



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 518 OF 2004**

**MANJAT SINGH SETHI ..... 1<sup>ST</sup> PLAINTIFF**

**PERMINDER SINGH SETHI ..... 2<sup>ND</sup> PLAINTIFF**

**RUAHA CONCRETE COMPANY LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**PARAMOUNT UNIVERSAL BANK LTD. .... 1<sup>ST</sup> DEFENDANT**

**KIRIT KHARKAR ..... 2<sup>ND</sup> DEFENDANT**

**MUSA SAID HASSAN ..... 3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. The second Defendant herein has moved to the Court to be granted leave to amend his Statement of Defence filed herein on 26th October 2004 and to plead a Counterclaim thereto. The Notice of Motion dated 26th April 2012 is brought before Court under **Order 8 rules 3 and 8** of the *Civil Procedure Rules* as well as **sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Application is grounded on the fact that the proposed amendment was partially occasioned by the terms of the Consent Order filed herein on 27th January 2012 as between the Plaintiffs and the first and third Defendants. The second Defendant maintained that the proposed amendments were intended to bring before the Court all the issues in controversy as between the parties and that such arose from the same facts for which relief is claimed by the Plaintiffs and by the second Defendant in his draft Amended Defence and Counterclaim. He noted that that the failure to plead the Counterclaim at the outset was an inadvertent omission on the part of the advocates who had previously represented the second Defendant in this suit.
2. The Application was supported by the Affidavit of the second Defendant sworn on 26th April 2012. The second Defendant recounted therein that by an Agreement for Sale dated 14th March 2003, he had purchased L. R. No. 209/7307, Mugoiri Road, Kileleshwa, Nairobi (hereinafter called “the suit property”) from the first Defendant in exercise of the latter’s statutory power of sale. He had paid in full for the suit property at the agreed price of Shs. 7 million. The suit property had been transferred to the second Defendant by a Transfer document dated 3rd May 2004 registered in his favour on the 5th May 2004. The deponent considered that he was the rightful and registered owner of the suit property but the first and second Plaintiffs herein had refused and/or failed to vacate the same and hand over possession. Further, they had wrongfully collected rents arising from the suit property since May 2004 depriving the second Defendant of

the amount of Shs. 5,844,000/-. The second Defendant went on to say that on 27th January 2012, a Consent was entered into settling the suit as between the Plaintiffs and the 1st and 3rd Defendants. As a result thereof, the second Defendant maintained that it was necessary for him to amend the joint Defence filed herein. The second Defendant vigorously protested that the sale and transfer of the suit property had been afflicted with illegality, collusion or fraud as between the first Defendant and himself. He thereafter reiterated at length, in his said Supporting Affidavit, what he had been advised as regards to the law and procedure in respect of this suit, by his advocates on record.

3. The first Defendant herein through its Executive Director **Muhammad Mujtaba**, swore a Replying Affidavit in relation to the first Defendant's said application, which was sworn on 20th July 2012. The deponent immediately annexed a 56 page exhibit marked "MM 1" containing a number of copy documents. The deponent admitted to the said Agreement for Sale dated 14th March 2003. However, he maintained that it was incorrect that the second Defendant had paid any monies towards the purchase of the suit property as alleged in the Supporting Affidavit. He went on to say that a sum of Shs. 7 million was credited to the account of the third Plaintiff with the first Defendant on 15th May 2004. However, these monies were not provided by the second Defendant but financed entirely through a loan to him advanced by the first Defendant. The second Defendant had made no repayments of those monies despite the Shs. 7 million being debited to his loan account with the first Defendant on the 15th May 2004. The deponent was of the opinion that the second Defendant's application to amend the Defence is based on falsehoods and to allow the same would be to unjustly enrich the second Defendant. The latter had not produced any evidence before the court that he had purchased the suit property and he could not controvert the fact that the suit property was wholly financed by the first Defendant bank. Mr. Mujtaba wound up his Replying Affidavit detailing legal matters upon which he had been advised by the advocates on record for the first Defendant but pointed out that there had been a delay of 8 years in bringing about the Application for the amendment of the Defence which delay, in his opinion, had not been adequately explained.
4. In regard to the second Defendant's Application before Court to amend his Defence and introduce a Counterclaim, the first Plaintiff filed Grounds of Opposition on 25th June 2012. Those Grounds detailed as follows:

**"1. THAT the Applicant is guilty of a long, inexplicable, fragrant and inordinate delay in seeking leave to amend his statement of defence.**

**2. THAT the Application by the Applicant lacks merit and has not demonstrated sufficient grounds that warrant this Honourable Court to grant leave to amend his pleadings.**

**3. THAT the reasons set forth in the application are merely excuses and the pleadings annexed thereto particularly the Counter claim is an aforethought owing to the age of this case.**

**4. THAT this application only seeks to delay the hearing and determination of this case.**

**5. THAT the Application by the applicant is misconceived and its being premised on the consent is misleading as the outcome culminating into a consent should have been a fact already foreseen by the Applicant as the Transfer was illegal from the beginning and hence the need to cancel the entries.**

**6. THAT further the facts and material that are intended to form the basis of his counterclaim were within his knowledge at the time of filing of his statement of defence.**

**7. THAT from the prayers concisely pleaded in the amended Plaint dated 24<sup>th</sup> May 2004 set forth the possibility of cancellation of transfers and restoration of the**

**Plaintiffs as owners thereof in the respective parcel registers.**

**8. THAT the application is an abuse of court process as the proposed amendments do not intend to bring any clarity of the issues in controversy but only seek to clog and cloud the Court by furthering greater delay by elongating and lengthening the hearing and adjudication of this matter.**

**9. THAT the 2<sup>nd</sup> Defendant's omission and lack of foresight should not be visited on the Plaintiffs and to do so shall be unfair and unjust.**

**10. THAT the amendments sought herein are extensive and introduces a whole new suit which is a counterclaim of 30 paragraphs, introducing new pleadings. That the said amendments seek inclusion of substantial claims previously unclaimed and unpleaded.**

**11. THAT the Application is otherwise a gross abuse of the court process thus should be dismissed with costs to the Plaintiff".**

5. On 10th July 2012, the second Plaintiff herein also filed Grounds of Opposition to the second Defendant's said Application. Those Grounds detailed:

**"1. The parties have been litigating in this case since the year 2004 and the delay of almost eight years has not been explained or justified. The long and inordinate delay clearly shows that the Application is an afterthought and meant to delay the conclusion of this matter.**

**2. Ordinarily the Court will not grant leave to amend pleadings where it is shown that the facts or material that are intended to form the basis of a counterclaim were within the knowledge of the Applicant at the time of filing a statement of defence. It is clear from the Affidavit in support of the Application that all the facts being relied on were within the knowledge of the 2<sup>nd</sup> Defendant and there are no justifiable reasons for departure from this principle of law.**

**3. The prayers sought by the Applicant clearly show that he is on a fishing expedition. The Plaintiffs had pleaded from the outset that the transfer to the defendants of the suit properties was fraudulent and that the 2<sup>nd</sup> Defendant had not made any payment. If the Applicant is truthful he should have filed the counterclaim against the Plaintiff and other Defendant when filing its defence.**

**4. The proposed amendment introduces a new suit whose purpose is to muddle the waters of justice. The proposed amendments do not bring before the court all the issues in controversy between the parties as alleged. To the contrary the proposed amendments will only cloud and obfuscate the real issues in dispute.**

**5. The Plaintiff are in the suit properties as the lawful owners and are legally staying in the suit properties pursuant to an order of this Court. There was no Appeal against that order and therefore the proposed amendment against the Plaintiffs are misconceived and an abuse of the court process.**

**6. The intended amendments will cause prejudice to the 2<sup>nd</sup> Plaintiff that cannot be compensated in costs".**

6. With the leave of the Court granted on 23rd of July 2012, one **Faiz H. A. Kader** swore an Affidavit on 14th September 2012 detailing that he was an advocate and that he had been employed by the 1st Defendant bank in 2004 but had left that employment in October 2005.

