



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 142 of 2012**

**ANN NJOKI MURANI ..... PLAINTIFF**

**- VERSUS -**

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

**SAVINGS AND LOAN KENYA (S & L) LIMITED .....2<sup>ND</sup> DEFENDANT**

**MUSA NYAKWAYE .....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Notice of Motion dated **12<sup>th</sup> February 2013** seeks as substantive prayers order that the 1<sup>st</sup> Defendant be granted leave to amend its defence in terms of the annexed draft amended defence and counter-claim and that the said annexure be deemed as duly filed and served upon payment of the requisite fees.
2. The application is based on several grounds set out therein and is supported by affidavit of **ISAAC K. NJOROGE** dated **12<sup>th</sup> February 2013** with its annexures.
3. The application is opposed via a Replying Affidavit by **NAOMI KATHURE GITHAKA** dated **20<sup>th</sup> February 2013**.
4. It was submitted for the Applicant that the suit property had been charged to the Defendant by the Plaintiff who provided security being Title No. Ngong/Ngong/20254. Upon default in repayment of the loan the 1<sup>st</sup> Defendant sold the suit property on a date which is not disclosed by the Applicant. However, the said sale realized an amount which was not enough to clear the Plaintiff's outstanding debts in the loan account. It was submitted that there remained an outstanding balance on the Plaintiff's account of **Kshs.1,282,119.15** as at 31/10/2012 which continues to accrue interest. The proposed amendment to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's defence is intended to set up a counter-claim on behalf of the 1<sup>st</sup> Defendant for the payment of the said outstanding balance.

5. The Plaintiff/Respondent has opposed the application submitting that the application is an afterthought, is brought after inordinate delay and is meant to embarrass the Plaintiff and to delay the hearing of the main suit.

6. I have carefully considered the application. The general rule under Order 8 is that the court has the discretion to allow amendments of pleadings. In the case of **KASSAM – VS – BANK Of BARODA (KENYA) LIMITED**, the court held *inter-a-alia* that :-

**“The general rule is that amendments should be allowed if the court is satisfied that:-**

**§ *the party applying is not acting mala fide.***

**§ *the amendment will not cause injury to the other side which cannot be compensated by costs.***

**§ *the amendment is not a device to abuse the court process.***

**§ *amendments must not be unduly delayed.***

**§ *the reasons why the subject matter of amendment was not included in the original pleading or offered sooner.”***

7. The court has a wide discretion in deciding whether or not to allow an amendment. In the matter before the court, the Applicant submits that the reasons as to why they intend to amend their defence is to include a counter-claim. This counter-claim arises from a realization that the sale of the suit property did not realize enough money to liquidate the Plaintiff’s debt. In other words, the 1<sup>st</sup> Defendant bank has already realized its security and now wants to introduce a counter-claim to reclaim the balance. The Respondent submits that this should not be allowed since the chargee’s equity of redemption was extinguished together with any liability arising therefrom at the fall of the hammer. The Respondent’s submission could be valid but it is not enough to stop this court from allowing the application for amendment. After the amendment the Respondent can still during the hearing advance that submission.

8. However, in my view this application has not been brought timeously and no reasons whatsoever have been advanced by the Applicant to explain the delay. The Applicant has not stated when the suit property was sold so that this court can determine the time from the date of sale and the date of filing of this application. The Applicant states that it is after failing to get good returns from the sale of security that they realized the need to amend defence and counter claim to claim the balance. I am only able to get the date of sale from the Plaintiff’s Amended Plaintiff. In the Amended Plaintiff, that date is stated to be 31<sup>st</sup> January 2012. The Applicant has not disclosed the date of sale, and so I will go with that stated in the Plaintiff. If it is correct that the date of sale was 31<sup>st</sup> January 2012, then the Applicant has always had the information and this ought to have been included in their defence which was filed in court on 2<sup>nd</sup> November 2012. The current application is dated 12<sup>th</sup> February 2013, more than one year after the suit property was sold in an auction. The Applicant has failed, either in supporting affidavit or in its submission to even give a feable explanation for this delay. No reasons are given whatsoever. Under the circumstances, I am prepared to hold, which I hereby do, that this application is an afterthought and has under the circumstances being brought after undue delay, more than one year after the relevant facts came to the knowledge of the Applicant.

9. The application does not deserve the discretion of this court and is dismissed with costs.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 19<sup>TH</sup> DAY OF APRIL 2013**

**E. K. O. OGOLA**  
**JUDGE**

**PRESENT:**

*Masaviro for the Plaintiff*  
*Njoroge for the Defendants*  
*Teresia – Court Clerk*