



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 66 of 2005

ELEGANT FREIGHTERS.....
.....PLAINTIFF

VERSUS

ORIENTAL COMMERCIAL BANK (FORMERLY DELPHIS BANK LTD)
.....DEFENDANT

R U L I N G

This is an application by the Plaintiff, who seeks leave to amend the Complaint, as well as leave to enjoin two new parties as defendants to the suit.

It is the plaintiff's case that the proposed amendments would bring before the court all the issues in controversy between the parties. By so doing, the plaintiff says that the court would then resolve all the issues which would have been placed before it, through the pleadings, as amended. The only way that the plaintiff is aware of, that would enable it to bring out the issues, is through amendment, as it is said that the rules of pleading require that the issues which the plaintiff seeks to raise, be specifically pleaded.

Secondly, the plaintiff seeks to enjoin two new parties to the suit. The said two new proposed parties are National Industrial Credit Bank Limited and Instore Promotions East Africa Limited. It is the plaintiff's contention that the two are necessary parties as there are allegations made against them. Therefore, as it would be wrong of the plaintiff to make allegations against people who were not parties to the suit, the plaintiff believes that the only recourse available to it, is to enjoin the two people as defendants to this suit.

In response to the application, the defendant put up a spirited opposition. Principally, the defendant deems the proposed amendments to be wholly unnecessary as they would hit a dead end. In effect, the defendant feels that if the amendments were allowed, that would only increase the costs of litigation and take up judicial time, unnecessarily. Therefore, the defendant submitted that justice demands the dismissal of the application.

Why would the proposed amendment be considered unnecessary?

As far as the defendant was concerned, the answer lies in the provisions of Section 69B (1) and (2) of the Indian Transfer of Property Act. That Section provides that once a statutory power of sale had been exercised, and the property transferred to the purchaser, the title was unimpeachable. At that stage, when any person felt aggrieved by the said exercise of the statutory power of sale, the statute stipulates that he could only have a claim in damages, as against the person who exercised the said power.

In this case, the plaintiff is saying that National Industrial Credit Bank Limited was paid in full.

Therefore, as the said bank was the original chargee, upon receipt of payment, it ceased to have any legal authority to transfer the legal charge to the defendant herein. In those circumstances, the plaintiff believes that the defendant did not acquire a valid charge, pursuant to which they could thereafter seek to exercise a statutory power of sale. It is therefore submitted, by the plaintiff, that the case goes to the validity of the security documents.

On the other hand, the defendant states that even if the transfer or assignment of the charge instrument was not valid, the defendant had already exercised the statutory power of sale, and the purchaser had transferred the suit property to himself. In those circumstances, the defendant was said to fall within the category of persons envisaged by Section 69B (1) of the Transfer of Property Act as **“the person exercising the power.”** It is therefore said that even as against it, the plaintiff can only seek damages. Furthermore, as the defendant was the person who exercised the statutory power of sale, it is only as against him that the plaintiff has a claim, if any. Therefore, the defendant feels that there was no need to allow either the proposed amendment or the opportunity to enjoin more persons to the suit.

By virtue of the provisions of Order 6A rule 3(1) of the Civil Procedure Rules, the court is empowered to allow any party to amend his pleadings at any stage of the proceedings.

In **CENTRAL KENYA LTD V TRUST BANK LTD [2000] 2 E.A. 365 at 368**, the Court of Appeal held as follows:

“It is also trite law that as far as possible a litigant should plead the whole of his claim which he is entitled to make in respect to his cause of action. Otherwise, the court will not later permit him to re-open the same subject of litigation. (see Order II, Rule 1 of the Civil Procedure Rules), only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend, that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendments or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

Appreciating the fact that amendments ought to be freely allowed, at any stage of the proceedings unless they were prejudicial to the other party, I asked myself how the defendant herein would be prejudiced, if I were to allow the proposed amendments herein.

The defendant cited the case of **GEORGE GIKUBU MBUTHIA V. JIMBA CREDIT CORPORATION LTD & ANOTEHR (MILIMANI) HCCC NO. 937 OF 1986**, as authority for the proposition that once the property in issue had been transferred, it was unnecessary to enjoin the transferor.

In that case, P.J.S. HEWETT, Commissioner of Assize, (as he then was) dismissed an application by the plaintiff for leave to amend the plaint and also for leave to enjoin other parties to the suit. In his considered opinion:

“Whether the transfer was right or wrong, the issue is closed as to land. What was open and still is, is the question of damages against Jimba for wrongful exercise of the power of sale. The sooner the plaintiff understands and accepts that that is the law, the better.”

