



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**CIVIL CASE 99 OF 2005**

**MARY MUTHONI MURIITHI .....1<sup>ST</sup> PLAINTIFF**

**WILLIAM GACHENGO NDUHIU .....2<sup>ND</sup> PLAINTIFFS**

**DUNCAN NDERITU NDEGWA**

**EDWIN ALFRED BRISTOW**

**(AS ADMINISTRATORS OF THE ESTATE OF THE ESTATE OF SAMSON MURIITHI  
NDUHIU )**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED .....1<sup>ST</sup> DEFENDANT**

**MUTUALITY INVESTMENT TRUST LIMITED .....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

By their Chamber Summons undated and filed on the 15/6/2005 the Applicant seek to amend their Plaint in the manner set out in the draft annexed to the Chamber summons.

The application is supported by the affidavit of James Gitau Singh the advocate for the Applicant.

It was his submission that the amendment were necessary to determine the real matters in controversy between the parties.

He relied on a number of authorities in which the principles on which a court will allow an amendment have been considered.

The general rule is that amendments will be allowed liberally to ensure that the matters in issue between the parties can be fairly determined at the hearing.

Amendments will not be allowed where (1) they introduce a new cause of action which is time barred and (2) The amendment will cause substantial prejudice to the other parties due to the amendments being sought so late that for example the other party has lost touch with witnesses who are no longer available

Mr. Oraro for the Respondent opposed the application on these grounds:-

1. That the affidavit in support of the application is defective and should have been sworn by the Applicant themselves and not the advocate.
2. The Plaintiff discloses no cause of action.
3. The amendments bring in a new cause of action which is time barred.

If the Applicant needs to rely on evidence then the supporting affidavit must be sworn by a litigant and not an advocate. In this case I take the view that what is being amended does not require evidence to support them.

The amendment to paragraph 7 and 8 are an amplification and clarification of what was already pleaded.

The amendment to paragraph 9 merely adds a further particular of the alleged fraud.

The amendment to paragraph 10 is again to clarify the position of the 1<sup>st</sup> Defendant as its nominees.

The new paragraph 11(a) alleges mistake and gives particulars of this allegation. It appears to me to be a matter of law as to whether or not mistake existed.

The proposed amendments to the prayers seek orders based on the amendments to the Plaintiff.

There is already an application pending to strike out the suit as disclosing no cause of action. This is the proper procedure to consider if there is a cause of action or not. The affidavit can not only relate to the Plaintiff as filed but also relate to it as amended. Indeed if the amendment to the Plaintiff were to give it a cause of action which was necessary this would be a good reason for allowing this amendment. On the other hand if the Plaintiff as amended still does not disclose a cause of action this can be the subject matter of the application to strike it out.

A number of submissions were made to me about the illegality or not of the transaction pleaded. In my view this is the subject matter of an application to strike out the Plaintiff and not whether or not the Plaintiff should be amended.

Lastly on the submission that the amendments are time barred pursuant to the provisions of the Limitation of Actions Act I do not think so. Even if the new allegation that the Agreement was entered into by mistake is in the alternative to this allegation of fraud and is an averment based on the facts already pleaded in the Plaintiff.

In the result I allow the amendments as prayed. The Applicant to file and serve the Amended Plaintiff within 14 days from today. The Defendant at liberty to file an amended Defence within a further 14 days. Costs in cause.

Dated and Delivered at Nairobi this 26<sup>th</sup> day of October, 2005.

**P. J. RANSLEY**

**JUDGE**