



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 314 OF 2010

SURAYA PROPERTY GROUP LTD. .. 1ST PLAINTIFF/RESPONDENT

W&K DEVELOPERS LTD. 2ND PLAINTIFF/RESPONDENT

VERSUS

W&K ESTATES LTD. 1ST DEFENDANT/RESPONDENT

ISAAC KAMAU NDIRANGU 2ND DEFENDANT/APPLICANT

ELVIN WAMBUI KAMAU 3RD DEFENDANT/RESPONDENT

RULING

1. Before the Court are two applications: the first application by the 1st Plaintiff is dated 16th May, 2012 brought under the ambit of **Order 8 Rules 3, 5 and 8** of the *Civil Procedure Rules* and **Sections 1A and 1B** of the *Civil Procedure Act*. The applicant prays for orders *inter alia* for leave to amend his *Plaint* dated 13th May, 2010. The application is predicated upon the grounds set out therein and further supported by the Affidavits of **Peter Muraya** and **Philip Kamindi Mtange**, both sworn on 16th May, 2012. The second application is brought jointly by the 1st and 3rd Defendants, pursuant to the provisions of **Order 1 Rule 10(2), Order 4 Rule 5 and Order 51 Rule 1** of the *Civil Procedure Rules* and *Sections 1A and 1B* of the *Civil Procedure Act*. The applicants seek prayers, *inter alia*, for the names of the 1st and 3rd Defendant to be struck out of the *Plaint* herein, ostensibly on the grounds that the *Plaint* does not disclose any cause of action against them and that no relief is sought against them. The application is predicated upon the grounds therein and supported by the Affidavit of **Elvin Wambui Kamau**, the 3rd Defendant. Following the directions issued by Kimondo, J presiding over the matter on 5th August, 2013, both applications were to be heard together, and dispensed through written submission by the parties. The Court therefore, in its discretion and for the effective and expeditious determination of the two applications, will consider the application by the 1st and 3rd Defendants first.
2. That application, as aforementioned, is brought pursuant to the highlighted provisions under the *Civil Procedure Act* and the pertinent rules thereto. It is the applicants' contention that the subject matter in the instant suit, relating to the intended development on a parcel of land known as L.R No. 12239 (hereinafter "the suit property"), is owned by neither the 1st nor the 3rd Defendant. Further, they aver that their involvement in the suit is an abuse of the process of the Court as neither of them has an obligation towards the 1st Plaintiff as set out in the development agreement

- dated 1st December, 2007 in relation to the suit property and are thus strangers to the 1st Plaintiff, with no relationship in equity, law or otherwise and owe no obligation, right or duty to it. In the Affidavit of the 3rd Defendant, a shareholder and director of in the 1st Defendant company, it is deponed that neither the 1st Defendant nor the deponent have any legally recognized interest in the suit property, and that the said agreement entered into on 1st December, 2007 was as between the 1st Plaintiff and the 2nd Defendant. Further, the deponent contends that the joint venture to be carried out for the development of the suit property was between the 1st Plaintiff and the 2nd Defendant. As a result, any relief and remedy sought is obligated upon the 2nd Defendant.
3. In opposing the application, the 1st Plaintiff submitted that the application by the 1st and 3rd Defendants is incurably defective for having being brought under the wrong provisions of the law. It averred that the application ought to have been brought under **Order 2 Rules 15(1)(a) and 15(2)** of the *Civil Procedure Rules*, and that the Courts inherent jurisdiction under **Section 1A and 1B** could not be invoked to cure the fundamental defect in the 1st and 3rd Defendants' incurably defective application. The 1st Plaintiff relied on the cases of **Samuel Gitonga v Peter Mugweru H.C.C.C No. 3356 of 1989**, **Trade Bank Ltd v Kersam Ltd H.C.C.C No. 6662 of 1991**, **D.T Dobie & Co. (K) Ltd v Muchina & Another Civil Appeal No. 37 of 1978** and **Shem Mukoma Muraya & Others v Peter Mburu Ngugi & Others H.C.C.C No. 1262 of 2004** to buttress its application.
 4. In an application to strike out, such as the one brought by the 1st and 3rd Defendant, the Court, in considering the application, will be guided by the provisions of **Order 2 Rule 3** of the *Civil Procedure Rules*. The Court considers the facts, and not the evidence adduced before it, in rendering its determination on such application. The 1st Plaintiff contends that the application should have been brought under **Order 2 Rule 15(1)(a)** of the *Civil Procedure Rules* instead of **Order 4 Rule 5** and **Order 1 Rule 10(2)** as in the instant application. **Order 4 Rule 5** of the *Civil Procedure* reads:

