



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 46 OF 1996**

**KENYA BREWERIES LTD. ....PLAINTIFF**

**VERSUS**

**MUNICIPAL COUNCIL OF MOMBASA.....1<sup>ST</sup> DEFENDANT**  
**ABDULWAHID A. MOHAMED.....2<sup>ND</sup> DEFENDANT**  
**ANNE JEPNGETICH.....3<sup>RD</sup> DEFENDANT**  
**HAWA LUL BASHIR.....4<sup>TH</sup> DEFENDANT**  
**LUCY SALUKO MUKHONGO.....5<sup>TH</sup> DEFENDANT**  
**NANCY NJERU MAINA.....6<sup>TH</sup> DEFENDANT**  
**SHAHKRAM SHADOSI HAJI .....7<sup>TH</sup> DEFENDANT**

**R U L I N G**

Two applications were listed before the court for hearing and determination. The first was an application by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants dated 25<sup>th</sup> April 2009 for an order to strike out the Plaintiff's suit and for it to be dismissed for failure to disclose any reasonable cause of action against the said Defendants.

The second Application is dated 27<sup>th</sup> 2009 by the plaintiff seeking leave of the court to further Amend the plaint dated 23<sup>rd</sup> September 1998.

Upon consultations with counsel on the 24.03.2010, I directed that the application for leave to further amend the plaint be heard first. The Defendants were given the liberty to raise the issue of Limitation of Actions in their responses which was one of the grounds for the application to strike out the plaint.

In the Amended plaint dated 23.09.1998 the plaintiff avers inter alia that:-

- It is the registered owner of all that leasehold plot of Land known as Mombasa/Block IX/133 from the 1<sup>st</sup> Defendant, the Municipal Council of Mombasa for a term of 99 years commencing 1.4.48.
  
- The Plaintiff being holder of the certificate of Lease from the 1<sup>st</sup> Defendant has consistently and faithfully paid all rates, rents and such other outgoings as are necessary.
  
- That the Plaintiff developed part of Mombasa/Block IX/132 by putting up 4 blocks each containing 12 flats and left open space for future development.
  
- The plaintiff states that it came to its knowledge sometimes in 1992, that the 1<sup>st</sup> Defendant had carried out some re-planning that clearly encroached into the plaintiffs parcel of land to, wit, Mombasa/Block IX/133 without any knowledge or consent of the plaintiff.
  
- That the 1<sup>st</sup> Defendant in complete disregard to the legal title of the plaintiff while carrying out the said re-planning went on to illegally create the following subdivisions:-
  - o Mombasa/Block IX/210 leased to the 2<sup>nd</sup> Defendant
  - o Mombasa/Block IX/121 leased to the 3<sup>rd</sup> Defendant.
  
  - o Mombasa/Block IX/212 leased to the 4<sup>th</sup> Defendant
  - o Mombasa/Block IX.213 leased to the 5<sup>th</sup> Defendant.
  
- That the plaintiff at no time did surrender any part of its leasehold interest of the plot to any person and as such all the subdivisions were illegal, contrary to law and all fairness. The Plaintiff seeks a declaration that the subdivisions were illegal and a clear order of the court that the same be declared null and void and of no legal consequences.
  
- That the plaintiff became aware about the illegal subdivisions sometimes in May 1992 and consequently wrote to the 1<sup>st</sup> Defendant a letter of complaint which letter was copied to amongst others the Permanent Secretary Ministry of Local Government, the Commissioner of Lands and director of Survey. The Ministry of Local Government through the Permanent Secretary responded sometimes in June 1992 by a letter to the 1<sup>st</sup> Defendant and copied the same to the Commissioner of Lands and the Plaintiff rested assured that action was being taken.
  
