



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 734 OF 2002**

**WAB HOTELS LTD (IN RECEIVERSHIP).....1<sup>ST</sup> PLAINTIFF**

**JOSEPH WAMBUA MULUSYA.....2<sup>ND</sup> PLAINTIFF**

**- VERSUS -**

**INDUSTRIAL DEVELOPMENT BANK LTD.....1<sup>ST</sup> DEFENDANT**

**LAWRENCE ODORI NABWANA.....2<sup>ND</sup> DEFENDANT**

**PONANGIPALLI VENKATA RAMANA REO.....3<sup>RD</sup> DEFENDANT**

**KOLLURI VENKATA SUBBARAYA KAMA SANT.....4<sup>TH</sup> DEFENDANT**

**RULING NO.2**

1. The application dated 28<sup>th</sup> March 2016 seeks leave of the Court to amend the plaint.
2. When canvassing the application, the 2<sup>nd</sup> plaintiff, **JOSEPH WAMBUA MULUSYA**, explained that the proposed amendments were intended to demonstrate that the only property which had been charged to the 1<sup>st</sup> defendant, **INDUSTRIAL DEVELOPMENT BANK LIMITED**, was **L.R. No. NAIROBI/BLOCK 75/1031**.
3. He added that the Debenture and the Loan Account touched on only that property.
4. However, when the bank exercised its statutory powers of sale, it is said to have sold the charged property together with another property.
5. Secondly, the plaintiff intends to demonstrate that the properties were sold without any valuation. As the business which was being operated in the buildings erected upon the charged property, was a going concern, the plaintiffs hope to demonstrate that the absence of a valuation prior to the sale, resulted in a sale at an under-value.
6. Thirdly, the applicants submitted that the suit property ought never to have been sold because, for a period of five (5) years preceding the sale, there had not been any audited accounts.
7. As far as the applicants were concerned, the Accounts which were lodged by the bank and the

receivers, were fraudulent.

**8.** At the time of hearing the application, the court was asked by the applicant, to disregard the Replying Affidavit which had been lodged late. By the applicants' calculations, the said affidavit was filed about 53 days late.

**9.** However, the defendants pointed out that although the replying affidavit had been filed late, that did not prejudice the plaintiffs, as the latter had already filed a further affidavit to respond to the replying affidavit.

**10.** In relation to the replying affidavit which was filed late, I hold the view that if the applicant was desirous of having it expunged from the court records, that request should have been made on its own.

**11.** The defendants would then have been accorded an opportunity to respond, and then the court would have made its determination before the substantive application was canvassed.

**12.** I so hold because it is important that by the time parties were canvassing an application, they and the court should already be clear about the documents which were to be taken into account.

**13.** It would be messy to proceed with the substantive application before the parties and the court were clear about the documents which could be considered.

**14.** As the court was not called upon to make a determination on the issue as to whether or not the replying affidavit would be expunged, before the application was canvassed, it follows that the said affidavit remained on record when the application was being argued.

**15.** It would therefore be too late to expunge the affidavit when the court was rendering its decision on the application.

**16.** Meanwhile, the applicants did file a further affidavit, to respond to the replying affidavit. In the circumstances, the applicants did not suffer any prejudice due to the late filing of the replying affidavit, as the applicants had the opportunity to respond to it, prior to the hearing of the substantive application.

**17.** In the circumstances, I decline to strike out or to expunge the replying affidavit from the record.

**18.** The second issue raised by the defendants is that the applicants had sought leave to amend the plaint when there was no suit in existence.

**19.** The suit had been dismissed for want of prosecution, on 16<sup>th</sup> June 2015.

**20.** Therefore, as at 28<sup>th</sup> March 2016, when the current application was filed, there was no suit in existence.

**21.** If the applicants had prosecuted their application at that stage, it would have been an exercise in futility.

**22.** However, the court records show that the applicants first sought the reinstatement of the suit, and on 7<sup>th</sup> September 2016, the court did reinstate the suit.

**23.** Accordingly, as at 13<sup>th</sup> March 2017 when the plaintiffs were canvassing the application for leave to amend the plaint, there was a suit in existence. The defendants submissions to the contrary, are without merit, in that respect.