“The plaintiff shall show that the defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the plaintiff’s demand. (Underling mine).”

Further, **Order 1 Rule 5** reads:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, *order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out*, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.
(Emphasis mine).

My interpretation of the two provisos under the *Civil Procedure Rules* i.e. **Order 1 Rule 10 (2)** and read with **Order 4 Rule 5** of the *Civil Procedure Rules*, would be as regards an improperly joined party to a suit and the general provisions as regards the contents of allegations in a Plaintiff. In the application at paragraph A, the applicant seeks orders that:

“A. THAT the Plaintiff’s suit as drawn and filed *discloses no cause of action as against the 1st and 3rd Defendants/Applicants*”.

5. In the grounds adduced thereto and the affidavit filed in support of the application, the 1st and 3rd Defendants' contend that the Plaintiff, as instituted, discloses no cause of action against them, and as such, their names should be struck out of the Plaintiff. **Order 1 Rule 10 (2)** and **Order 4 Rule 5** of the *Civil Procedure Rules* do not provide for the striking out of the 1st and 3rd Defendants' names from the suit. The same is provided for under **Order 2 Rule 15 (1) (a)** of the *Civil Procedure*

Rules which reads:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

a. it discloses no reasonable cause of action or defence in law;”.

The 1st and 3rd Defendant have gone to great lengths to show that they were improperly joined as parties to the suit, and that, as such, and pursuant to the provisions of **Order 1 Rule 10 (2)**, should be struck out for misjoinder. However, the grounds adduced in the application, especially under paragraph A thereof and paragraph 13 of the supporting affidavit, the 1st and 3rd Plaintiff do not contend that they were improperly joined in the suit, but that the Plaint does not disclose any cause of action against them. In exercise of its jurisdiction under **Section 1A and 1B** of the *Civil Procedure Rules*, however, the Court will determine the application on its merits and, pursuant to the provisions of *Article 159(2)* of the *Constitution*, determine the matter, slight of the technicalities as to the provisions of the law. It would be of more concern for this Court and in the interest of the parties concerned, to examine the true intention of the application, and not be easily swayed by the mere fact that the wrong provisions of the law were used by the 1st and 3rd Defendants to come before Court. To this end, the Court is cognizant of the provisions of **Order 51 Rule 10 (1)** which read as follows:

“10. (1) Every order, rule or other statutory provisions under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reasons of a failure to comply with this rule”.

6. In the submissions filed by the 1st and 3rd Defendants dated 12th February, 2013, it was pointed out to Court that the 1st and 3rd Defendants were not involved in the agreement dated 1st December, 2007; that there was no contractual or legal obligation, therefore, put upon them and that the Plaint, as drawn, seeks no relief as against them. As a consequence, it does not disclose any cause of action as against them. It is their contention that the suit property belongs to and is registered solely in the name of the 2nd Defendant. Further, they contend that the agreement was executed by the 3rd Defendant, not in her personal capacity, but as the Director and shareholder in the 1st Defendant Company. They contend further, that following the Ruling on 25th January, 2012 they were exonerated from any liability arising from the said agreement and that the Plaint as against them is therefore, incompetent. The 1st and 3rd Defendants relied on the Court of Appeal decision in **P.K Langat & Another v Raphael M.A Juma Civil Appeal No. 138 of 2001** and this Court’s finding in **Elizabeth Njeri v Housing Finance Co. (K) Ltd & 2 Others (2009) eKLR**.
7. The 1st Plaintiff, in its submissions dated 19th February, 2013, submitted that the Ruling dated 25th January, 2012 of Mabeya, J dismissing an application for injunction, should not be used to deem the suit unreasonable and by the Court’s Ruling on 28th September, 2012, the parties were instructed to endeavour to set down the matter for hearing. It was further submitted that no evidence was admissible under **Order 2 Rule 15 (2)** of the *Civil Procedure Rules* in an application for striking out and relied on **Shem Mukoma Muraya & Others v Peter Mburu Ngugi** (supra) to support its argument.
8. In considering the application before it, the Court has perused the instant application, the affidavits, the submissions, both oral and written and the response thereto by the 1st Plaintiff. According to Black’s Law Dictionary, 9th Edition at pg. 251, a cause of action is defined as:

“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person”. (Underlining mine).

The 1st and 3rd Defendants also referred to **Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure***, 2nd Edition, where at pg. 170 the author writes:

“What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be- (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunctions; or (c) it may be that there are doubts as to some duty or right, or the right be clouded by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property.”

A cause of action, therefore, would be a set or group of facts that give rise to a claim or suit and that which clearly violates the rights of the Plaintiff. **Order 2 Rule 15 (2)** states that the application should be predicated upon facts, and that evidence may not be adduced in the first instance for its determination. In **Anderson v Bell Mobility Inc. (2008) NWTSC 85** it was held that:

“In an application to strike a statement of claim, the allegations of fact are accepted without evidence and the question is whether those allegations of fact disclose a cause of action...[T]hat a pleading will be struck only if it is “plain and obvious” that it discloses no reasonable claim.”

Such was similar to the position taken by the Court of Appeal as held in **D.T Dobie & Co. (K) Ltd v Muchina & Another** (supra) where Madan, J (as he then was), held *inter alia*:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment.”

9. The 1st and 3rd Defendants in their application contend that even though the 3rd Defendant is a shareholder and director in the 1st Defendant company, the agreement entered into on 1st December, 2007 has no privity on her personally, and that the 1st Defendant had no capacity to enter into the agreement as the suit premises were registered solely in the name of the 2nd Defendant. The 1st Plaintiff, however, contends that paragraphs 8, 9, 11, 13, 14, 21 & 22 of the Plaint discloses the cause of action against the 1st and 3rd Defendants, and that further, as in **Samuel Gitonga v Peter Mugweru** (supra), striking out pleadings is a draconian measure that should only be exercised in the clearest of cases. This also follows the findings in **Trade Bank Ltd v Kersam Ltd** and **D.T Dobie & Co. (K) Ltd v Muchina & Another** (both supra).
10. In the Plaint at the aforementioned paragraphs in the 1st Plaintiff's submissions, only the 2nd Defendant is aversely mentioned. At paragraph 8, 9 and 11, it is established that the suit property was/is registered in the name of the 2nd Defendant. At no point in the entire Plaint is the 3rd Defendant mentioned or otherwise stated to be a registered owner or have any proprietary rights in the suit property. At paragraph 21, the 1st Plaintiff claims that there was breach of contract and goes further to detail at paragraph 21(i) – (iv) to illustrate the particulars of breach. At 21(ii) the 1st Plaintiff avers as follows:

“ii. Failing to release the original title document for L.R No. 12239 for purposes of registering a transfer to the 2nd Plaintiff as stipulated in the various agreements”.

The claim against the Defendants in the Plaint is for specific performance. In the application for injunction against the Defendants in which the Court ruled on 25th January, 2012 dismissing the

application, the Court determined *inter alia*:

“The Defendants contended that the Plaintiffs were in breach of all their obligations under the agreement of 1st December, 2007 including the failure to open an account in the name of the 2nd Plaintiff in which the 2nd Defendant was to be a mandatory signatory. These were not denied and no plausible explanation was forthcoming from the Plaintiffs. I have perused that agreement of 1st December, 2007 and I have noted various obligations of the 1st Plaintiff thereon including the obligation of paying the 2nd Defendant for his property. None of it seems to have been accomplished by the Plaintiffs. In view of the foregoing, has any right of the Plaintiffs been infringed and is there any probability of a success of the Plaintiff’s case at the trial? I entertain doubt. From what I have set out above, I am not satisfied that the Plaintiffs have established any prima facie case with any probability of success.”
(Underlining mine).

