



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Civil Case 818 of 1995**

**KENYA BREWERIES LIMITED ..... PLAINTIFF**

**V E R S U S**

**MUNICIPAL COUNCIL OF MOMBASA ..... 1<sup>ST</sup> DEFENDANT**

**MARGARET AKOTH OLUNGA ..... 2<sup>ND</sup> DEFENDANT**

**MARY RONO ..... 3<sup>RD</sup> DEFENDANT**

**JUMA GOSHI ..... 4<sup>TH</sup> DEFENDANT**

**LEONARD SAWE T/A ELANA DEVELOPERS ..... 5<sup>TH</sup> DEFENDANT**

**GOLDFINGER INVESTMENTS ..... 6<sup>TH</sup> DEFENDANT**

**SAUDI MUCHELE ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

- 1) On 20<sup>th</sup> November 1995 the Plaintiff commenced these proceedings. Some 14 years later the matter was not ready for hearing and there was still a discussion on the pleadings. What is before me is an application dated 18<sup>th</sup> June 2010 by the Plaintiff for leave to amend the plaint. That is what I must decide 16 years after that plaint was filed.
- 2) An affidavit sworn on 18<sup>th</sup> June 2010 on behalf of the Plaintiff by Agnes Murgor explains that the intention of the amendments is to specifically plead and include allegations as to the acts of wrong doing, fraud and collusion between the 1<sup>st</sup> Defendant and the other Defendants. Although not stated on oath, the Plaintiff through its Counsels submission, sought to blame the omission on its past Advocates. Even the undue delay in seeking leave to make the amendments was blamed on those Advocates.
- 3) The 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants (hereinafter the Defendants) resisted the application and filed their response in different affidavits. They adopted a somewhat common position. To begin with it seemed to them that the amendments were intended to introduce a new cause of action which was hopelessly out of time. Allowing the application would therefore prejudice their defence as they would be deprived from taking up the plea of limitation.
- 4) In addition there was no satisfactory explanation given for the delay in making the application and

that it does not matter that the omissions both in the pleadings and in the delay in filing the applications could be attributed to the lethargy of the Plaintiffs past Advocates.

5) Also, the Defendants sense bad faith in the timing of the application. Some background explains this. The Plaintiff herein took out Judicial Review proceedings in **Mbsa Misc. Application No. 260 of 2001** (hereinafter “**the Judicial Review proceedings**”). In those Judicial Review proceedings the Plaintiff challenged the decision of the Commissioner of Lands approving the Municipal Council of Mombasa’s Scheme to create Mbsa Block 1/433, 434, 435, 436, 427 & 428. These are the parcels of land that form the subject of the suit before this Court. Luck was not on the side of the Plaintiff, because, as fate would have it, those Judicial Review proceedings were struck out. The Plaintiffs have preferred an appeal against that decision and the same, I am told, is pending before the Court of Appeal. It is the view of the Defendants that the Plaintiffs application for leave is simply to pave way for the Plaintiff to take a second go at a cause it failed to achieve in those Judicial Review proceedings.

6) It is common ground that, generally, an amendment should be allowed freely at any stage of the proceedings as long as the amendment does not cause prejudice or injustice to the opposing side which cannot be remedied in costs. The factors to be taken into account in the exercise of the Courts discretion were summarized in the decision of **Kassam –Vs- Bank of Baroda (Kenya) Ltd [2002] I KLR 294**. These are-

- (a) **the party applying is not acting mala fides;**
- (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.**
- (e) **and that the amendment will not alter the character of the suit.”**

7) It took the Plaintiff 14 years to seek the permission of this Court to amend its pleadings. That seems, and is, an awfully long time. The Plaintiff heaps all the blame on its past Advocates. But that may not wash in view of the observation made by Ringera, J (as he then was) in **Trust Bank –Vs- Portway Stores (1993) Ltd HCC No. 413 of 1997** cited by the Defendants-

***“Speaking for myself, I am yet to be persuaded that the errors of commission and omission by a duly instructed Advocate who is obviously the agent of the instructing party should not be visited on his principal. If the acts and omissions of other agents with actual or ostensible authority in other spheres of life are not without consequence to their principals, why should it be different in the legal profession? In short if this application turned only on the explanation given for the default, I would be inclined to dismiss it.”***

8) That said, the real test as to whether delay should foreclose an amendment lies with the effect of the delay. Does the delay cause an injustice or prejudice to the other side? Here, no witness has taken the stand. And only the 2<sup>nd</sup> Defendant suggests such prejudice in paragraph 10 of her affidavit of 21<sup>st</sup> July 2010-

***“10. THAT, the witnesses to the transactions the subject matter of this suit may not readily be availed after such a lengthy period of time.”***

One cannot help but notice that the statement is not emphatic. It is not said, with any measure of conviction, that witnesses are now not available because of the delay. In the absence of any such concerns raised by the Defendants the Court finds that the delay is unlikely to prejudice the Defendants.

