



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 810 & 817 of 2009**

**KENYA COMMERCIAL BANK LTD. : 1<sup>ST</sup> PLAINTIFF**

**EASTERN AND SOUTHERN AFRICAN**

**TRADE AND DEVELOPMENT BANK (EADB) : 2<sup>ND</sup> PLAINTIFF**

**TRITON PETROLEUM CO. LTD.**

**(in receivership) : 3<sup>RD</sup> PLAINTIFF**

**- VERSUS -**

**CAMELOT ESTATES LTD. : 1<sup>ST</sup> DEFENDANT**

**EAST AFRICAN DEVELOPMENT BANK. : 2<sup>ND</sup> DEFENDANT**

*CONSOLIDATED WITH CIVIL CASE NO. 817 OF 2009*

**LAXMANBHAI CONSTRUCTION LTD. : PLAINTIFF**

**- VERSUS -**

**CAMELOT ESTATES LTD. : 1<sup>ST</sup> DEFENDANT**

**EAST AFRICAN DEVELOPMENT BANK. : 2<sup>ND</sup> DEFENDANT**

**KENYA COMMERCIAL BANK. : 3<sup>RD</sup> DEFENDANT**

**EASTERN AND SOUTHERN AFRICAN**

**TRADE AND DEVELOPMENT BANK (PTA) : 4<sup>TH</sup> DEFENDANT**

**RULING**

**1.** The **Notice of Motion** application before the court is adated **9<sup>th</sup> May 2012**. It seeks the substantive orders namely that:-

(i) Leave be granted to amend the Plaintiff in HCCC No. 810 of 2009 within 7 days of the Order of the court as per the draft amended to the application.

(ii) The 2<sup>nd</sup> Defendant do furnish under oath complete statements of account from inception until the payment of the debt in full in respect of the account of Camelot Estates Limited within 7 days of the Order of this court.

2. The application is supported by the grounds set out therein and by the affidavit sworn by **JOHN ORINGO** dated **9<sup>th</sup> May 2012** which has also annexed the proposed amended Plaintiff.

3. The application is opposed through an affidavit sworn by **EPHRAIM MAGAMBO** dated **18<sup>th</sup> May 2012**.

4. The history of this matter is long and complicated but is well documented in the pleadings and I will not detail it here, except to say that the Applicant/Plaintiff filed a suit against the Defendant vide the Plaintiff dated **3<sup>rd</sup> November 2009** seeking *inter-a-alia* order of this Honourable Court that the suit premises forming the securities of the 2<sup>nd</sup> Defendant by way of legal charge dated **1<sup>st</sup> July 2008** over **Land Reference Numbers 209/4497** and **209/4498** be sold and a declaration that the Plaintiffs are entitled to the surplus of the sale proceeds of the suit properties which were then registered in the name of the 1<sup>st</sup> Defendant.

Subsequently, by an application dated **16<sup>th</sup> February 2010**, the Plaintiffs sought *inter-a-alia*, an amendment of the Plaintiff and an injunction preventing execution of any instrument of transfer following a sale by private entered into between Laxmanbhai Construction Limited and East Africa Development Bank.

The Ruling on the application was delivered by the Honourable Mr. Justice Muga Apondi on the **12<sup>th</sup> of November 2010** where the Honourable Justice held that in view of the sale that had already taken place, the Applicants were only entitled to damages.

However, subsequent to the Ruling, the sale of Laxmanbhai collapsed and EADB resold the charged property by sale agreement dated **6<sup>th</sup> May 2011** to C&P Industries for **Kshs.826 million** despite valuation report dated **30<sup>th</sup> July 2009** giving a market price of over **Kshs.1 billion**. These facts are set out in the **Notice of Motion** dated **16<sup>th</sup> February 2010**.

5. Parties with the leave of the court filed written submission to the application. Mr. Gichuhi for the Applicant seeks to amend the Plaintiff in view of the Ruling delivered on **12<sup>th</sup> November 2010**, where Honourable Justice Muga Apondi stated that the Applicants were only entitled to claim damages for sale of the suit property at such an undervalue.