- The 1<sup>st</sup> Defendant early in 1996 wrote a letter threatening to demolish the fence/boundary of the plaintiff in a bid to enforce the boundaries of the plots that were illegally curved out of the plaintiff's plot. It is clear that despite the authorities assurances that action was being taken, the new and illegal "leaseholders" intend to develop their "plots" and the plaintiff now seeks the court's intervention to issue a permanent injunction against all the Defendants restraining them by themselves, their servants or agents from developing, transacting or in any way interfering or inter meddling with the plaintiffs plot

*Number Mombasa/Block IX/133.*

In the said Amended Plaint the Plaintiff sought the following orders/reliefs:-

- a) A declaration that the Certificates of Lease of the Plaintiffs Plot No. Mombasa/Block IX/133 is valid and currently in force.
- b) A declaration that the subdivision to Mombasa/Block IX/210, Mombasa Block IX/211, Mombasa Block IX/212 and Mombasa/Block IX/213 are illegal, null and void.
- c) A permanent injunction against all the Defendants restraining them by themselves, servants, or agents from developing, transactions, intermeddling and/or in any way to deal with the plaintiff's Plot No. Mombasa/Block IX/133.
- d) Costs of this suit
- e) Interest thereon.

The Defendants' have filed their respective defences.

In its defence, the 1<sup>st</sup> Defendant, the Municipal Council of Mombasa has pleaded inter alia that:-

“3. \_\_\_\_\_

- (a) That having been given a lease by the first Defendant for 99 years from 1<sup>st</sup> April 1948 the plaintiff failed and/or neglected to register the same and in the absence of such registration, the property remained vested in the First Defendant.**
- (b) That in 1988, the First Defendant prepared a Scheme in respect of Plot Number IX/133 thereby replanning the same, the R.I.M. was changed and new plots were lawfully created as the aforementioned plot no longer existed.**

4. \_\_\_\_\_

5. \_\_\_\_\_

**6. The First Defendant shall maintain that the plaintiff's claim if any and or at all is time barred by virtue of the provisions of the Public Authorities Limitation Act, Cap 39 of the Laws of Kenya and the plaintiff has no cause of action against it.**

The 3<sup>rd</sup> Defendant on its part filed Notice of Preliminary Objection dated 23.02.09 on a point of law that the plaintiff's case is time barred under the provisions of the Public Authorities Limitation Act, Chapter 39, Laws of Kenya. The 3<sup>rd</sup> Defendant then filed an application to strike out the plaint on the ground that it did not disclose any reasonable cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

Again it was mainly grounded on the point that the 3<sup>rd</sup> Defendant's rights emanate from the 1<sup>st</sup> Defendants against who the claim by the plaintiff is time-barred under the Public authorities Limitation Act.

I have already stated that the court directed that the Application for leave to amend the Amended Plot be heard first. However there is no doubt in my mind and as argued by the Defendants' Counsel that the main purpose for the intended further amendment of the plaint is to overcome the allegations that the plaintiff's cause of action is time-barred. The plaintiff in its draft Further Amended Plaint intends to plead fraud and mistake. The relevant paragraph State as follows:-

**“14 A. The Plaintiff avers that by reason of the assurances by the Ministry of Local Government through the Permanent Secretary as aforesaid the Plaintiff had no Cause to take legal action at the time.**

**14 B. The Plaintiff therefore avers that the Cause of action herein arose at the time when there was an attempt by the Defendant, their agents and/or servants to demolish the fence and boundaries of the Plaintiffs suit land and pleaded in paragraph 14 above.**

**14 C. The Plaintiff states that the purported subdivisions and consequent issuance of the parallel, leases and certificates of lease by the 1<sup>st</sup> Defendant to the 1<sup>st</sup>, 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 Plaintiffs suit property are fraudulent, null and void ab initio.**

**14 D. In the alternative, without prejudice and/or further to the pleadings in paragraph 14C above, the plaintiff avers that the purported subdivisions and consequent issuance of parallel 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 his plaintiff's suit property were by mistake and ought to be rectified by cancellations of the subdivisions, the lease and the certificate of leases issued as a consequence thereof.”**

The Plaintiff then sets out particulars of fraud and/or mistake as against end Defendant in the proposed Further Amended Plaint. The plaintiff intends to seek eviction orders of the 2<sup>nd</sup> – 7<sup>th</sup> Defendants to new plots created from its original Plot No. 133.

