi at a consideration of Kshs.56,000,000/=. Pursuant to the terms of the contract of sale, Elecon paid a deposit of Kshs.5,600,000/= to Rachier & Amollo Advocates to hold in stake holding.

7. Elecon avers that under Clause 6 of the agreement the completion date would be 3 months or 90 days from the date of its execution. Under clause 10, the Plaintiff would be entitled to vacant possession on the completion date.

8. In its pleadings, as they now stand, Elecon accuses KCB of breach of contract and sets out certain particulars. Worthy of note, is that, at the inception of the agreement, KCB deliberately and/or intentionally failed to disclose to it the existence of litigation being HCCC 1766 of 2000 Alcon Holdings Limited vs Kenya Commercial Bank Ltd ( Civil Suit No. 1766 of 2000) which involved the suit property.

9. In a Plaint dated 5<sup>th</sup> October 2020, Elecon sued KCB for the following orders:-

a) *Specific performance of the said agreement;*

b) *General damages for breach of contract in lieu or in addition to specific performance of the contract;*

c) *Permanent injunction restraining the Defendant, itself, its servants, agents or otherwise howsoever from dealing, selling, transferring, disposing, alienating and discharging the premises.*

10. In an affidavit sworn by Praful Premchand Salva in support of the Motion before Court, and which is uncontroverted, Elecon deposes that unknown to it, KCB entered into consent with Alcon Holdings Limited without involving it or caring for its interest. The consent was in the following terms:-

#### **CONSENT**

The parties herein agree as follows:-

1. The property known as Land Reference Number 12467 (the suit property) will be sold subject to and under the supervision of this Honourable Court.

2. The Plaintiff agrees to remit to the Defendant the sum total of Kenya Shillings Ninety Million (90,000,000/=) from the proceeds of the Sale (hereinafter the said sum) in full and final settlement of the claims in Civil Suit Number 1766 of 2000 and Civil Suit Number 735 of 2003 and with regard to the charge dated 16<sup>th</sup> October 1995 over the suit property upon execution of the proposed sale agreement.

3. The said sum will be paid immediately upon execution of the proposed sale agreement but not later than one (1) month hereof.

4. The title documents will thereafter be discharged and released to the Plaintiff.

5. Upon the payment of the said sum this suit together with suit Number 735 of 2003 be marked as settled.

6. This matter be mentioned after two (2) months from the date hereof to confirm the settlement.

**Dated at Nairobi this 8<sup>th</sup> day of November 2017**

**IBRAHIM, ISAACK & COMPANY**

**ADVOCATES FOR THE PLAINTIFF**

**RACHIER & AMOLLO**

**ADVOCATES FOR THE DEFENDANT**

11. An attempt by Elecon to challenge the consent failed as the Court declined its attempt to have the two suits consolidated. Elecon cites the following observation by Court:-

**“Because of the undue delay in bringing the motion for consolidation and for the fact that it came after Civil Suit No. 1766 of 2000 had been compromised, the Motion is without merit. But I have to say that Elecon is not without remedy. It can pursue damages for breach of contract.”**

12. It is against that backdrop that the Plaintiff seeks to amend its pleadings.

13. The effect of the consent in 1766 of 2000, which is subsisting, is that the suit land may never be available for transfer to Elecon. A prayer by Elecon for specific performance is all but an illusion. The plea by Elecon for leave to include the prayers now sought is a plea by it to specify what it sees as damages it deserves. If the Plaintiff were to succeed in its action for breach of contract then the only remedy that is now available to it is for specific damages. Whether or not the substantial damages it seeks will prevail is of course another matter and would have to await trial.

14. Yet before this Court can grant the leave sought it must give due regard to the grounds of opposition raised by the Bank.