6. The claim for damages is based on the fact that 2<sup>nd</sup> Defendant has not shown how it arrived at the figure of **Kshs.826 million**, the price at which the charged property was sold to C&P Industries in spite of a valuation carried out in **2009** by Tyson's Limited and Lloyd Masika under the instructions of the Chargee giving a market value of **Kshs.1,090,000,000** based on the stage of construction at the time.

7. It is submitted that the 2<sup>nd</sup> Defendant namely East Africa Development Bank as the Chargee of the property is in breach of the duty of care to not only the Charger but also to the other Chargees to see that the property is sold at the right market price.

8. The Applicant submits that in view of the developments subsequent to the filing of this suit and the alleged under sale, the Applicants are seeking to add additional reliefs which will aid this Honourable Court to not only fairly and justly determine the suit but also avoid multiplicity of suits in furtherance of the overriding objectives. The intended amendments seek damages and formulae to apportion the surplus. In the interest of justice, it is submitted, these amendments should be allowed.

In this regard the Applicants are seeking two main reliefs namely:-

a) Damages of **Kshs.264,000,000** or any other sum against the 2<sup>nd</sup> Defendants for failing to attain the proper market price or such sum as may be found due and payable based on a proper market price for the suit properties Land reference Numbers 209/4497 and 209/4498.

b) This Honourable Court be pleased to give direction on how the surplus of the purchase price of **Kshs.154,019,147.86** together with accrued interest is to be apportioned in an equitable manner.

9. Mr. Rubello for the Plaintiff in **HCC NO. 817 of 2009 (Laxmanbhai Construction Limited)** did not oppose the application but he adopted Mr. Regeru's submissions while Mr. Wena for the 1<sup>st</sup> Defendant opposed the application on the grounds that the application is based on grounds which are *res judicata*, while at the same time adopting Mr. Regeru's submissions in opposing the application.

10. Mr. Regeru for the 2<sup>nd</sup> Defendant raised 4 grounds of opposition to the application. He submitted firstly that the grounds offered for the application are *res judicata* for the reasons that on **12<sup>th</sup> November 2010** Justice Muga Apondi did make a determinate findings on a number of those grounds that are now being used to support this application, e.g. that the allegations of fraud, negligence and recklessness were never proved. He submitted that these allegations have not been overturned in appeal. On this issue, I have looked at the said Ruling of Honourable Justice Muga Apondi. At **page 19** of the said Ruling the Judge stated:-

**“From the above analysis, it is crystal clear that before the property was sold there was an advertisement of the same for period of 26 days. That means that the process was open and available to any prospective bidder or investor. Though allegations of fraud, negligence and recklessness have been thrown in the air, the evidence on record shows otherwise. This court appreciates the fact that KCB and PTA may have lost a colossal amount of money due to some loans which it had lent to some individuals who are not present in court. Those loans may have been granted without proper diligence and security. However, there is no evidence so far to show how that money was utilized in this particular case. This court is satisfied that the sale was done openly and in a transparent manner. I have no doubt that EADB exercised its statutory power of sale in accordance with the law. Over and above, it is also crystal clear that the law does not require EADB to come to this court to obtain any consent to exercise its power of sale. I did also agree with the submissions made by the counsels for Laxmanbhai and EADB that the only remedy available to KCB and PTA are for damages and that they are not entitled to any other remedy.”**

In view of the above I have noted that the proposed amended Plaintiff extensively reintroduces the above issues. In these regard, I am inclined to agree with the submission of Mr. Regeru on this issue.

11. Secondly Mr. Regeru submitted that the Applicants lack *locus*, and have no interest in the matter before the suit. Mr. Regeru submitted that Justice Muga Apondi had made a specific finding that the funds used to develop the suit property emanated from the Applicants. He submitted that there is ample authority that where a Chargee has exercised its power of sale under a charge document the only party who can legitimately raise a challenge is the Chargor, in this case CAMELOT ESTATES LIMITED – the 1st Defendant. But the Chargor has not raised any objections at all. Indeed his submission is given credence by the Chargor's lawyers who are opposed to this application instead of supporting it. The Chargor's lawyer Mr. Were submitted that indeed the application is *res judicata*, and he supported Mr. Regeru's opposing submissions.