During his employment, he was the Legal Officer for the 1st Defendant based at its Head Office at Westlands, Nairobi. Basically to back up the version of the 2nd Defendant as to the circumstances surrounding the preparation and execution of the alleged Charge document dated 15th May 2004 annexed to the Replying Affidavit at page 30 of the exhibit thereto, the deponent declared that he prepared in-house legal documents for the 1st Defendant. During the entire period that he was in employment of the 1st Defendant, Mr. Kader detailed that he did not prepare any Charge document on behalf of the 1st Defendant, that task was generally performed by external advocates on the 1st Defendant's panel of advocates. He categorically denied preparing the said alleged Charge document dated 15th May 2004. He recalled the sale transaction of the suit property which he remembered was handled by Mr. Ayaz Merali as he had a close personal relationship with the 2nd Defendant.

7. As regards that Charge document, Mr Kader made the following observations:

**“10. i) The Charge does not have the front/covering page to indicate who are the parties neither is the name of the Advocate who has drawn the Charge indicated on the front/covering page in accordance with the normal practice.**

**ii) The last page thereof purporting to assert that I drafted the Charge has been inserted. I reiterate that I did not draft the Charge.**

**iii) I did not witness the signature of KIRIT KHAKHAR who is well known to me and my signature may have been forged.**

**iv) My purported stamp which purports to witness the signature of KIRIT KHAKHAR is smudged, messy and does not appear genuine to me. I would have witnessed the document in a neat and professional way had I prepared it as alleged.**

**v) The date when I witnessed the signature of KIRIT KHAKHAR is not indicated in the document.**

**vi) All the writings made by hand in the Charge document are alien to me and that is not my handwriting”.**

The deponent continued by saying that when he left the employment of the 1st Defendant, he was prevented from taking away his books, rubber stamps and other personal belongings. He highly suspected that the 1st Defendant may have used his stamp to witness the said Charge document without his knowledge or authority.

8. Thereafter, on 3rd October 2012, the said **Faiz H. A. Kader** swore a Further Affidavit ancillary to his said Affidavit of 14th September 2012. In his Further Affidavit, the deponent detailed that he had been shown an Affidavit drawn and filed herein on 17th September 2012 by the firm of Walker Kontos, Advocates that was purported to have been executed by him on 14th September 2012 before one **Ray Onoka Aboge**, Advocate and Commissioner for Oaths. The deponent categorically stated that he did not sign the said Affidavit and that his purported signature thereon had been forged. He had never appeared before Mr. Aboge and did not even know him. He had noted that the contents of the said Affidavit were diametrically opposed and contradictory to his said Affidavit of the 14th September 2012. He went on to say that the said **Ayaz Merali**, the Managing Director of the 1st Defendant had called him on his mobile phone demanding that he should see him in his office at Westlands. Indeed, the deponent stated that he had been to see Mr. Merali at his office at about 4.00 PM on the 14th September 2012. The deponent maintained that Mr. Merali was visibly angry with him and demanded to know why he had sworn his said Affidavit of 14th September 2012. He had requested the deponent to withdraw and/or retract that Affidavit, which the deponent declined.

9. Again with the leave of the Court granted on 23<sup>rd</sup> July 2012, the 2nd Defendant swore a Further Affidavit on 3rd August 2012. He denied vigorously the allegations contained in paragraph 4, 5, 6 and 7 of the Replying Affidavit to the effect that he had not paid a single cent for the suit

property. He maintained that upon entering into the Sale Agreement dated 14th March 2003, he paid the deposit of Shs. 700,000/-in cash to the 1st Defendant of which receipt was duly acknowledged. He then went on to say that he paid to the 1st Defendant the balance of the purchase price being Shs. 6,300,000/-through internal transfers from his accounts with the 1st Defendant bearing the numbers 18287-50, 18287-180, 18287-30 and 18287-170. The entire purchase price of Shs. 7 million had been expressly acknowledged by the 1st Defendant in the Transfer Document dated 3rd May 2004. Further, the 2nd Defendant referred this Court to the Replying Affidavit of **Muhammad Mujtaba** filed herein on 22nd November 2004 where it had been stated that the 2nd Defendant had purchased the suit property honestly and for value, the proceeds of sale being credited to the Plaintiff's account with the 1<sup>st</sup> Defendant. He maintained that he had purchased the suit property in good faith. He noted that in previous pleadings filed by the 1st Defendant herein, there had never been any allegation that the 2nd Defendant had never paid the purchase price of Shs. 7 million. He denied acquiring any loan finance to go towards the said purchase price neither did he sign any Charge document in favour of the 1st Defendant.

