



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NUMBER 228 OF 2014

MASOLE ENTERPRISES LIMITED.....1ST PLAINTIFF/APPLICANT

BALA ENTERPRISES LIMITED.....2ND PLAINTIFF/APPLICANT

GILERA LIMITED.....3RD PLAINTIFF/APPLICANT

KOIT DEVELOPERS LIMITED.....4TH PLAINTIFF/APPLICANT

SAMAN DEVELOPERS LIMITED.....TH PLAINTIFF/APPLICANT

KENETE ENTERPRISES LIMITED.....6TH PLAINTIFF/APPLICANT

MARIMO ENTERPRISES LIMITED.....7TH PLAINTIFF/APPLICANT

LINSALA ENTERPRISES LIMITED.....8TH PLAINTIFF/APPLICANT

VERSUS

SHAKHALAGHA KHWA JIRONGO.....1ST DEFENDANT/RESPONDENT

BETHLEHEM TRADING CO. LTD.....2ND DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion Application dated 13th March 2020 filed together with a supporting affidavit, pursuant **Order 8 Rule 3 & 5 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 100 of the Civil Procedure Act, Cap 21 Laws of Kenya** and all other enabling provisions of law. The Applicants sought orders;

- a) That this Court grants leave to the Plaintiffs to amend the Plaint dated 27th May 2014 and filed on 30th May 2014 and/or to file a supplementary Bundle of Documents.
- b) That the draft Amended plaint as filed herein be deemed as properly filed upon payment of the requisite court fees.
- c) That costs of this application be in the cause.

2. The Application was based on grounds;

- a) That the Plaintiffs have discovered and obtained new material evidence that goes to the root of the present suit which thus necessitates the amendment of the pleadings.
- b) That the statements of Defense filed by the 1st and 2nd Defendants raised issues that required the Plaintiffs to file appropriate documentary evidence for the court to be able to conclusively, fairly and justly determine this suit.
- c) That the issues that the Applicants intend to raise in the amended Plaint and new documentary evidence thereto are pertinent to the

fair determination of the suit between the parties and it is necessary that this Court has the benefit of considering them.

3. In the supporting Affidavit sworn by Sammy Biot Arap Kogo a director in all the Plaintiff Companies herein and acting on behalf of all the Plaintiffs.

He averred that after the Plaintiffs filed this suit vide the Complaint dated 27th May 2014, they discovered and acquired new material that goes to the core of this case and they pray that the same be considered by this Court. That at all material times relevant to this suit;

- a) The 1st Plaintiff was the registered proprietor and owner of title L.R. No. 20077 in Malindi containing by measurement 4.011 Ha.
- b) The 2nd Plaintiff was the registered proprietor and owner of Title L.R. No. 20078 in Malindi containing by measurement 4.011Ha.
- c) The 3rd Plaintiff was the registered proprietor and owner of Title L.R. No. 20088 in Malindi containing by measurement 8.024Ha.
- d) The 4th Plaintiff was the registered proprietor and owner of Title L.R. No. 20066 in Malindi containing by measurement 4.011 Ha
- e) The 5th Plaintiff was the registered proprietor and owner of Title L.R. No. 20076 in Malindi containing by measurement 4.011 Ha
- f) The 6th Plaintiff was the registered proprietor and owner of Title L.R. No. 20075 in Malindi containing by measurement 4.011 Ha
- g) The 7th Plaintiff was the registered proprietor and owner of Title L.R. No. 20082 in Malindi containing by measurement 5.015 Ha
- h) The 8th Plaintiff was the registered proprietor and owner of Title L.R. No. 20087 in Malindi containing by measurement 8.024 Ha.

Copies of the title documents are annexed at **pages 33-56** of the Plaintiff's Supplementary Bundle of Documents dated 20th November 2018.

4. The Applicants averred that as at 13th October 1994, the cumulative value of the above-mentioned properties was Ksh 205,000,000/-. **Pages 313-369** of the Plaintiff's supplementary bundle of documents dated 13th March 2020 are copies of the valuation reports.