**24.** As regards the merits of the application, I note that the suit was filed in the year 2002.

25. The complaint is dated 14<sup>th</sup> June 2002.
26. On 16<sup>th</sup> September 2005, the court granted leave to the plaintiffs to amend the complaint; and the Amended Complaint was filed on 20<sup>th</sup> September 2005.
27. In the proposed “*Amended Complaint*”, the plaintiffs state at paragraph 20 that the suit property was sold and transferred on 24<sup>th</sup> October 2008.
28. In effect, as at the time the complaint was filed, and when it was first amended, the suit property had not yet been sold. Therefore, the claims arising from the alleged wrongful acts which took place at the time when the suit property was sold, cannot have been made prior to 2008.
29. However, it is clear, from the proposed “*Amended Complaint*”, at paragraph 25, that the plaintiffs had sought the valuation of the suit property in the years 2004 and 2006.
30. Therefore, when the suit property was sold in 2008, the plaintiffs should have been in a position to ascertain whether or not it had been sold at an under-value. That should have been possible from either the Valuation Reports of 2004 and 2006, or from a new valuation in the year 2008.
31. The plaintiffs have not tendered any explanations for not having realized earlier, that the sale was allegedly at an under-value. The failure to provide such an explanation is significant because it constitutes a failure to explain the delay in bringing this application for leave to amend the complaint.
32. Secondly, the existence of the Leasehold Agreements dated 20<sup>th</sup> December 1999 and 21<sup>st</sup> August 2000, were matters which were always within the knowledge of the plaintiffs. They cannot therefore constitute the basis for seeking an amendment to the complaint in the year 2017.
33. Incidentally, those leases were said to have been in favour of **EAGLE SUPERMARKETS LIMITED** and **MULUSIAH LAND CONSULTANTS LIMITED**, and they related to the “*Beer Garden*”; Children Swings and Slides; and a **40 KVA F.G. Wilson** Generator.
34. The plaintiff’s complaint was that the defendants misled members of the public by incorporating into newspaper Advertisements, details of properties which were not a part of the charged property.
35. The said advertisements were in the newspapers on 12<sup>th</sup> August 2005 and 24<sup>th</sup> August 2006.
36. In the result, I find that from the dates when the advertisements appeared, the plaintiffs could have lodged appropriate claims against the defendants or any of them. There is no explanation why the plaintiffs should be allowed to raise those complaints more than 10 years later.
37. I also find that there had been nothing barring the plaintiffs from bringing a suit earlier, in relation to the alleged conflicting “*Loan Balances*” dated 17<sup>th</sup> April 2007 and 9<sup>th</sup> June 2007.
38. The appointment of **LAWRENCE ODORI NABWANA** as a Receiver Manager of **WAB HOTELS** has now been described by the plaintiffs as a situation which gave rise to a Great Conflict of Interest. That appointment was made on 5<sup>th</sup> June 2002, whilst Nabwana was an employee of **IDB** Bank.
39. Once again, I find no explanation from the plaintiffs, as to why they could not have raised those claims earlier.
40. The plaintiffs propose to demonstrate that the Consent Order recorded on 30<sup>th</sup> May 2008 was flawed, as it was based on accounts which had not been audited, but which the bank had misled the plaintiffs and the court to believe, to have been audited.

41. In my considered view, a party ought not to be permitted to amend a plaint with a view to attacking an order which the court had made. The law provides ways and means of challenging orders, whether such orders were or were not recorded by the consent of the parties.

42. There is a large part of the proposed “*Amended Plaint*”, which is basically in the nature of evidence. If I were to allow them, it would violate the express rules governing pleadings.

43. The court also finds that it would be wrong to allow amendments which would result in the possibility of;

**a) Finding the defendants liable to third parties such as the Kenya Revenue Authority; Mulusiah Land Consultants Limited and the 2 Directors of Wab Hotels Limited. If any such third parties have claims against the defendants, they ought to institute proceedings to advance the said claims;**

**b) Allowing the plaintiffs to lodge claims which were already time-barred by dint of the provisions of the Limitation of Actions Act;**

**c) Making findings of impropriety against persons who were not parties to the suit, such as Adera & Co. Advocates; Kinyua Koech Limited and Lloyd Masika Limited;**

**d) Making findings in respect to matters which were pending before the Employment and Labour Relations Court;**

**e) Making findings on claims of a criminal nature, whereas this court was not handling any criminal case against any particular person who may have been charged with any criminal offence.**

44. In the result, I find that the grant of leave to further amend the plaint would result in serious prejudice to the defendants; and a probable massive delay in the prosecution of the suit. In other words, the proposed amendments would not enhance the administration of justice; but would hamper the same.

45. Accordingly, the application dated 28<sup>th</sup> March 2016 is dismissed, with costs to the defendants.

**DATED, SIGNED and DELIVERED at NAIROBI this 15<sup>th</sup> day of May 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

*No appearance for the 1<sup>st</sup> Plaintiff*

*2<sup>nd</sup> Plaintiff in person for the 2<sup>nd</sup> Plaintiff*

*K’Opere for Maweu for the 1<sup>st</sup> Defendant*

*K’Opere for Maweu for the 2<sup>nd</sup> Defendant*

*K’Opere for Maweu for the 3<sup>rd</sup> Defendant*

*K’Opere for Maweu for the 4<sup>th</sup> Defendant*

*Collins Odhiambo – Court clerk.*