



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**OF KISII**

**Civil Case 296 of 2002**

**1. CHRISANTUS OMARIBA**

**2. ALFAKISAD OMURWA**

**3. BABURI NYANGOYA**

**4. PAUL OMWENGA**

**5. DAVID OKIOMA T/A MOCHENWA TRADING COMPANY ..**

**PLAINTIFFS**

**VERSUS**

**TINGA TRADING COMPANY COMPANY LTD .....**

**DEFENDANT**

**RULING**

The plaintiffs stated in their plaint that they were the registered proprietors of a parcel of land known as **KISII TOWN/BLOCK III/266B** and the Defendant was the registered proprietor of **KISII TOWN/BLOCK III/266A**. In or around 1981, the plaintiffs and the defendant entered into a contract wherein the defendant was to construct a storey building on behalf of the plaintiff at the plaintiff's parcel of land. The defendant was also building on its own parcel of land aforesaid. The Plaintiffs averred that as per a joint meeting held on 23<sup>rd</sup> May, 1982 between the two parties, it was agreed that the total construction cost of the building on the two plots was Kshs.6, 497,054/= and the same was to be shared equally in the sum of Kshs.3, 248,527/=.

It was a further term of the agreement that the plaintiffs were to repay the defendant the aforesaid debt

over a period of twenty years at the rate of Kshs.15, 430.50 per month. But owing to some difficulties in effecting the repayments as above, on 19<sup>th</sup> June, 1983, it was agreed that the defendant takes over the management of the entire building until they recovered their money in full. The plaintiffs stated that the debt had now been cleared and prayed that accounts be taken and if there was any credit balance, the same be paid to the plaintiff **“and the defendants be ordered to vacate KISII TOWN/III/226(A)”**.

The defendant filed a statement of defence and denied the plaintiffs’ claim. In paragraph 4 of the defence it was pleaded as follows:

**“4. The Defendant shall aver at hearing that that the Plaintiffs’ claim is bad in law and does not disclose any reasonable cause of action”.**

The plaintiffs’ case was heard and finalized on 4<sup>th</sup> October 2006. Before commencement of the defence case on 7<sup>th</sup> April, 2008, Mr. Bosire, the defendant’s advocate, raised a preliminary objection in terms of paragraph 4 of the statement of defence. He argued that the plaintiffs’ case was bad in law and did not raise any cause of action. The court was urged to strike out the suit. Counsel advanced the following arguments:

**(i) The plaintiffs gave three different citations for**

**their parcel of land, KISII TOWN/BLOCK III/266(B), KISII TOWN BLOCK III/226(B) and KISII TOWN/BLOCK III/226(A). It was therefore not clear what the subject matter of the dispute was.**

**(ii) It was not stated that the plaintiffs had brought this suit in a representative capacity.**

**They had not stated whether they were partners or trustees of Mochewa Trading Company.**

**(iii) There was no verifying affidavit to the plaint in respect of the fourth plaintiff. The verifying affidavit in respect of the other plaintiffs do not comply with the provisions of sections 34 and 35 of the Advocates Act. It was not indicated who drew them. The heading of the verifying affidavits did not show the names of all the plaintiffs.**

**(iv) During the hearing of the plaintiffs’ suit, evidence was adduced to the effect that the third plaintiff had died at the time of filing the suit.**

Mr. Ondieki for the plaintiffs opposed the preliminary objection and submitted that the plaintiffs’ case disclosed what he termed **“a huge cause of action.”** He added that during the hearing, it was shown that the plaintiffs were the registered proprietors of that parcel of land known as KISII TOWN/BLOCK III/266 and the defendants were the proprietors of KISII TOWN/BLOCK III/265. Mr. Ondieki further stated that there was a typographical error in the plaint with regard to the parcel number. The said error could be cured by an amendment, he added.

Regarding the plaintiffs’ capacity, it was submitted that the plaintiff had not filed the case in a representative capacity or as Trustees but as proprietors of the land in dispute.

The plaintiffs merely traded as Mochewa Trading Company.

Counsel denied that the third plaintiff died before the suit was filed. He died on 15<sup>th</sup> July, 2007 whereas the cause of action arose in 1993. He urged the court to grant him an opportunity to amend plaint.

I have considered the rival arguments advanced by the advocates for the parties. It is not disputed that the plaintiffs referred to three different plot numbers in their plaint. That was readily conceded to by the plaintiffs’ advocate.