5. The Applicants stated that sometimes in the year 1994, the 2nd Defendant through the 1st Defendant approached the Plaintiffs with a request that the Plaintiffs provide bank collaterals to facilitate the 2nd Defendant secure a letter of credit for purposes of importing sugar and thereafter parties entered into an irrevocable memorandum of agreements dated 3rd October 1994. A copy of the Memorandum of Agreement dated 3rd October 1994 is at **pages 23-24** of the Plaintiff's supplementary bundle of documents.

6. The Applicants stated that charges were created over the Plaintiffs properties and registered in favor of National Bank of Kenya as security to the credit facilities advanced to the 2nd Defendant. **Pages 64-266** of Plaintiffs supplementary bundle of documents are copies of the charge instruments and certificates of postal search conducted after registration of the charges respectively.

7. It was a term in the agreement that the 1st Defendant would return to the Plaintiffs the said collaterals intact and fully discharged upon the conclusion of the business transaction.

8. The Applicants stated that the 1st and 2nd Defendants defaulted on payment of the amounts advanced by the lender National Bank of Kenya.

9. The Defendants vide the Memorandum of Agreement dated 12th September 2013 fraudulently misrepresented to the Applicants that the properties the subject of the suit herein had been sold by National Bank of Kenya through a public auction on 22nd May 2009. **Page 1-9** of the Plaintiffs supplementary bundle of documents is the Memorandum of Agreement.

10. The Plaintiffs and 2nd Defendant through the 1st Defendant came to an agreement vide the Agreement dated 12th September 2013 wherein the 2nd Defendant through the 1st Defendant agreed to compensate the Plaintiffs on the loss of their properties at the then cumulative market rate of **Ksh 700,000,000/-**

11. The Applicant stated that they have recently discovered that in fact the properties were never sold as advised by the Defendants but the properties were still in the Plaintiffs' names albeit with encumbrances of the amounts advanced to the 1st and 2nd Defendants. At pages **289 - 293** of the Plaintiffs supplementary documents are copies of certificates of postal search.

12. The Plaintiffs have retrieved correspondences informing the Defendants of the Plaintiffs wish to withdraw their titles held as security for the reason that the 1st and 2nd Defendants had failed to perform their obligations. At pages **306 - 307** of the Plaintiffs' documents is a copy of the letter.

1ST DEFENDANT'S REPLYING AFFIDAVIT

13. The Application is opposed vide an affidavit dated 15th December 2020, sworn by Shakhalaga Khwa Jirongo the 1st Defendants herein.

He stated that whereas parties should ordinarily be allowed to amend their pleadings freely subject to costs, the amendments proposed by the Plaintiffs particularly paragraphs 13, 14, 23, 24 and 25 of the proposed amended should be dismissed with costs.

14. The 1st Defendants stated that the amendments proposed at the foregoing paragraphs the Plaintiffs now seek to shift the basis of their claim from the Agreement dated 12th September 2013 which was the sole document filed and relied on by the Plaintiffs at the inception of the suit to a purported Agreement or Agreements made sometime in 1994.

15. The 1st Defendant averred that the purported Agreement of 1994 had been the subject of previous court proceedings between the Plaintiffs and the Defendants herein being **HCCC482 of 2016 Sango Trading Company and all the Plaintiffs –vs – the Defendants herein and National Bank of Kenya Limited.** That suit stalled when the Plaintiffs failed to pay security for the costs of National Bank of Kenya Limited as ordered by the Court.

16. The 1st Defendant stated that it is an abuse of the court process for the Plaintiffs to relaunch that suit in a new guise and introduce it in this suit through the proposed amendments at paragraph 13 and 14 of the proposed amended Plaintiff. Marked as **SKJ 1 a) & b)** is the Plaintiff and 1st Defendant's defence in the said suit.

17. The 1st Defendant stated that the proposed claim at paragraph **23 to 25** of claim that 1st Defendant allegedly misrepresented to the Plaintiffs that their titles which are charged to National Bank of Kenya Limited and were sold through Public Auction on 22nd May 2009.

18. The 1st Defendant stated that the aforesaid averments by the Plaintiffs are mischievous, misleading and contrary to their own averments in the Plaintiff, witness statement and previous affidavit herein;

i) In the Plaintiffs witness statement of 27th May 2014, the Plaintiffs witness clearly asserts that the Plaintiffs' later learnt from the Bank that all the said properties were sold by National Bank of Kenya Limited through Public Auction on 22nd May 2009.

ii) At paragraph 15 of the original Plaintiff it is clearly stated that the Defendants defaulted and the Plaintiff have learnt from the Bank that all the said properties were sold by National Bank of Kenya through public Auction on 22nd May 2009.

iii) The said averment is also contained as recital D in the Agreement dated 12th September 2013.