9) In determining whether the proposed amendments are timebarred, this court finds great assistance in the decision in Nzirane –Vs- Lukwago [1971] EA 328 where Goudie, J said-

***“Where the proposed amendments have the effect of creating or proceeding upon a fresh cause of action which is time-barred the amendment will not be allowed unless, owing to some disability or sufficient other cause, the fresh cause of action could not have been brought within the statutory time limit.”***

This Court must examine whether the proposed amendments relate back to the original cause of action or introduce an entirely new cause of action.

10)The argument by the Defendants is that the amendments seek to introduce fraud as a new cause of action. If this were so then it being a tort, the cause of action would be hopelessly out of time. The Plaintiffs answer to this in paragraph 16 of the affidavit of Agnes Murgor sworn on 1<sup>st</sup> September 2010-

***“THAT the Application herein is not an abuse of the court process and that the amendments sought therein will not alter the character of this suit and/or give rise to a new cause of action. The amendments sought herein still embody a legally valid claim and which was filed in Court within time.”***

11) It is necessary to examine the original cause of action vis-à-vis the proposed amendments. I must reproduce a substantial portion of the proposed amended plaint.

***“9. The Plaintiff avers that the allocations of the said roads reserve by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants is tainted with a lot of illegalities and irregularities and is immoral and amounts to a mischievous exercise of complete misuse and abuse of powers by the 1<sup>st</sup> Defendant, namely, the Municipal Council of Mombasa and that in view of those irregularities, illegalities, abuse of power the allocations should be declared as null and void and of no consequence whatsoever and howsoever and the Court should declare the same as conveying no title whatsoever to the Defendants and the Defendants should not be allowed to occupy the plots as allocated by the 1<sup>st</sup> Defendant and/or develop the same and the road reserve should be left in the same status as it has always been.***

#### **PARTICULARS OF ILLEGALITIES, IRREGULARITIES AND ABUSE OF POWER**

(i) ...

***(ii) That in view of the existing amenities situated on the road reserve there is really no land that could be available for allocation to the 6 Defendants by the 1<sup>st</sup> Defendant and the allocations are merely paper allocations manipulated to get the Defendants a paper authority to enable the Defendants to sell the plots to the adjacent land owners, namely, the Plaintiff and therefore the allocations are tainted with agreed and desire to make a fast buck by the Defendants and they are therefore mischievous allocations purely calculated for the personal aggrandizement of the 6 Defendants at the expense of the greater well-being of the Plaintiff and other local residents.”***

***10A. The Plaintiff further avers that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants have equally been guilty of fraud, in their acquisition of the said parcels of land that are actually a road reserve as aforesaid and have no legal and/or equitable right to own, possess, occupy and/or develop the same.***

***10B. The Plaintiff further states that the purported allocation and consequent issuance of Leases and Certificates of Leases by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants respectively in respect of the road reserve as aforesaid are fraudulent, null and void ab ignition.***

***10C. In the alternative, without prejudice and/or further to the pleading in paragraph 10B 0above, the Plaintiff avers that the purported allocation and consequent issuance of Certificates of Leases by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants respectively in respect of the said road***

reserve were by mistake and ought to be rectified by cancellation of the Leases and the Certificates of Leases issued as a consequence thereof.