11. The agreement dated 1st December, 2007 was entered into between the Plaintiff and the 2nd Defendant, with the ostensible purpose of developing residential houses upon the suit property. The 2nd Plaintiff, W & K Developers, is a company incorporated with the 1st Plaintiff and 1st Defendant having a shareholding of 33% and 67% respectively. The 1st Defendant is incorporated with the 2nd and 3rd Defendants as the Directors and shareholders thereof. The 2nd Defendant, as has been established above, is the registered owner of the suit premises. The suit property is neither owned by the 2nd Plaintiff, 1st Defendant nor the 3rd Defendant. It is solely owned by the 2nd Defendant. From the Plaintiff, the 2nd Defendant has been adversely mentioned as playing a very vital and pivotal role in the agreement dated 1st December, 2007. As it is the sole registered proprietor of the suit premises, the Plaintiffs would not have any privity of contract with the 3rd Defendant, nor indeed, the 1st Defendant, being a company which has no proprietary interests over the suit property. Annexures marked “**IKN-1A**” and “**IKN-1B**” show titles registered under the name of **Isaac Kamau Ndirangu**, the 2nd Defendant herein.
12. In the Plaintiff, it is the 2nd Defendant, as the registered owner of the suit premises, who according to the Plaintiffs, failed to fulfill his obligations under the said agreement and who was therefore, in breach of contract. Paragraph 21(ii) made reference to the Defendants failing to register the Transfer of the suit property to the 2nd Plaintiff. The 2nd Defendant, being the duly registered owner of the suit premises, was the sole party that could effectually and legally transfer the property to the 2nd Plaintiff. The 3rd Plaintiff had no legal or contractual obligation, to have the same transferred into the name of the 2nd Plaintiff. The particulars of breach therefore, would be pegged upon the 2nd Defendant. A similar conclusion was arrived at by this Court in **Elizabeth Njeri v Housing Finance Co. (K) Ltd & 2 Others** (supra) where Koome, J (as she then was) held, *inter alia*:

“It is not in dispute that there was no contract between the 3rd Defendant and the Plaintiff. It is trite that a contract affects only the parties to it and cannot be enforced by or against a person who is not a party. There existed no direct contract between the Plaintiff and the 3rd Defendant thus there is no cause of action against the 3rd Defendant...The Plaintiff does not disclose any cause of action against the 3rd Defendant.”

Also, in **P. K Langat & Another v Raphael M. A Juma** (supra), the Court of Appeal found that:

“It is trite that directors are in the eyes of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors. Hence, where directors make a contract in the name or purporting to bind the company- it is the company as the principal- which is liable on it, not the directors; they are not personally liable unless they undertook personal liability.”