19. The 1st Defendant stated that the Plaintiffs now seek to resile from their afore stated averments in a manner that is contrary to Equity and law. That the Plaintiffs cannot be allowed to approbate and reprobate as countenanced by the amendments they seek at paragraphs 23, 24 and 25 of the proposed amended Plaintiff.

20. The 1st Defendant averred that he is a stranger to the Agreement dated 12th September 2013 and his signature thereon is forgery. The Plaintiff got the senior partners to swear an oath that 1st Defendant executed the said Agreement in their presence at Rachier & Amollo Advocates offices.

21. The 1st Defendant further stated that the documents introduced through the supplementary bundle dated 13th March 2020 save for certificates of postal searches relate back to the period between 1994 to 1997 they cannot be termed as new evidence.

2ND DEFENDANT'S REPLYING AFFIDAVIT

22. The Application is further opposed vide an affidavit dated 15th December 2020, sworn by Haron Omeke Mokomba, director of 2nd Defendant herein. He stated that by an order pronounced on 29th November 2019, this Court directed the Plaintiffs' to provide security for costs for the 2nd Defendant by filing in court a bank guarantee for an amount of Ksh 5,000,000/- within 40 days of the said ruling.

23. The 2nd Defendant stated that the court reaffirmed its orders on 20th December 2019, when it dismissed the Plaintiffs' application to provide a third party title in substitution for the bank guarantee and granted the Plaintiffs 90 days to procure a bank guarantee.

24. The 2nd Defendant averred that Sammy Boit Kogo (Director of all Plaintiff Companies) procured a bank guarantee dated 21st February, 2020 from the Kenya Commercial Bank but the said Guarantee does not accord with the orders of the Court as;

a) It does not guarantee the costs payable by the Plaintiffs it guarantees the liability of Sammy Boit Arap Kogo who is not a party to this suit and cannot therefore be liable in costs in this suit.

b) The said guarantee is also limited in time as it expires on 21st February 2021, it is therefore not available to meet the 2nd Defendant's costs in this suit if any whenever those may arise as ordered by the court.

25. The 2nd Defendant stated that though the aforesaid shortcomings in the purported Bank guarantee were pointed out to the Plaintiffs' lawyer by the 2nd Defendant, lawyer by a letter dated 26th March 2020 the Plaintiffs have failed to provide a complaint bank guarantee. Marked **HMO 1 a & b** are copies of the purported Bank guarantee dated 21st February 2020 and the letter of objection dated 26th March 2020.

26. The court order of 29th November 2019 stayed this suit as against the 2nd Defendant unless an appropriate bank guarantee is provided. That the purported bank guarantee issued by Kenya Commercial bank to Sammy Boit Kogo on 21st February 2020 does not satisfy the terms of the order issued by this court on 29th November 2019 requiring the Plaintiffs to provide a bank guarantee for the 2nd Defendants costs if and whenever they may arise.

27. In any event the amendments sought to be introduced by the Plaintiffs are an abuse of the court and should be disallowed for reasons that;

a) Paragraphs 13 and 14 of the proposed amended Plaint seeks to plead Agreements purportedly entered into in 1994 between the Plaintiffs and the Defendant concerning a sugar importation joint venture Agreement. The said transaction has been the subject of a previous suit between the Plaintiffs and the Defendants HCCC No. 482 of 2006 which suit stalled after the Plaintiffs yet again failed to provide security for costs ordered by the court.

b) The claim on the Agreements dated 1994 sought to be introduced by the Plaintiffs is hopelessly statute barred by the **Limitation of Act, Cap 22 Laws of Kenya**.

PLAINTIFFS/APPLICANTS SUBMISSIONS

28. It was Applicants submissions that they had offered their properties as security for the loans advanced to the Respondents on the clear understanding that the Respondents would repay the loans and discharge the properties which they failed to. As a result, the parties herein entered into the Memorandum of Agreement dated 12th September 2013 (herein referred to as "the Agreement") to compensate the Applicants for the loss of their properties. The Applicants submit that this suit was and is still anchored by the Agreement.