**PARTICULARS OF FRAUD AND/OR MISTAKE ON THE PART OF THE 1<sup>ST</sup> DEFENDANT**

- 1. Purporting to plan, scheme, subdivide, allocate and issue Titles to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants respectively for the property known as plot numbers 436/1/1M, 431/1/1M, 434/1/1M, 433/1/1M, 427/1/1M and 428/1/1M without due regard to the law, public interest and the rights of the Plaintiff.**
- 2. Doing the aforesaid acts for personal reward to the officers of the 1<sup>st</sup> Defendant.**

**PARTICULARS OF FRAUD ON THE PART OF THE 2<sup>ND</sup> DEFENDANT**

- 1. Knowingly causing the 1<sup>st</sup> Defendant to purport to subdivide the said road reserve and creation of Plot 436/1/1M within a road reserve and apply for and obtaining a Certificate of Lease in respect of the same.**
- 2. Failing to do a due diligence on the subject property and obtaining a Certificate of Lease for a portion thereof when he knew and/or ought to have known that the same is a road reserve and that any developments thereon will interfere with the Plaintiff's rights.” (proposed amendments)**

So was fraud a cause of action when the suit commenced on 20<sup>th</sup> November 1995? The Court will be concerned with whether the substance of pleadings reveals fraud as a cause of action. It is for this reason that the Court's attention is drawn to paragraph 9(ii) of the original Plaint.

***“9 (ii) That in view of the existing amenities situated on the road reserve there is really no land that could be available for allocation to the 6 Defendants by the 1<sup>st</sup> Defendant and the allocations are merely paper allocations manipulated to get the Defendants a paper authority to enable the Defendants to sell the plots to the adjacent land owners, namely, the Plaintiff and therefore the allocations are tainted with greed and desire to make a fast buck by the Defendants and they are therefore mischievous allocations purely calculated for the personal aggrandizement of the 6 Defendants at the expense of the greater well-being of the Plaintiff and other local residents.”***

12) Fraud in ordinary parlance is defined as-

***“Wrongful or criminal deception intended to result in financial or personal gain.***

(12<sup>th</sup> Edition Concise Oxford English Dictionary)

The definition at law is not much different.

***“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”***

(8<sup>th</sup> Edition Blacks Law Dictionary).

If a transaction is manipulated to confer an illegal and undeserved benefit to an individual at the expense of others then it amounts to fraud. To my mind the allegation in paragraph 9(ii) is an allegation that fraud had been committed. The cause of action in respect to fraud existed right from the outset.

13) But no particulars of fraud were pleaded. This would contravene Order VI Rule 8 of the past Edition of the Civil Procedure Rules (now Order 2 Rule 10). As it is, the allegation of fraud cannot stand. If the

intention of the amendments is to prop up the pleadings, then I must consider allowing the application as it seeks to strengthen an action which relates back to the original cause of action. But I am told there is mala fides on the part of the Plaintiff.

14)As stated earlier the Defendants think that the real motive of the amendments is to side step the challenges the Plaintiff confronted in the Judicial Review proceedings. This is against the Plaintiffs position that the amendments merely seek to tidy and tighten the pleadings. Its motive is to bring forth the real issues in controversy. What is to be made of this? I note that the Judicial Review proceedings commenced in 2001, six (6) years after the filing of this suit. And I have held that the intended amendments do not introduce a new cause of action. An option available to the Defendants would be either to stay one of the proceedings or to apply for its striking out as being an abuse of Court Process. This Court was however told that the Judicial Review proceedings have been struck out for other reasons. The parties, it seems, have to await the outcome of the appeal before deciding which way to go. On my part I cannot find that the pendency of the appeal (or indeed the Judicial Review proceedings) should stand in the way of the amendments sought as the amendments do not alter the character of the suit. The latter proceedings do not affect the fate of the application to amend one way or other.

15)I reach this conclusion. The application dated 18<sup>th</sup> June 2010 is hereby allowed. The Plaintiff must file and serve the amended Plaint within fourteen (14) days hereof, with reciprocal leave to Defendants to file their reply, if necessary, within fourteen (14) days of service. But I do not think the Plaintiff deserves costs on its very late application. It shall pay the Defendants costs in any event.

16)This is a very old matter. Parties must comply with pre-trials within 45 days hereof and move the Court for hearing.

*Dated and delivered at Mombasa this 23<sup>rd</sup> day of October, 2012.*

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-**

**No appearance for the Plaintiff**

**No appearance for the 1<sup>st</sup> Defendant**

**Kinyanjui for the 2<sup>nd</sup> Defendant**

**Maosa for the 5<sup>th</sup> and 6<sup>th</sup> Defendants**

**Court clerk - Moriasi**

**F. TUIYOTT  
JUDGE**