The application was supported by an affidavit sworn by the Group's Company Secretary of the plaintiff one Agnes K. Murgor on 27<sup>th</sup> July 2009.

The application is opposed by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. The 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants did not file any grounds of opposition and/or replying Affidavit to the application. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, filed grounds of opposition. The 4<sup>th</sup> Defendant also filed a Replying Affidavit.

At the hearing it was also agreed and understood, that the 3<sup>rd</sup> and 4<sup>th</sup> Defendant's application to strike out the Plaintiff's plaint would also be treated as part of the Reply by the said Defendants.

In the light of the foregoing, it is necessary for this court to determine whether from the pleadings, the plaintiffs' claim if any and/or at all is time-barred by virtue of the provisions of the Public Authorities Act (Cap 39), Laws of Kenya. If the cause of action was time-barred by the date the suit was filed on 6<sup>th</sup> February 1996.

Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and supported by Counsels for the 1<sup>st</sup> and 5<sup>th</sup> Defendants submitted that the plaint is based on a claim for a lease-hold interest. Paragraph 8 of the Amended Plot states:-

**“8. The plaintiff is the registered owner of all that leasehold plot of land known as Mombasa/Block IX/133 from 1<sup>st</sup> Defendant for a term of 99 years commencing 1.4.48.”**

Mr. Gathuku, submitted that the suit is not for recovery of land but the protection of a lease-hold interest that a lease is a contract between lessee and lessor and that being the cause Section 3 (2) of the Public Authorities Limitation Act would apply. The said provisions reads as follows:-

**“3. (1) \_\_\_**

**(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued”.**

Mr. Gathuku for the for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants added that the Plaintiff's cause of action as stated in paragraph 10 arose in 1992. It is stated in the said paragraph that:-

**“10. The Plaintiff states that court ift came to its knowledge sometimes in 1992, that the 1<sup>st</sup> Defendant had carried out some re-planning that clearly encroached into the plaintiffs parcel of land, to wit, Mombasa/Block IX/133 without any knowledge or consent of the Plaintiff.”**

It is contended that on the basis of the averment, the date when the plaintiff's cause of action arose is clear.

I have considered the two applications, the pleadings, proposed Further Amended Plaint and submissions by counsel.

Is the plaintiff's suit and specifically cause of action based or founded on contract?

At this stage and on the basis of the application under order VI, Rule 13(1)(a) no evidence is

admissible. Order 6, Rule 13 (a) provides:-

**“13. (1). 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.**

**(b) —**

**(c) —**

**(d) —**

**And may order the suit be stayed or dismissed to judgment be entered accordingly as the case may be.**

**(2) No evidence shall be admissible on an application under sub-rule (1) (a) but the application shall state concisely the grounds on which it is to be made.”**

As a result of the aforesaid provision which is mandatory in its terms, the 3<sup>rd</sup> and 4<sup>th</sup> Defendant did not annex any affidavit and exhibits to the Application. In arguing the points of law, the said Defendants referred to the lease between the Plaintiff and the 1<sup>st</sup> Defendant. The court has not had sight of the Lease and for it to know and appreciate all the terms and conditions thereof. Strictly, the averments in the Amended Plaint and the Defences in respect of the Lease and leasehold interest which the plaintiff has or may have had must be proved by evidence. In this case it will be documentary evidence i.e. the Lease in respect of the suit property which is said to be for a term of 99 years commencing 1/4/48. For this court to determine whether the said document constitutes a contract, it will have to look at and peruse the said document. I therefore hold that it would be risky and premature at this stage to determine the question of whether the suit is time-barred in the circumstances. Striking out pleadings is a serious and grave matter which the court's are hesitant to act upon. It would be presumptive for the court to merely hold that this suit is founded on contract because a lease has been referred to without seeing the lease itself and knowing its terms and conditions. In the absence of evidence on the lease itself then I am not inclined to hold the action is time barred at this stage.