29. On whether the Applicants should be granted leave to amend the Plaint dated 27th May 2014 and file additional documents, the Applicants have submitted that they have recently discovered that the properties were actually not sold by the National Bank of Kenya (NBK) as had earlier been represented to them but the same are still charged to the NBK together with some caveats by entities and individuals claiming purchaser's interest.

30. In light of this fact alone the Applicants submitted that it is only just and fair to present this material before this Court and plead to the same in the Plaint to enable this Court come to a fair, just and logical determination of this suit. These amendments will assist the court to determine the real question in controversy.

31. The Applicants submitted that their application for amendment was timeously made having learnt if the new evidence in January 2020, and which evidence goes to the root of this case to determine the real issue in controversy being the genesis of the Agreement and its breach thereof by the Respondents. Furthermore, these amendments morph into the suit and buttress, explain and give clarity to the agreement and as such do not change the Applicants' original cause of action that would be the subject of another suit.

32. The Applicants further submitted that it would be inaccurate to state as has been done by the Respondents that the Applicants have resiled from their averments and cause of action and abandoned the same but in fact, the intended amendments buttress the suit as filed and brings forth all relevant and necessary information for the justicious determination of this matter. The Respondents have not demonstrated the point of departure between the Applicants amendments and the original plaint to which the Applicants have consistently reiterated that this suit emanates from the Memorandum of Agreement dated 12th September 2013, which position was held by Hon. Lady Justice Olga Sewe in a previous application in this suit vide the Ruling delivered on 23rd October 2017, wherein she pronounced herself thus;

"...Secondly, it is evident from the Plaint herein that its subject matter is the Agreement dated 12th September 2013, which agreement was in respect of the sale of the charged properties, and which sale is said to have taken place by public auction on 22nd May 2009."

33. The Applicants also call to their aid **Sections 1A, 1B and 3A of the Civil Procedure Act and the Oxygen Principle of Overriding Objective** of this Court to do justice and determine this matter on its merits on the basis of all material that is available and can be produced to the Court.

34. On the issue of whether the Applicants proposed amendments amount to a new cause of action, the Applicants submitted that their original Plaint prayed for judgment against the Respondents for the sum of Ksh 700,000,000/- as was provided for in the agreements and the breach of the agreement thereof led to the filing of this suit. The recent discovery that actually the properties were not sold thus precipitated the filing of this application.

35. The Applicants submitted that the documents at pages 289 to 293 of the Plaintiffs' Supplementary Bundle of documents dated 13th March 2020 are not new material as has also been admitted by the Respondents. These documents form a crucial part of the case and with their discovery, the amendment of the Plaint was necessary to reflect this development for the court to make a wholesome determination on the same. The rest of the documents produced in the same bundle thus became extremely necessary in this suit in light of the new discovery to buttress the amended Plaint in relation to the Memorandum of Agreement dated 12th September 2013, the substratum of this case.

DEFENDANTS/RESPONDENTS JOINT SUBMISSIONS

36. The Respondents submitted that the Plaintiffs had litigated in bad faith in this suit and that should disentitle them to a favourable exercise of the courts discretion. The following facts illustrate this bad faith;

a) The Plaintiffs obtained judgment against the defendants for a whopping Ksh 700 million on the basis that 8 of their properties

L.R. Nos. 20077, 20078, 20088,20066, 20076, 20075, 20082 and 20087 totaling to the aforesaid sum in value had been sold by National Bank of Kenya Limited on 22nd May 2008 on account of the 2nd Defendants liability. They now disclose that 7 of these titles remain charged to National Bank suit and the Agreement they relied on dated 12th September 2013 is false.

b) On the basis of their false allegation aforesaid the Plaintiff's obtained a Decree and lodged bankruptcy proceedings against the 1st Defendant and obtained a bankruptcy order which was only stayed after vigorous litigation that involved a mini hearing with great expense to the 1st Defendant in costs in excess of Ksh 5,000,000. The Plaintiffs now acknowledge that the facts they put forward to obtain the interlocutory judgment and bankruptcy order were false. The 1st Plaintiff therefore prays that the court do order the Plaintiffs to pay the thrown away costs.