15. I would think that the backdrop to the application given by the Court and reasons why an amendment is possibly justified answers the argument by the Bank that the Plaintiff has not established sufficient cause to merit an amendment. Secondly, it may be true that Elecon's attempt to impeach the consent in 1766 of 2000 was unsuccessful, yet it has to be remembered that the consent in that suit firmly shut the door to Elecon insisting on specific performance. In the circumstances it is not fair to begrudge Elecon's attempt to tidy up what may be the only remedy, i.e special damages, it can reach in the event its action on liability prevails.

16. Still, the Bank thinks that the Motion comes late. And it is of course true that an unexplained or inordinate delay may disentail an otherwise deserving applicant from grant of leave to amend pleadings (Andrew Ouko v Kenya Commercial Bank Limited & 3 others [2014] eKLR.) This is particularly so where such delay prejudices the other party. Let me examine this argument.

17. Looking at the Plaintiff as it stands, the Plaintiff was always aware that the remedy of damages for breach of contract was always an alternative to specific performance. The very prayers now specified. The Court also agrees with the Bank when it argues that Elecon should, right from the outset of these proceedings, have known the exact quantum of these claims.

18. That said, the consent which made the two prayers sought to be introduced or specified as perhaps the only feasible relief available to the Plaintiff arose on 8<sup>th</sup> November 2017 and it can be argued that the consent created an urgency for the Elecon to strengthen or revamp these two prayers.

19. But again there was a time lag from the date of the consent to 5<sup>th</sup> October 2020 (about 3 years) or from 8<sup>th</sup> November 2019 when the Court dismissed the Plaintiff's application which has not been explained by Elecon. These delays disfavour the application.

20. Yet, on the other hand, because the Court maybe interested in making orders that serve substantial justice, the Court will not decline to grant orders unless the delay has prejudiced KCB. On this aspect KCB did not file a replying affidavit. It does not state for instance, that because of the delay it is either handicapped or somehow disadvantaged in mounting a defence to what it sought to be introduced. For this reason the Court excuses the delay.

21. The Bank then submits that the pleading for loss of mesne profits of Kshs.2,423,030,316/= “does not show how the loss is pleaded.” I understand the Bank to be arguing that the prayer is not pleaded with sufficient exactitude to enable the Bank defend it. In regard to that limb, the proposed amendment is worded:-

**“20. The Plaintiff had a concrete plan to set up apartments for commercial purposes and as at 1<sup>st</sup> February 2008 the construction ought to have been completed and the houses and the offices ready for occupation and let out for rent immediately thereafter. The plaintiff shall rely on the full meaning and import of the architectural drawing and designs done by Nature Architects on 22<sup>nd</sup> June 2006.**

**21. As a consequence of the deliberate failure by the Defendant to honour the terms of the contract and obtaining money by obvious false pretense, the Plaintiff has suffered huge damage and losses to the tune of Kshs. 2,423,030,316 as at 30<sup>th</sup> June, 2020. The Plaintiff shall rely on the full meaning and import of the Report of the Certified Public Accountant for the period 1<sup>st</sup> January, 2008 to 30<sup>th</sup> June 2020.”**

22. The Bank has not demonstrated that the alleged loss ought to be pleaded in a certain way in which the Plaintiff's pleadings fall short. The basis for which the claim sought is revealed and should the Defendant need further particulars then it can bespeak them. Pleadings need not be a detailed discussion of facts.

23. In the end this Court is inclined to grant the leave sought. But even as I do so I very much doubt that the loss pleaded by the Plaintiff is, as referred to in the draft pleadings, mesne profits. Mesne Profits are profits of an estate received by a tenant in wrongful or unlawful possession and recoverable by the landlord (see Black's Law Dictionary, Tenth Edition).

24. The Notice of Motion dated 5<sup>th</sup> October 2020 is hereby allowed. However, there must be some censure for the delay in which it was brought and so costs of the Application shall be to the Bank.

**Dated, Signed and Delivered in Court at Nairobi this 19<sup>th</sup> Day of May 2021**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>TH</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**