13. With reference made to the Ruling of Mabeya, J (sic) in which the 2nd Defendant was confirmed as being the registered owner of the suit property, could the 1st Defendant purport to execute a Transfer relating to the suit property? The Plaintiffs contended in the Complaint, that the 2nd Defendant failed to transfer the property or to have it registered in the name of the 2nd Plaintiff. Such was clearly set out in the particulars of breach and in several other paragraphs in the Complaint. It is a matter of fact, therefore, that the 1st Defendant could not carry out the obligations of the land owner (the 2nd Defendant), having no proprietary, obligatory or legal status over the suit property. From the Ruling of the Court on 25th January, 2012, the 1st and 3rd Defendant have no discernible interest over the suit property, and thus no reasonable cause of action would arise as against them with regards to the said agreement. As stipulated in **D.T Dobie & Co. (K) Ltd v Muchina & Another** and **Anderson v Bell Mobility Inc.** (both supra), where no reasonable cause of action arises against a defendant, and is incurable even after amendment, the same should be struck out. As reiterated by Koome, J in **Elizabeth Njeri v Housing Finance Co. (K) Ltd & 2 Others** (supra) no useful purpose would be served in allowing the suit to proceed against the 3rd Defendant. In this matter, the Court is persuaded by the 1st and 3rd Defendants, that no reasonable cause of action issues against them in the Complaint.
14. Accordingly, and in consideration of the foregoing, the application by the 1st and 3rd Defendants is allowed with costs against the Plaintiffs.
15. I turn now to the second application for determination which is dated 16th May, 2013 and brought under the provisions of **Order 8 Rules 3, 5 and 8** of the *Civil Procedure Rules* and **Sections 1A and 1B** of the *Civil Procedure*, and in which, the applicant seeks leave of the Court to amend the Complaint. The application is predicated upon the grounds that the amendment would be necessary to enable the Court to identify and determine the real issues in question and that no prejudice would be suffered upon the Defendants should the instant application be allowed. The application is further supported by the affidavit of **Peter Muraya** and **Philip Kamindi Mtange**, sworn on 16th May, 2012. Therein, the deponents reiterate several issues touching on the said agreement dated 1st December, 2007 together with other incidental circumstances surrounding the entire process, including but not limited to, agreement antecedent involving the 2nd Defendant and the 1st Plaintiff, execution of the building contract with the contractor and deliberations by the involved parties intended at ameliorating the situation as it was. It was further suggested that the development was to be on the entire suit property and was not limited to the 11.5 Hectares hived off from the 2nd Defendant's property.
16. The application is opposed. In the Replying Affidavit sworn by **Isaac Kamau Ndirangu**, the 2nd Defendant contends that the 2nd Plaintiff Company has two shareholders, the 1st Plaintiff and 1st Defendant Company. He reiterates that as a shareholder in the 1st Defendant Company, he is aware that no resolution was passed by the Board of Directors thereof, authorising the 1st Plaintiff to institute the instant suit, and as such, the Complaint was improperly filed and therefore a nullity. Further, he averred that the second deponent in the Plaintiffs' application, one **Philip Mtange**, acted unprofessionally and contrary to the rules of legal practice, by disclosing confidential information obtained while performing his duties and obligations as the 2nd Defendant's advocate.
17. The fore mentioned Order at **Rule 3** reads:

“(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. (Emphasis mine).

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.** (Emphasis mine).
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. (Emphasis mine).

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 the 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”.**

Further at **Rule 5(1)** it is provided that:

“(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”.
(Emphasis mine).

In determining an application requesting the Court to exercise its discretion as to the amendment of a pleading, the Court has to examine the particular circumstances of the case, and render its determination, pursuant to the establishing the real issues in question between the parties and for the just, equitable and expeditious determination of matters, as is espoused under the ambit of **Sections 1A and 1B** of the *Civil Procedure Act*.

18. Under **Order 8 Rule 1** of the *Civil Procedure Rules*, a party may, without the leave of the Court, make amendment once at any time before the close of pleadings. **Order 2 Rule 13** gives the definition of the term ‘close of pleadings’ and is deemed to mean fourteen (14) days after the service of reply to defence or counterclaim, and if neither is served, after the service of defence. The instant suit was filed on 13th May, 2010 whilst the Defendant filed their respective statements of Defence on 27th January, 2012. The delay is attributable to several applications of which the Court had to make determinations before the Defendants could put in their statements of Defence. The application before Court by the Plaintiffs is dated 15th May, 2012, filed several months after the close of pleadings as per Order 2 Rule 13 of the *Civil Procedure Rules*. However, the applicants seek leave under **Order 8 Rule 3(1) and (2)**, which allows the applicant to seek leave to amend its pleadings after the close of pleadings, as provided under **Order 2 Rule 13**. The discretion of the Court is to be exercised to allow for such an application if it deems the same to be fair and for the purpose of determining the real questions in controversy between the parties.
19. The Plaintiffs’ counsel submitted orally in Court that the amendments sought would determine the real issues. In their submissions thereon, the Plaintiffs reiterate the agreement entered on 1st December, 2007 which covered the entire suit property, whilst it was the Defendants’ contention that only 11.5 Hectares thereof was to be developed. The Plaintiffs’ submissions further contended that the submissions filed by the 1st and 2nd Defendants dwelt on the capacity of the 2nd Plaintiff to contract, and that the challenge should be brought in a different application, not the instant application to amend.
20. In the submissions filed by the 1st and 2nd Defendants as regards the Plaintiffs’ said applicaiton, the capacity in which the 2nd Plaintiff filed this suit is challenged, with the contention that, as a shareholder in the 1st Plaintiff, the 2nd Defendant was aware that no authority was issued to the 1st Plaintiff to file the suit. They further submitted that the 1st Plaintiff had no *locus standi* to bring the suit on behalf of the 2nd Plaintiff as against the Defendants, and, as such, the suit was improperly instituted and thus nullified. They relied on the cases of **A.J Ltd & Another v**