10. Mr. Khakhar thereafter commented upon the purported documents produced by the Executive Director of the 1st Defendant stating that the said documents were forged and/or not genuine and giving a number of reasons therefore. He also maintained that there would have been no injunction in place to prevent the 1st Defendant from registering the purported Charge simultaneously with the Transfer if, at all, the borrowing was genuine. He further maintained that the mere existence of the suit before Court could not be a valid excuse for the 1st Defendant not to have demanded the alleged debt owed to it by the deponent. He had not received any demand letter nor statement of account in respect to the alleged loan and/or outstanding debt of Shs. 140,457,420.64. The 1st Defendant had raised the issue with Mr. Khakhar for the first time in March 2012 after he had demanded the release of his Title Deed and motor vehicle log books. He maintained that he had never operated any account with the 1st Defendant and he denied owing the aforesaid sum maintaining that the same was fictitious and erroneous. In his view, the 2nd Defendant stood fully discharged from all liabilities due to the 1st Defendant by virtue of the express terms of the Consent Order filed on 28th August 2008 in *HCCC No. 172 of 2007*. He had surrendered his valuable properties and the 1st Defendant was paid the amount of Shs. 92,037,629/- all-inclusive in full and final settlement of all the liabilities of the two companies and their directors. As a result, the 2nd Defendant maintained that there were substantial issues requiring to be investigated at the trial of this suit in due course. He was of the belief that the amendments should be allowed so as to enable the Court to weigh up all the facts and evidence appropriately.

11. The 2nd Defendant's submissions in relation to his Application dated 26th April 2012 were filed herein on the 19th September 2012. They opened by summarising the documents in relation to the Application and what the 2nd Defendant considered as to the facts of the dispute before this Court for determination. He commented that on 27th January 2012, a Consent Order was entered into between the Plaintiffs and the 1st and the 3rd Defendants settling the suit wholly as between those parties in respect of the suit property. The 2nd Defendant maintained that the recording of the said Consent Order had great ramifications and impact upon his pleadings and position. He laid out instances where, as the 3rd Defendant was no longer involved in the suit, his name needed to be removed from the pleadings. He further maintained that the said Consent Order did not address the fate of the suit premises. It was his position that the same had been sold and transferred to him by the 1st Defendant. It was therefore necessary for the 2nd Defendant to be permitted to amend his pleadings so as to seek appropriate Orders in respect of the suit property by referring to the draft Defence and Counterclaim annexed to the Affidavit in support of the Application.

12. As regards the law, the 2nd Defendant referred the Court to the case of **Kassam v Bank of Baroda (Kenya) Ltd (2002) KLR 294** in which **Kuloba J.** had held:

**“1. The general rule is that amendments should be**

**allowed if the court is satisfied that:**

**a. the party applying is not acting mala fide;**

**b. the amendment will not cause some injury to the other side which cannot be compensated by**

costs;

- c. **the amendment is not a device to abuse the court process;**
- d. **the amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;**

**2. Amendments sought after the statutory free period**

cannot be claimed as of right, but it is within the discretion of the court.

**3. Late amendments may be done, but the applicant**

must show why the application is made late and must satisfy the court that the delay is not deliberate.

**4. In exercise of the court's discretion the following**

factors must be considered:

- a. **whether the amendment sought embodies a legally valid claim or defence;**
- b. **the reasons why the subject matter of the amendment was not included in the original pleading or offered sooner;**
- c. **delay or disruption of judicial administration;**
- d. **and the extent to which the amendment departs from the original claim or tends to complicate the issues”.**

The 2nd Defendant also referred the court to the cases of Leroka v Middle Africa Finance Co. Ltd (1990) 549, Macharia v Guardian Bank Ltd & Anor. (2003) KLR 271, Jashbhai Patel v B.D. Joshi Civil Appeal No. 39 of 1951 (unreported), Stephen Gititha v Family Finance Building Society & Ors HCCC No. 360 of 2003 and Suleiman v Karasha (1989) KLR 201. He maintained that the proposed amendments to his Defence and Counterclaim were necessary as he was not acting in bad faith. The proposed amendments would not be prejudicial to the Plaintiffs as they would have an opportunity to amend their pleadings as necessary.