For those reasons, the learned commission of assize declined leave to amend, as the amendments, **“if submitted to trial, would end in a statutory dead-end.”**

Another authority cited by the defendant was that of **NANCY KAHOYA AMADWA V EXPERT**

CREDIT LTD & ANOTHER, (MILIMANI) HCCC NO. 1803 of 1999. At page 16 of his decision, the Hon Azangalala J. expressed himself thus:

“The Court of Appeal has also had occasion to consider Section 69B of the Transfer of Property Act in the case of *Priscilla Grant V. Kenya Commercial Finance Company Ltd and 2 Others, Nairobi Court of Appeal No. NAI. 227 of 1995 108/95, U.R.* That was an application by a mortgagor for injunction which had been refused by the High Court. The Court of Appeal was considering whether or not the mortgagor had an arguable appeal, and Section 69B of the Transfer of Property Act fell for consideration. After setting out the said section, the Court of Appeal said:

“In the present case, therefore, the only remedy of the applicant would be a claim for damages should she be able to prove that there was an improper or irregular exercise of the statutory power of sale. It would appear to us at this stage that the Applicant does not have an arguable case.”

On the authority of the Court of Appeal observation in *Priscilla Grant V. Kenya Commercial Finance Company Ltd* case (supra), and the express provisions of Section 69B of the Transfer of Property Act aforesaid, I hold that the 2nd Defendant obtained a good title to the suit premises after the auction sale, and the Plaintiff has not placed material before me to suggest otherwise.”

From my understanding of the plaintiff’s submissions, he too accepts the contention that the title of the person who purchased the suit property was unimpeachable. Therefore, should I not go along the same path as that taken by the Hon. P.J.S. Hewett, Commissioner of Assize, in ***George Gikubu Muthia V. Jimba Credit Corporation Ltd & Another*** (supra)?

In principle, I accept the fact that if the court is satisfied that the proposed amendments could not ever change the final outcome of a case, there would be no need to allow an amendment, simply because ordinarily amendments are to be freely allowed. However, I believe that it is not right for a court which has been called upon to decide whether or not to allow an appeal, to be seen as pre-judging the outcome of the proposed amendment. In other words, unless the legal position was so obviously clear and final, the court should not proceed to determine it. In such instances, it is best to allow the proposed amendments, so that the matters in issue can be determined after the parties are heard on the same.

I note that the Hon. P.J.S Hewett did acknowledge (in the *Mbuthia V Jimba Credit Corporation case* (supra) that there was need to bear in mind the importance of the court not trying to decide the issues raised by amendments, on the application for leave to make amendments. Although the Hon. Hewett made that observation, he thereafter proceeded to make decisions on the proposed amendments. To that extent, I hold the considered view that the court failed to heed its own caution, and by so doing exceeded its jurisdiction. For that reason, as I am not bound by the decision of my later brother, I reluctantly but respectfully depart from it.

In the case of ***ZE YU YANG V. NOVA INDUSTRIAL PRODUCTS LTD [2003], E.A. 362 at p. 364***, the Hon. J. G. Nyamu J., expressed himself thus:

“I therefore find that;

(a) the existence of a valid sale agreement as exhibited extinguished the equity of redemption and the Applicant has no remedies touching on the property both as against the former mortgagee and against the purchaser nor the Respondent/Plaintiff. Its remedy if any is in damages only as against the person exercising the power, namely the third party. Section 60 of the Transfer of Property Act as amended by Act No. 19 of 1995 puts this beyond any doubt. A valid contract of sale extinguishes the equity of redemption.

(b) The title issued to the plaintiff/purchaser cannot be impeached whatsoever as per the unambiguous wording of Section 69B set out above and clauses (a), (b) and (c) are in my opinion wide enough to cover nearly all the situations one can imagine including all possible sins by the

mortgagee except fraud.

With those sentiments, I am in full agreement. And that being the case, since the plaintiffs have indicated an intention to plead fraud in the draft amended plaint, I find that there is a possibility that it may have a claim that could be sustainable against the defendant and the proposed additional defendants. I say so because a sale that was otherwise deemed valid, can be set aside on the grounds of fraud.

As fraud has been alleged, I hold the view that it is best to allow the plaintiff to enjoin the proposed new defendants, and also to amend the Plaint, so that all the matters in issue can be conclusively determined. By being made parties to the suit, the purchasers would have the opportunity to prove that they acquired title lawfully, rather than fraudulently.

Accordingly prayers 1 and 2 of the application dated 7th December 2005 are granted as prayed. The plaintiff is to file and serve its amended plaint within the next fourteen (14) days.

The costs of the application are to be borne by the plaintiff, in any event, because the plaintiff has not demonstrated to the court that there is any legitimate reason for asking the defendant to meet such costs.

FRED A. OCHIENG

JUDGE

Dated and Delivered at Nairobi, this 24th day of May 2006.

M. KASANGO

JUDGE