



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO.90 OF 2009**

**VERONICAH WANJIKU WACIURI.....APPLICANT**

**VERSUS**

**SAMWEL MBUGUA IKUMBU.....RESPONDENT**

**RULING**

The applicant brought this suit on 25<sup>th</sup> March, 2009 against the respondent, Samuel Mbugua Ikumbu for orders of permanent injunction, specific performance of an agreement, or in the alternative judgment in the sum of Kshs.5.71m with interest at 14%, liquidated damages costs and interest.

The cause of action arose from a sale agreement where the respondent sold to the applicant a bar and restaurant called Vejodia Gardens Villa located at NAKURU MUNICIPALITY BLOCK 4/54 at a consideration of Kshs.18m.

It is averred that it was a term of that agreement that the respondent would obtain the original title documents from Barclays Bank, the chargees for purposes of completing the sale transaction and effecting the transfer of the property to the applicant. It is further stated that despite the existence of a sale agreement, the respondent has continued to offer the property to other prospective buyers. That the respondent has refused to instruct Barclays Bank to release the original documents, hence this suit.

In the meantime, the applicant has brought the present application seeking leave to amend the plaint by joining Barclays Bank Limited and Heiwa Auto Spares and distributors Limited. The application is grounded on the facts that Barclays Bank of Kenya Limited has now advertised the suit property for sale by public auction. That Heiwa Auto Spares and Distributors Limited is the entity used by the respondent to obtain a loan facility from Barclays Bank of Kenya Limited and in whose name the suit property is registered.

Although the application and the hearing notice were served upon the respondent's advocate, no response has been filed and counsel also did not attend the hearing of the application.

The court's general powers to amend pleading at any stage, for the purpose of determining the real question or issue in a suit was succinctly considered by the Court of Appeal in the case of **Joseph Ochieng' and 2 others Vs. First National Bank of Chicago**, Civil Appeal No.149 of 1991. The court laid down the following principles to be satisfied before leave to amend pleadings can be granted:

- i) amendments should be timeously applied for;
- ii) power to amend can be exercised by the court at any stage of the proceedings, including appeal stage;
- iii) as a general rule, however late the amendment is sought, it should be allowed if it is made in

good faith, provided costs can compensate the other side;

- iv) the exact nature of proposed amendment sought ought to be formulated and submitted to the other side and the court;
- v) if the court is not satisfied as to the truth and substantiality of the proposed amendment, it ought to be disallowed;
- vi) the proposed amendment must not be immaterial or useless or merely technical;
- vii) if the proposed amendments introduce a new case or a new ground of defence, it can be allowed unless it would change the action into one of a substantially different character which could have conveniently be made the subject of a fresh action;
- viii) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaintiff, the defendant would be deprived of his right to rely of limitation
- ix) the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendments.

These are only guiding principles as no hard or fast rules can be laid when the court is exercising a discretion. See **order VIA rule 2** of the **Civil Procedure Rules**.

In this application, I am satisfied that in view of the alleged roles of Barclays Bank of Kenya Limited and Heiwa Auto Spares and Distributors Limited with respect to the suit property, by joining them, the real question in this dispute will, with finality be determined. The application, I conclude has been brought in good faith; the proposed amendment is substantial and not trivial, useless, or technical.

For these reasons, the chamber summons dated 9<sup>th</sup> August, 2010 is allowed in terms of prayer (2) and in accordance with the draft amended plaint annexed. The amended plaint to be filed/served within 14 days.

I make no orders as to costs.

**Dated, Signed and Delivered at Nakuru this 1<sup>st</sup> day of October, 2010.**

**W. OUKO**  
**JUDGE**