37. On the issue of the suit being stayed against 2nd Defendant, the 2nd Defendant submitted that by its order made on 29th November 2019. This Court directed the Plaintiffs to provide security for the costs of the 2nd Defendant in this suit by filing a Bank guarantee for the sum of Ksh 5,000,000 within 40 days of the said ruling date.

38. Further, that the Court reaffirmed its orders on 20th December 2019 when it dismissed the Plaintiffs application to provide a third party title in substitution of the Bank guarantee and granted the Plaintiffs 90 days to procure the Bank guarantee.

DETERMINATION

The issue for determination is whether the Plaintiffs /Applicants are granted leave to amend pleadings.

39. The matter herein relates to the Main Court file **HCCC 228 of 2014** which despite several requests to have it availed to this Court have been unsuccessful. The Court has been operating on skeleton files due to Corvid 19 pandemic health protocols that provide for virtual hearings and skeleton staff to accommodate social distancing requirement.

Secondly, there is also a related suit in Court file **HCCC482 of 2006** directly related to the present suit that ought to be retrieved during the mention and/or hearing of the suit.

40. The Plaintiff's application is that the amendment is sought by way of filing additional evidence that is pertinent to the fair and just determination of the suit and it does not seek to introduce new evidence.

This claim is based on the fact that the Plaintiffs realized that contrary to the position earlier taken, some suit properties were not sold by National Bank in 2009 as earlier alluded to.

41. Upon the Defendants filing Defenses pursuant to the Court order of LJ O. Sewe on 23rd October 2017 as per Court Ruling Annexed, new issues arose that necessitated amendment of Pleadings/Plaint to include pertinent evidence to the hearing of the matter.

42. The Defendants/respondents opposed the amendment of Plaint and alleged it is an application made in bad faith. Relying on the case of **Ochieng & Others vs First National Bank Chicago Appeal Number 147 of 1991** that set out principles that guide grant of leave to amend pleadings, which include;

- a) The Amendment must be applied for timeously
- b) When seeking an amendment, one ought to do it in good faith.

43. The Plaintiffs are acting in bad faith as shown as follows;

- a) The plaintiffs obtained- judgment against the Defendant for Ksh 700 million on the basis that their 8 properties were sold only to discover that 7 of the titles are intact and held by National Bank.
- b) The Plaintiffs obtained and a decree and lodged bankruptcy proceedings against the Defendants and it was found the facts relied on in the Bankruptcy and Interlocutory judgment that was set aside were false.
- c) The Court on 29th November 2019, the Court directed the Plaintiffs to provide security of Ksh 5m which todate they have not done/complied.

44. The Court has taken into account the parallel submissions with regard to amendment of pleadings. The Court is not in a position at this stage in the absence of the Court files to peruse the records and confirm the veracity of allegations by both parties.

45. So, this Court shall rely on the law on amendment of Pleadings as outlined in the case of **Court of Appeal 85 of 2017 Daniel Ouma Okuku vs Kenya Plantation & Agricultural Workers Union & 7 Others** held as follows;

“Order 8 CPR 2010 donates wide discretionary power to the Trial Court to allow amendment of pleadings for the purpose of determining the real questions in controversy between the parties or to correct any defect or error in the proceedings. The Court may do so either on its own motion or on application by a party..... Parties can amend their pleadings with leave of the Court at any time before judgment.....”

46. Therefore, generally parties are entitled to amend pleadings to include real issues for hearing and determination. Of course, there is a caveat, the amendment is not to introduce a new cause of action subject to Limitation of Actions Act or start a whole new suit from one filed.

DISPOSITION

47. The Plaintiffs may amend pleadings /Plaint and serve the Defendants within 14 days.

48. The Defendants have corresponding leave to amend their Defense(s) within 14 days after service of Amended Plaintiff.

49. The Plaintiff to pay costs to the Defendants.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH MAY 2021. (VIRTUAL HEARING)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MRS LIGUNYA FOR THE PLAINTIFF

WAGARA, KOYYOKO & CO. ADVOCATES FOR DEFENDANTS – N/A

COURT ASSISTANT: GRACE