



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**CORAM: GITHINJI, MARAGA & MURGOR, J.J.A**  
**CIVIL APPEAL NO. 137 OF 2004**

**BETWEEN**

**MAE PROPERTIES LIMITED.....APPELLANT**

**AND**

**WILLIAM OLOTCH.....RESPONDENT**

**(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Njagi, J) dated  
14<sup>th</sup> November, 2003**

**in**

**H.C.C.C. NO. 331 OF 2003)**

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**JUDGMENT OF THE COURT**

1. This is an appeal from the ruling of Njagi, J delivered on 14<sup>th</sup> November, 2003 in Nairobi HCCC No.331 of 2003 in which the learned Judge dismissed the appellant's application for an order for a request for further and better particulars holding that the application was a fishing expedition for evidence in the guise of further and better particulars. The issues for our determination in the appeal therefore are the distinction between evidence on the one hand and further and better particulars on the other, and when an order for further and better particulars is merited.

2. The object of a civil litigation is to reach a fair and just resolution of a dispute between parties. For a court to reach a fair and proper determination of the case before it, it should apply the law to the correct facts of the case. Before the court thinks of the law applicable, it has to have the facts of the case. Facts of the cases are stated in the parties' pleadings.

3. The object of pleadings is to give fair and proper notice to the opponent of the case he has to meet to enable him to prepare his case for trial. The major function of the pleadings therefore is to state with sufficient clarity the case that has to be met. In this regard, **Order 2 Rule 3** of the **Civil Procedure Rules** requires pleadings to be concise and succinct statements the

material facts, and not evidence, on which the party pleading relies for his claim or defence.

4. The other function of pleadings is to crystallize and define the issues for determination and thereby enable the relevance and admissibility of evidence to be determined at the trial. This is the reason why amendments to pleadings are freely granted.

5. Not all facts, however, are direct facts. At times facts are conclusions or inferences drawn from other facts which are not clearly understood thus obviating the need for further and better particulars of the plaint or defence to be furnished. The court in **Bailey v. Federal Commissioner of Taxation [1977] 136 clr 214 at 219** succinctly stated the importance of particulars of pleadings:-

**“Particulars fulfill an important function in the conduct of litigation. They define the issues to be tried and enable the parties to know what evidence it will be necessary to have available and to avoid taking up time with questions that are not in dispute. On the one hand they prevent the injustice that may occur when a party is taken by surprise; on the other they save expense by keeping the conduct of the case within due bounds.”**

6. Parties should not be allowed to fish for evidence in the guise for further and better particulars. This calls for a clear distinction between evidence, which should not be pleaded, and the primary facts, which should be pleaded. As was stated by the Malaysian Court of Appeal in the case of **LembaPelabuhan Kelang v. Mega – Wan Corporate Services SDN BHD, Civil Appeal No. W-01(IM) – 446-2010:-**

**“Evidence is what proves a fact, and the particulars of facts are the primary facts that are relied upon to prove, by inference or conclusion, a disputed fact.”**

7. Having set out the law applicable to pleadings and in particular to the application for further and better particulars, we now wish to revert to the facts of this case to which it should be applied.

8. At all material times, the plaintiff company was a wholly-owned subsidiary of Pan African Insurance Company Ltd., (Pan Africa). Besides being a director of both companies, the respondent was also the Managing Director of Pan Africa. At all material times, the appellant was engaged *inter alia* in purchasing, developing and selling immovable properties and in particular it was engaged in selling to third parties immovable properties in Runda Estate in Nairobi. The appellant alleged in its plaint filed in Nairobi HCCC No. 331 of 2003 that as its director, the respondent was a trustee and/or owed the obligations of a trustee in respect of the appellant's assets. In breach of that duty, and without declaring to other directors of the appellant, the respondent purchased from the appellant pieces of land in Runda Estate at prices markedly below the market value and subsequently sold them to third parties at much higher prices thereby making huge profits.

9. In paragraphs 8 and 9 of its plaint, the appellant pleaded the market values of the pieces the properties the respondent bought from it, the prices he bought them at and the prices at which he sold some of them to third parties. The appellant therefore claimed from the respondent the difference between the market prices and those the respondent paid for the properties together with interest thereon.

10. In his defence, the respondent admitted purchasing and subsequently selling the properties enumerated in paragraph 8 of the plaint but denied that he bought them at prices below their respective market prices asserting that he bought the properties at the prices set by the Board of Directors of the appellant over whom he had no influence. He failed to plead the prices at which he subsequently sold them at. Upon spurning the appellant's request for particulars of those prices, the appellant applied for an order to compel the respondent to furnish those particulars. As stated

Njagi, J dismissed that the application terming it an evidence fishing expedition. Aggrieved by that decision, the appellant filed this appeal.

11. We have considered the matter. The respondent admitted in paragraph 5 of his defence that by virtue of being director of the appellant he owed to the appellant what he termed as “certain duties analogous to those of trustees.” He also admitted purchasing from the appellant and selling to third parties the properties enumerated in paragraph 8 of the plaint. He claimed that having bought and being the proprietor of those pieces of land, he was legally entitled to do whatever he liked with them, including selling them, as he did, to third parties.

12. In effect, the appellant’s claim in the suit is that the respondent duped the appellant’s Board of Directors to sell the suit pieces of land to him at undervalues and he later sold them at a profit to third parties. It is trite law that a party does not need to adduce evidence to prove an admitted fact.

13. The appellant pleaded particulars of the market values of the suit properties and the prices at which the respondent bought them. As stated the appellant also pleaded the prices the respondent received for some of those properties which are around the alleged market prices but way above what the respondent bought them for. Subject to proof, that *prima facie*, gives credence to the appellant’s claim of mala fides against the respondent.

14. Having admitted selling the properties to third parties, the particulars of the people he sold those properties to and the prices he fetched for them are facts the respondent should have pleaded to demonstrate his claim of *bona fides* in the whole affair. Furnishing particulars of those facts will not only enable the parties and the court to frame the issues for determination but will also shorten the hearing thus saving judicial time. As the respondent failed to plead the particulars of the people he sold the suit pieces of land to and the prices he got for them, the appellant was within its right to demand those particulars. Those are facts that required to be pleaded and not evidence.

15. For these reasons we find that the learned Judge erred in dismissing the appellant’s application. We therefore allow this appeal, set aside the learned Judge’s order of 14<sup>th</sup> November, 2003 and substitute it with one allowing the application with costs. The appellant shall have the costs of this appeal.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of February, 2014.**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**