



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 49 OF 2010**

**BUSAM HOLDINGS LIMITED.....PLAINTIFF**  
**VERSUS**  
**BANK OF BARODA (K) LTD.....DEFENDANT**  
**RULING**

In the Chamber Summons dated 30<sup>th</sup> July, 2010, brought under **Order VIA Rule 3(1)** and **5(1)** of the Civil Procedure Rules, and Section 3A of the Civil Procedure act, the Plaintiff/Applicant seeks orders of this court as follows;-

- 1 That leave be granted to the applicant to amend its Plaintiff filed on 4<sup>th</sup> February, 2010**
- 2. That the draft amended Plaintiff annexed to the Chamber Summons be deemed as duly filed and served**
- 3. That costs of the application be provided for**

The application is founded on four grounds as set out on the face thereof and the Supporting Affidavit sworn by Nick Kariuki, a director of the applicant, on 26<sup>th</sup> July, 2010. The application was argued orally before me and the submissions made by counsel for both parties, together with the authorities cited to support their clients' respective positions, have been carefully considered in light of the law.

The Applicant seeks to amend the Plaintiff mainly to enhance the special damages claimed in the suit and to plead, with more particularity, the agreement out of which the cause of action arose, by the introducing a claim for lost income, and of a right to rescind the said agreement. According to the applicant, the amendments sought are necessary for the just determination of the real question in controversy between the parties. The Plaintiff/Applicant contends that it stands to lose a substantial amount of money if the amendments are not allowed. It contends also that no prejudice will be occasioned the Defendants in the event that the amendments are allowed.

In reply, the Respondent filed a Replying Affidavit sworn by its Advances Manager, Duncan Lemiso on 18<sup>th</sup> October, 2010. Its position is that the proposed amendments would seriously prejudice the Defendant/Respondent as the same are, in the Respondents view, bound to alter the suit materially. The Respondents argue that the prayers sought in the proposed amended Plaintiff introduce new facts and new prayers. The Respondent reads ill-intent on the part of the Plaintiff/Applicant in bringing the application and holds the view that the same is without merit, since the Plaintiffs assertion that the suit property has risen in value, to the tune of Kshs 135 Million, is made in the absence of any evidential support and is merely speculative.

The power to grant or not to grant leave to amend pleadings is discretionary and will ordinarily be exercised freely by the court, whenever the court is satisfied that no injustice will ensue to the opposite

party, by virtue of the amendments if allowed. In addition to the general power to amend pleadings under Section 100 of the Civil Procedure Act, this court is empowered to allow amendments generally under **Order V1A Rule 5(1)** which reads as follows:-

**“5(1) For the purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may, either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just”.**

In the case of **MWAKIO –VS- KENYA COMMERCIAL BANK LTD [1987] KLR 513** cited in support of the application, the Court of Appeal held, *inter alia*, that;

**“1. Leave to amend should not be normally declined unless it would occasion injustice to the other side.**

**2. Leave to amend should always be granted unless the court is convinced that the party applying is acting mala fides or that it will cause an injury to the opponent which could not be compensated in damages”.**

I have perused the proposed pleadings and have noted that the agreement forming the basis of the contract from which the suit arises, being the agreement of 12<sup>th</sup> July, 2007, is not disputed. Under the said agreement the Defendant/Respondent, in exercise of its statutory power of sale over L.R No. 11531/5, agreed to sell the said property to the applicant for a sum of Kshs 22,000,000/=. Save for paragraph 3 of the amended Plaintiff which is not underlined as necessary (perhaps due to an oversight which resulted in the underlining the previous paragraph 3 which in the proposed amended Plaintiff becomes paragraph 4), the amendments sought under prayers 10, 11, 12, 13, 14, 15, 16, 17 and 20 all arise from paragraphs 8 and 9 of the original Plaintiff to which the Defendant has replied under paragraphs 8, 9, 10, 11, and 12 of its defence. The said defence appears to have been reproduced to in the Replying Affidavit where it is deponed in paragraphs 9 and 10 as follows:-

**“9.THAT the Defendant cannot be accused of non-disclosure of material facts since in transactions of this nature, the purchaser and/or its advocate have a duty to cross-check what has been disclosed to them regarding the property by taking the initiative of conducting the requisite searches both at the Lands Office and the Court with a view to ascertaining whether the property in question is encumbered or not.**

**10.THAT by completing the transaction giving rise to the instant suit, the Plaintiff and/or its advocate is deemed to have been satisfied with the status of the property and is thus estopped from claiming that the same was sold fraudulently”.**

I am not persuaded that the above depositions and the Respondents submissions as a whole, provide sufficient grounds for me to disallow the application. Unless there be a decree, caution, caveat, restriction or prohibition registered against a title, in the encumbrances section of the register, court processes will not ordinarily become evident upon a formal search being conducted at the lands registry. Similarly, unless a party be served with summons or other notice as regards a suit filed in a court of law, notice thereof cannot be presumed.

The existence of pending suits filed against the Defendant in respect of the subject property have not been denied and I doubt if the applicant would have had any way of knowing about the same when entering into the sale agreement. I do not consider that to amend a Plaintiff to include an enhancement of the sum claimed amounts to an introduction of a new cause of action. Neither does it, in my view, substantially alter the pleadings.

The claim for lost income is one which the Defendant can properly challenge in an amended defence and no evidence thereof needed to be furnished at this stage of the proceedings. The same is subject to formal proof at the main hearing.

For the above reasons I allow the application and direct that the amended Plaintiff be served upon the Defendants within 7 days. The Defendants can then file and serve their amended Defence within 14 days of service. For reasons hereinabove stated, the Plaintiff as filed cannot be deemed as duly filed.

In view of the circumstances, costs shall be in the cause.

**DATE, SIGNED and DELIVERED at NAIROBI this day of 2<sup>ND</sup> December, 2010**

**M. G. MUGO**

**JUDGE**

In the presence of:

Mr. Mulei For the Applicant

Ms Mingi For the Respondent