13. The 1st Plaintiff in his submissions filed on 10th October 2012 laid out the background of the Application and pointed to his Grounds of Opposition as above. He then submitted that in this case, it would not be just for the Court to allow the amendment of the 2nd Defendant's statement of Defence as the Application lacked merit and the 2nd Defendant had not demonstrated sufficient grounds for leave to be granted. He maintained that the reasons for amendment as put forward in the Application were merely excuses and that the draft Statement of Defence and Counterclaim was an afterthought owing to the age of the case. The 1st Plaintiff then pointed to the Kassam case (supra) and detailed that in general amendments should be allowed providing that the Court is satisfied that the party applying therefore is not acting *mala fides*, the amendment sought would not cause some injury to the other side which could not be compensated for in costs and that it was not a device in abuse of the Court process. It also has to be satisfied that the amendment was necessary for the purposes of determining the real questions in controversy between the parties so as to avoid multiplicity of suits. Finally, the 1st Plaintiff maintained that the amendment sought must not alter the character of the suit. He pointed out that this Application by the 2nd Defendant was made 8 years after this suit had been filed and it was not geared towards determining the real questions in controversy between the parties.

What the 2nd Defendant intended to do by his proposed amendments was to introduce new facts into the suit. The 1st Plaintiff maintained that the issue to be determined in the Counterclaim was a new issue that had not been previously covered in the Defence. The 2nd Defendant had not previously thought of asking for relief such as the recovery of rent and damages – this was an afterthought.

14. Continuing his submissions the 1st Plaintiff asked the question as to whether the amendments proposed by the 2nd Defendant embodied a legal claim. He pointed out that all the facts relating to the proposed amendments were within the 2nd Defendant's knowledge at the time that he had filed his original Defence. The 1st Plaintiff emphasised his position that the 2nd Defendant had never paid for the suit property and now wished to incorporate an amendment to his Defence by adding a Counterclaim in order to unjustly enrich himself. Further, it now seemed the case from the proposed amendments that the 2nd Defendant was alleging in the proposed Counterclaim, that he had acquired an indefeasible title to the suit property. In the opinion of the 2nd Plaintiff, the proposed amendments were not being put forth in good faith. The proposed amendments did not bring any clarity as regards the issues in controversy but only sought to clog and cloud the Court's process by elongating the hearing of the matter. The 2nd Plaintiff went on to submit that in the case of **Eastern Bakery v Castelino (1958) EA 461** it had been held that an amendment to a pleading may be allowed at a very late stage where it was necessitated solely by a drafting error and that there was no element of surprise/prejudice to the other side. Finally, and perhaps most importantly, the 2nd Plaintiff submitted that at the core of its Grounds of Objection to the Application by the 2nd Defendant was the question of Limitation of Action. He maintained that it was important to take cognizance of the fact that the proposed Counterclaim amounted to a fresh suit. He referred the Court to the case of **Barclays Bank D.C.O. v Shamsudin (1973) EA 451** where it had been held that in special circumstances amendment of a plaint will be allowed notwithstanding that the effect will be to defeat the defence of limitation. The learned judge in that suit had quoted from the finding of **Lord Esher MR** in **Weldon v Neal (1880) 19 QBD 394**:

**“We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment”.**

15. In turn, the 2nd and 3rd Plaintiffs filed their submissions on 21st January 2013, immediately referring the Court to what it described as the power to grant leave to amend pleadings being discretionary. They quoted from the finding of the Court of Appeal in the case of **Central Bank of Kenya Ltd v Trust Bank Ltd (2000) 2 EA 365 (CAK)** as follows:

**“The settled rule with regard to amendment of pleadings has been concisely stated in Volume 2, at 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 may be 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 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”.**