12. Relying on the case of **JOSEPH OCHIENG – VS - FIRST NATIONAL BANK OF CHICAGO**, the counsel submitted, thirdly, that contrary to purported believe accounts will not always be automatically allowed.

13. The last submission by the counsel was that the current application has been filed after an inordinate delay; that Justice Muga Apondi's ruling was delivered on **12<sup>th</sup> November 2010** and the current

application is dated **9<sup>th</sup> May 2012**, and is filed only in response to the application to strike out the suit for want of substance.

**14.** I am persuaded to accept these submissions. If, as it appears, this application to amend the pleadings was triggered by the aforesaid Ruling of Justice Apondi, why was it not filed until after one and a half years later, and even then, only after an application has been filed to dismiss the suit for want of substance? Clearly, there is an element of bad faith in this application.

**15.** I have carefully considered the application and the opposing submissions of counsel. **Order 8 Rule 3 (1)** of the Civil Procedure Rules allows this court a wide discretion on applications to amend pleadings. The power under that order is discretionary. The court, in the exercise of that power must be satisfied that:-

- a) The amendment sought is necessary for the purpose of determining the real question in controversy between the parties; or
- b) That there is an error or defect in the proceedings which need to be corrected by the amendment;
- c) The court has a duty to ensure that the pleadings identify the real matters in controversy and to ensure that substantial justice is done;
- d) The court must not allow amendments to the prejudice of the opposite party;
- e) An application brought late in the day must be justified before the court can exercise its wide discretion in favour of the Applicant.

**16.** I have considered the proposed amendments in light of the existing pleadings, the *res judicata* allegations and the aforesaid judgment of Honourable Justice Muga Apondi. The Applicant's application dated **16<sup>th</sup> February 2010**, which had as one of its prayers leave to amend the Plaintiff on some of the grounds now pleaded in the proposed amendment Plaintiff, was dismissed by the court. Recalling the issues which had already been decided upon by the court, and which have not been overturned in appeal, is an abuse of the process of this court.

**17.** I have also looked at the further affidavit sworn by **MS. LUCY MARUTI** on **30<sup>th</sup> March 2012** in which the East African Development Bank (EADB) explained that the consolidated suits herein are completely spent and that the only outstanding issue is the sharing of the surplus amongst the other parties to the suit excluding EADB. In that sense, it would appear that this application was meant to delay the finalization of the consolidated suits.

**18.** It is also evident that the Applicants are strangers to the lending arrangement and securities between EADB and Camelot. Camelot itself has not questioned the said sale by EADB. Camelot has not alleged recklessness, negligence or bad faith in the way the sale was conducted by EADB. It also has not sought prayers for accounts or damages. In fact it does not support this application. In that respect the proposed amendment are neither material nor substantial in the light of the decision in **JOSEPH OCHIENG & 2 OTHERS**. The proposed amendments seek to attack the manner in which EADB exercised its statutory powers of sale under its contract with Camelot; they also seek accounts from EADB and damages for an alleged under sale. However, Camelot, the only party who can legitimately mount such an attack has not done so. In my Ruling, the Applicants have no power or *locus* to raise such issues when Camelot is not raising them. In the circumstances it is clear that such issues are not material to the determination of the disputes between the parties.

**19.** For the foregoing reasons, I am not persuaded that I should exercise my discretion in favour of the Applicant. Accordingly, I dismiss with costs to the 2<sup>nd</sup> Respondent the **Notice of Motion** application dated **9<sup>th</sup> May 2012**.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 6<sup>TH</sup> DAY OF FEBRUARY 2013**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Regeru for the respondent  
Karungo for the Applicant  
Teresia – Court Clerk