Secondly, looking at the Amended Plaint, the Plaintiff's course of action is not based on any allegation of breach of the terms and conditions of the Lease per se in which event the action would be found on contract. The plaintiff was claimed in paragraph 11 that the 1<sup>st</sup> Defendants actions of creating the subdivisions and resulting in issuance of new titles and grant thereof to the other defendants, and “in disregard of its legal title” (para 11).

The plaintiff states that at no time did it surrender any part of its leasehold interest to the plot No. Mombasa Block IX/133.

The subject-herein is immovable property and it is my view that this action is one for recovery of land. It is not one based on breach of contract simpliciter and for specific performance or damages. The plaintiff desires to recover what it purports to be its lost land.

On this ground, I do hold that the plaintiff's action does not appear to be time-barred. I think this question also should go for trial and the matter should not be determined on the basis of an application to strike out the plaint.

I have considered the Ruling of Justice Serگون in Misc. Civil Appl. No. 244 of 2001. I do not agree that the issues raised in the suit or cause of action are Res judicata. That was judicial review proceedings while this is a civil action.

Also, the limitation raised there was with regard to orders of certiorari which must be applied for within 6 months from the date of judicial pronouncement, decree order etc. It is not the limitation envisaged under Public Authorities Limitation Act, Cap 39 laws of Kenya. The Honourable judge did not determine this question before me.

In the Case of D.T. Dobie & Company Ltd –v- Muchina 1 (1982) KLR 1 Justice of Appeal observed:-

**“The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out the pleadings, no opinions should be expressed as this would prejudice; fair trial, and would restrict the freedom of the trial judge in disposing the case.**

**.....The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”**

I am bound to apply the said principles of law, and the application to strike out the plaint is disallowed.

Is the plaintiff entitled to an order for leave to amend the plaint? It was held in the case of MCCOY –V- ALIBHAI 1938 5 EACA 70 that:-

**“That as a general rule leave to amend pleadings ought not to be refused unless the court is satisfied that the party applying is acting malafides or that his blunder has caused some injury to the other side which cannot be compensated by payment of costs or otherwise.”**

In the case of KASSAM –V- BANK OF BARODA (KENYA) LTD 2002 I KLR 294 it was held inter alia that the general rule is that amendment should be allowed if the court is satisfied that:

**“the amendment is necessary for the purpose of determining the real questions in controversy**

**between the parties and to avoid multiplicity of suits.”**

Upon consideration of all matters, I am of the view that the proposed amendments are reasonable and they do not change the character of the suit. They are necessary for the purpose of effectually determining the subject matter in dispute and all the issues. They bring out salient issues and particulars of the true dispute.

There has been delay but it is noted that the trial has never began and that there will be serious prejudice to the Defendants which cannot be compensated in costs.

The application is based on a genuine desire for the plaintiff to articulate and elaborate its case and is not based on any malice. There is no extra burden which has been exerted on the Defendants and they can adequately amend their defences.

I have considered that this dispute involves substantial and immovable properties with developments on them and the possible values must be equally substantial.

I do therefore allow the Application dated 27.07.2009 in terms of prayers 2 and 3.

The plaintiff do file and serve further amended plaint within 15 days.

The Defendants shall file their respective Amended or Further Amended Defences within 15 days of service. The Plaintiff shall pay the costs of the application to the Defendants who opposed the application. The costs of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' application shall be in the cause.

**Dated and delivered at Mombasa on 11<sup>th</sup> day of February 2011.**

**M. K. IBRAHIM**

**J U D G E**

**Coram:**

Ibrahim, J

Court clerk – Kazungu

Mr. Gathuku for the 3<sup>rd</sup> and 4<sup>th</sup> Defendant

Mr. Gathuku h/b for Kinyanjui for the 1<sup>st</sup> Defendant.

No appearance for the 5<sup>th</sup> Defendants.

**Ruling delivered in their presence.**