The 2nd and 3rd Plaintiffs pointed to the delay of 8 years that it had taken the 2nd Defendant to bring his Application before Court, despite his excuse that the delay had been occasioned by his previous advocates on record. They referred to the case of **Harrison Kariuki v Blue Shield Insurance Co Ltd** in which **Waweru J.** had quoted from the finding of the Court of Appeal in **Municipal Council of Thika & Anor v Local Government Workers Union (Thika Branch) Civil Appeal No. Nai 41 of 2001 (unreported)** in which the Court had detailed:

**“We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings.”**

The two Plaintiffs then quoted from the finding of my learned brother **Musinga J.** in the case of **Kiplangat A. Biator v Esther T. Chepyegon (2006) e KLR** as follows:

**“Ordinarily the court will not grant leave to amend pleadings where it is shown that the facts or material that are intended to form the basis of a counterclaim were within the knowledge of the applicant at the time of filing a statement of defence.”**

Finally the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs submitted that the proposed counterclaim would have the effect of introducing an entirely new cause of action into the suit. Despite the submissions of counsel for the 2<sup>nd</sup> Defendant that the other parties to the suit would have a chance to effect amendments to their pleadings, it was submitted that by allowing the counterclaim would, as such, amount to a new suit with all the consequences thereof.

16. The principles upon which amendments to pleadings may be made are as set out and stated in the Court of Appeal decision in **Eastern Bakery versus Castelino (1958) EA 461**. The principles were summarised as hereunder:

**“1. Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.**

**2. There is no injustice cause to the other side if it can be compensated with costs.**

**3. The court will not refuse an amendment simply because it introduces a new case.**

**4. There is no power to enable one distinct cause of action to be substituted for another nor to change, by means of amendment, the subject of the suit.**

**5. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation.**

**6. The principles applicable to amendments of complaints are equally applicable to amendments of written statements of defence.**

**7. A judge has discretion to allow amendment to the statement of defence to introduce a counterclaim provided that such an amendment does not transgress any of the aforesaid principles”.**

17. I have perused the draft Amended Defence and Counterclaim of the 2<sup>nd</sup> Defendant annexed as “KK 5” to the Affidavit in support of the 2<sup>nd</sup> Defendant’s Application. The Defence itself has had to be amended to take out any reference to the 3<sup>rd</sup> Defendant against whom the Plaintiffs’ suit has now been settled. In that regard, I see no real difficulty in allowing the amendment to the Defence as such and am satisfied that none of the aforesaid principles in the **Eastern Bakery** case had been breached. However, the 2<sup>nd</sup> Defendant’s Counterclaim is another matter, as it is entirely new. The 2<sup>nd</sup> Defendant now wishes this Court to award him 9 prayers as per the proposed amended Counterclaim which, to my mind, go far beyond what the 2<sup>nd</sup> Defendant had originally pleaded and prayed for in his Defence which was simply that the Plaintiffs’ suit against him be dismissed with costs. Now, the 2<sup>nd</sup> Defendant seeks all sorts of prayers including a declaration that upon sale of the suit property by public auction, the Plaintiffs’ title was extinguished, as well as Orders

seeking possession, an injunction restraining the Plaintiffs from collecting rent as regards the suit property, mesne profits and damages for trespass. Further and in the alternative, the 2nd Defendant seeks judgement for Shs. 7 million together with interest thereon at 3.5 percent per month as well as damages for loss of bargain amounting to some Shs. 52 million. In my opinion, the 2nd Defendant's amendments sought violate the principles as expounded in paragraphs 4 and 5 of the **Eastern Bakery** case supra. In my view, what is sought by the 2<sup>nd</sup> Defendant by his Counterclaim changes one cause of action into another of an entirely different nature even though relating to the same suit property. In my opinion, the amendment sought changes the action into one of a substantially different character to the present matter before this Court. Such goes far beyond simple amendments to the Defence as a result of the settlement of the case as between the Plaintiffs and the 3rd Defendant.

18. As a result and being bound by the **Eastern Bakery** case, I have no hesitation in denying the 2nd Defendant's Notice of Motion dated 26th April 2012 and dismiss the same with costs to the Plaintiffs.

**DATED and delivered at Nairobi this 29<sup>th</sup> day of November 2013.**

**J. B. HAVELOCK**

**JUDGE**