Catering Levy Trustee & 3 Others H.C.C.C No. 1488 of 2000 and Asia Pharmaceuticals Ltd v Nairobi Veterinary Centre Ltd H.C.C.C No. 391 of 2000 (U.R) to further support their argument.

21. The discretion of the Court in determining such an application for amendment of the Plaint, requires that the discretion be exercised judicially, in the interests of the parties concerned, in the interests of justice and the fair determination of matters. If it is found that the proposed amendments, as stated by the Plaintiffs, if allowed, would not be prejudicial to the Defendants, would be fair and would determine the real issues in controversy, the Court would be bound to exercise its discretion and allow such an application. However, if the Court found that the application is merely a sham, incompetent and an abuse of the process of the Court, then the Court would be duty bound to dismiss such an application with the contempt that it deserves. The onus is upon the Plaintiffs to show that the application is meritorious and in the event that it is allowed, the extra costs incurred by the Defendants in amending their defences would be adequately compensated. In **Registered Trustees Church of God in East Africa (K) v Fredrick Maengwe Matara & 8 Others (2013) eKLR**, it was reiterated *inter alia*;

“That Courts have over time in various cases, allowed amendments of pleadings in almost all instances except where such an amendment would result to an injustice or prejudice to the other party. See Samuel Oywa Wayuga –vs- The Trustees of the Church of Province of Kenya South Nyanza Province Kisii H.C.C.C. No. 4 of 2004, Robert Ombaso Nyarebu & Another –vs- Beldina Mokaya Kisumu C.A.C.A No. 200 of 2011. That even if the Plaintiff’s application was to be declared incompetent merely because of being filed outside the 21 days granted by the court on 24.7.2013, the Plaintiff would still have the option of seeking fresh leave through another application. This would result to unnecessary delay and expenses to both parties and for that reason the application will be looked into as favorably. That there is nothing before this court to show or suggest that the Defendants would be prejudiced or exposed to any injustice if the application was allowed. The additional costs the Defendants would probably incur, including filing of the amended defence, would be easily catered for by an award of costs”.

22. The amendments as proposed by the Plaintiffs are set out in paragraphs 7, 11 (ix), 14, 15, 16, 19, 21 (ii), 22, 25 (b) and (c) as per the intended Amended Plaint. Upon examination of the issues as proposed to be amended, the Court considers that they will give a deeper insight into the circumstances surrounding the development of the suit property and the agreement dated 1st December, 2007. There is no prejudice that the Defendants stand to suffer should the application be allowed, which in any event could be ameliorated by damages. The facts, as stated, would in my opinion, determine the real issues in controversy, and would be fair and just, for the expeditious determination of this matter. In exercise of the wide discretion of the Court to allow amendments as postulated under the relevant provisions of the *Civil Procedure Rules*, particularly **Order 8 Rules 1 (1), 3 (1) and (2)**, the Court hereby allows the application of the Plaintiffs, with costs awarded against the 2nd Defendant. The Amended Plaint as annexed to the said application should be filed and served within seven (7) days of this Ruling, with leave to the 2nd Defendant to file his amended Defence within fourteen (14) days after service of the same upon him. In view of the above Ruling as to the striking out of the Plaint as against the 1st and 3rd Defendants, the Plaintiffs may well wish to consider a further application for amendments thereto. It is so ordered.

DATED and delivered at Nairobi this 25th day of March, 2014.

J. B. HAVELOCK

JUDGE