



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 4140 of 1990**

**HOUSING FINANCE CO. OF KENYA LTD .....PLAINTIFF**

**VERSUS**

**GEORGE GIKUBU MBUTHIA ..... DEFENDANT**

**RULING**

The application which was coming up for hearing was one by notice of motion dated 14<sup>th</sup> March, 2003, and brought under sections 63(e), 3 and 3A of the Civil Procedure Act, and Orders XVI rule 5, XXIV, XXV, and L rules 1 and 15 of the Civil Procedure Rules. The application sought the following orders from the court-

- 1. THAT the defendant's counterclaim be dismissed for want of prosecution.**
- 1A THAT the defendant's amended defence and counterclaim dated 28<sup>th</sup> January, 2004 are an abuse of the process of this court.**
- 2. THAT in the event that the Honourable Court is not inclined to grant prayer 1 above, then it be pleased to order that the defendant do supply security for costs to the plaintiff**
- 3. THAT this court do take judicial notice of the fact that the defendant is a vexatious litigant.**
- 4. THAT should this court not be inclined to dismiss the defendant's counterclaim, then it be pleased to order that the case file be transferred to the High Court of Kenya at the Milimani Commercial Courts for it's hearing and determination.**
- 5. THAT the defendant be condemned to meet the costs of this application in any event.**
- 6. THAT the defendant be condemned to meet the costs of this suit.**

At the hearing of the application, Mr. Muriithi appeared for the plaintiff/applicant while Mr. Mbuthia, the defendant, appeared in person. At the commencement of the hearing Mr. Muriithi wasted no time to tell the court that he wished to abandon prayers 1, 1A, 2, 3,5 and 6 of the application, and to amend prayer 4 to read-

*“THAT the case file be transferred to the High Court of Kenya at the Milimani Commercial Courts for its hearing and determination.”*

Mr. Mbutia opposed the application, arguing that these were substantial amendments, which should come under O. VIA rule 1(1). He then added that there was nothing to amend as the plaintiff was non-suited way back in 1991. He also contended that the application was filed almost three years ago and the purpose of filing it was to buy time so that the plaintiff might be able to give notice under section 69 of the Transfer of Property Act with a view to selling the property. He finally submitted that the application was incompetent as it was supported by an affidavit which contravened the provisions of sections 34 and 35 of the Advocates Act. Therefore, there was nothing to transfer to Milimani and the applicant should withdraw the whole application.

In reply, Mr. Muriithi said that he was withdrawing the whole application save for prayer 4.

I have considered the arguments of both sides. While I find Mr. Mbutia’s arguments very interesting, I also think that he also contradicted himself. He started by saying that Mr. Muriithi’s application involved substantive amendments which ought to be brought under O.VIA rule 1(1). In the next breath, he said that there was nothing to amend as the plaintiff had been non-suited, and that there was nothing to transfer to Milimani as the notice of motion was incompetent. By contending that the amendments should have been sought under O.VIA rule (1), Mr. Mbutia impliedly admitted that there was an application which could be amended. Whether it could be transferred to Milimani would be an issue to be argued next if the amendment sought was granted.

I see no judicious reason why the applicant should not be allowed to abandon prayers 1, 1A, 2, 3, 5, and 6 as sought, and also why it should not be allowed to amend prayer 4 as applied for. I accordingly allow the applicant leave to abandon prayers 1, 1A, 2, 3, 5 and 6, and to amend prayer 4 as proposed.

The applicant may now proceed to take a date for the hearing of prayer 4 as amended. Costs will be in the cause.

Dated and delivered at Nairobi this 22<sup>nd</sup> day of February, 2006

**L. NJAGI**

**JUDGE**