Regarding the capacity under which the plaintiffs filed the suit, they did not state that they are trustees

of Mochenwa Trading Company. It was merely stated that they are proprietors of Kisii Town/Block III/266(B). But according to the Certificate of lease that was produced by the plaintiffs during the hearing, the second and fourth plaintiffs among other persons who are not in the list of plaintiffs are the proprietors of KISII TOWN/BLOCK III/266 and are also trustees of Mochenwa Trading Company. The legal status of the said company was not disclosed. There is no indication whether it is a limited liability company, a society, a partnership, a firm or a trust. The listed proprietors all trade as Mochenwa Trading Company.

**Section 3(1) of The Trustees (Perpetual Succession) Act** Cap 164 provides that trustees who have been appointed by any body or association of persons established for any religious, educational, literary, scientific, social, athletic or charitable purpose or who have constituted themselves for any other purpose may apply to the minister for a certificate of incorporation of the trustees as a corporate body. Where that has been done, subsection (3) thereof provides that the trustees become a body corporate by the name described in the certificate and may sue or be sued in their corporate name.

In this matter, it appears that the plaintiffs did not apply for a certificate of incorporation. From the wording of Section 3(1) aforesaid, it does not seem to be mandatory for trustees to apply for a certificate of incorporation. The use of the words, “**may apply**” is instructive. Where the trustees of any association do not have such a certificate of incorporation, they may sue in their own names. In the circumstances, I cannot hold that the plaintiffs herein brought the suit wrongfully. What is however clear is that only the second and fourth plaintiffs are shown in the certificate of lease as trustees of Mochenwa Trading Company. It is not clear whether the other plaintiffs have any proprietary interest in the suit property.

As regards the verifying affidavits, the purpose of such an affidavit is to vouch for the correctness of the averments contained in the plaint. In my view, where there are several plaintiffs, it may not be necessary for each of them to swear a verifying affidavit. One of them may swear such an affidavit for and on behalf of the rest but the deponent must be duly authorized by the other plaintiffs to do so. The fourth plaintiff did not swear a verifying affidavit. The other plaintiffs swore such affidavits on their own behalf only. But this is not the only short coming as concerns the verifying affidavits on record. All of them do not comply with the provisions of **section 35(1) of the Advocates Act** which requires every affidavit to show the name and address of the person who drew it. Failure to do so renders the affidavit inadmissible and such an affidavit is for striking out; see **BARCLAYS BANK OF KENYA LTD VS DR. SOLOMON OTIENO ORERO**, Milimani HCCC No.1736 of 2001. I therefore strike out all the verifying affidavits to the plaint herein.

I now come to the final limb of the preliminary objection. I perused the proceedings and I did not see any evidence adduced to the effect that the third plaintiff had died even before the suit was filed. I therefore reject that ground.

Having upheld the first and the third limbs of the preliminary objection, what order should I make as regards the plaintiffs’ suit? Mr. Bosire urged the court to strike out the plaintiffs’ suit while Mr. Ondieki pleaded with the court to allow the plaintiffs to amend the plaint and file compliant verifying affidavits.

This is an old case, filed in 2002 but the cause of action arose in 1993 or thereabout. It is a claim involving a huge amount of money. The defendant stated in paragraph 6 of the statement of defence that the plaintiff owed the defendant over Kshs.50 million as at March, 1999. The plaintiffs have already closed their case. If the suit is struck out, the plaintiffs may not be in a position to file another suit as it will be time barred.

As was held by the Court of Appeal in **D. T. DOBIE & COMPANY (KENYA) LTD VS MUCHINA** [1982] KLR 1,

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought***

***not to act in darkness without the full facts of a case before it.”***

In the circumstances, the order that commends itself to me and which I hereby give is that the plaintiffs be and are hereby granted leave to file an amended plaint and proper verifying affidavit(s). That should be done within the next fifteen (15) days from the date hereof. The plaintiffs shall also bear the costs of the preliminary objection which I assess at

Kshs.5, 000/=. The said costs should be paid before the filing of the amended plaint.

**DATED, SIGNED and DELIVERED at KISII this 6<sup>th</sup> day of May, 2008.**

**D. MUSINGA**

**JUDGE.**

Delivered in the open court in the presence of:

Mr. Ondieki for the plaintiffs

Mr. Bosire for the defendant.

**D. MUSINGA**

**JUDGE.**