

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 55 of 2001

KENYA COMMERCIAL BANK LTD APPLICANT

VERSUS

JOHN GATU RESPONDENT

RULING

The subject matter of this ruling is the summons dated 29th April 2010 in which **Kenya Commercial Bank Ltd**, the Defendant/Applicant herein, seeks for leave to amend its defence. The summons is supported by the affidavit of **N’Cruba Ojiambo** sworn on the 29th day of April 2010. **John Gatu Nderitu**, the plaintiff herein, filed the replying affidavit he swore on 5th May 2010 to oppose the summons.

I have considered the grounds set out on the face of the summons and the facts deponed in the affidavits filed for and against the application. I have also taken into account the oral submissions made by learned counsels from both sides plus the authorities relied upon. Basically the defendant intends to amend its defence to enable it introduce a counterclaim in which it would pray for judgment in the sum of Kshs.18,615,167/85 against the Plaintiff. The defendant also intends to seek in the counter-claim for an order authorizing it to sale the plaintiff’s parcel of land known as L.R. **Nyeri Municipality Block 1/639** to recover the aforesaid sum. It is stated by the defendant that its legal advisers inadvertently forgot to insert the word ‘counter-claim’ in its defence. It is said that if the amendment is allowed this court will have a chance to conclusively determine the real issues in contrary. It is also argued that the intended amendment will not prejudice the plaintiff in any way.

The plaintiff on his part vehemently opposed the application for amendment on the ground that it would allow the defendant as a chargee to sue for money through the counter-claim while at the same time insisting through the defence on its right to exercise its statutory power of sale. It is argued that the defendant cannot pursue its claim under the charge

and at the same time sue under Section 74 of the Registered Land Act. It is trite law that a counter-claim is a separate and distinct suit within an action by a defendant. Courts have a wide unfettered discretion to freely allow amendments of pleadings at any stage before judgment. Perhaps the only restriction to the court's discretion is that the court is duty bound not to allow amendments which would prejudice the opposite party. The defendant in its proposed counter-claim, intends to sue the plaintiff to recover a sum of Kshs.18,615,176/85. The aforesaid sum is said to be the principal and the accrued interest advanced to the plaintiff by defendant who in turn pledged L.R. No. **Nyeri/Municipality/ Blcok1/639** as security. The plaintiff herein was prompted to file this suit against the defendant when the defendant purported to sale by public auction the aforesaid collateral in exercise of its statutory power of sale under Section 74(1) of the Registered Land Act. A careful interpretation of the provisions of Section 74(3) of the Registered Land Act will reveal that the defendant is barred from filing an action to recover the secured sum when it has opted to exercise its statutory power of sale. The two rights cannot be exercised contemporaneously. If the amendment is allowed then the plaintiff will be prejudiced and in any case the court will have aided a party to breach the express provisions of the law.

In the final analysis, I am convinced the application is for dismissal. The same is hereby dismissed with costs to the plaintiff.

Dated and delivered this 9th day of July, 2010

J. K. SERGON

JUDGE