



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 162 of 2006**

**HOUSING FINANCE COMPANY OF KENYA LIMITED.....PLAINTIFF**

**VERSUS**

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

**RULING**

What was coming up for hearing was the Notice of Motion dated 21<sup>st</sup> June 2006, filed by the defendant George Gikubu Mbuthia.

The motion had 11 prayers but before the hearing began the said defendant deleted all the prayers except for two. The prayers that were left subsisting are that:

**“\* Leave be granted to the defendant to further amend his defence and counter claim in terms of the further amended draft defence and counter claim annexed herewith.**

**· the defendants further amended defence and counter claim be treated as properly filed.”**

This is a case that was instituted by Housing Finance Company of Kenya Limited under The Mortgages (Special Provisions) Act.

Along the way the defendant has filed defence and amended that defence by adding a counter claim.

On 24<sup>th</sup> April 2006 the plaintiff in exercise of its mortgagee’s power of sale transferred the defendant’s property to one Muhamud Sheik Hussein.

The defendant by his amendment to the defence intends to join the said Muhamud Sheik Hussein, at least that is what is sought in the application the subject of this ruling. But the fact on the ground is very different because the defendant before that leave could be granted, on 22<sup>nd</sup> June, filed a Further Amended Defence and counter claim. In that further amended defence the defendant has joined the said Muhamud Sheik Hussein as the 2<sup>nd</sup> defendant. From hence, that is the said amendments without leave, arose objections raised by the plaintiff and the 2<sup>nd</sup> defendant.

The 2<sup>nd</sup> defendant stated that he came to court because of the advert placed in the newspaper by the defendant. Counsel for the 2<sup>nd</sup> defendant stated that there was no order granted by the court giving leave for the said defendant to be joined as a party. That the 1<sup>st</sup> defendant without following procedure added the name of the 2<sup>nd</sup> defendant in these proceedings. Counsel therefore objected to inclusion of the 2<sup>nd</sup> defendant without leave.

Plaintiff also objected to the inclusion of the 2<sup>nd</sup> defendant on the basis that this was an action under Cap 304 and the defendant was not entitled to choose other defendants to be prosecuted. That the moment the order for possession, pursuant to cap 304 was declined, this suit also ended.

The 1<sup>st</sup> defendant, George Gikubu Mbuthia, opposed those objections on the basis that the parties had failed to serve him with notice of preliminary objection. He said that this denied him the right to be heard. He further sought that the court would grant him leave to file the amended defence.

The 1<sup>st</sup> defendant on hearing the objection raised might as well have '*thrown in the towel*'. Why do I say so; firstly the 1<sup>st</sup> defendant could not on his own motion join the 2<sup>nd</sup> defendant to these proceedings without the court's leave. The amended defence filed without leave on 22<sup>nd</sup> June 2006 will therefore be struck out. Secondly the Act upon which this suit is based, that is The Mortgage (Special Provisions) Act does not recognise any other party but the Mortgagor and mortgagee. The said Act provides that suits there under are instituted by mortgagee and the mortgagor "**shall be made the defendant.....**", see section 3 (3) of that Act.

The plaintiff hereof, the mortgagee, sought possession of the suit property from the mortgagor. It does seem that by an order issued on 16<sup>th</sup> May 1991, the court declined to order of possession to be given. I am in agreement with the plaintiff that thereon, this suit ought not to have proceeded in the manner the 1<sup>st</sup> defendant has taken it, that is, the issues whether the plaintiff debited illegal charges, interest ought not to have been entertained hereof. Much more the issue relating to the sale of the charge property to the 2<sup>nd</sup> defendant cannot be entertained in this suit.

It also was not open to the 1<sup>st</sup> defendant to join the 2<sup>nd</sup> defendant in a suit, unless he joined the said 2<sup>nd</sup> defendant to the title of his defence, a title similar to the plaint and, the 1<sup>st</sup> defence ought to have been served upon such one who is joined. See Order VIII Rule 7 of the Civil Procedure Rules.

The objection raised hereof are upheld in the following terms; that the Further Amended defence and counter claim filed herein on 22<sup>nd</sup> June 2006 is struck out with costs to Muhamud S. Hussein, for having been filed without leave of the court; that the Notice of Motion dated 21<sup>st</sup> June 2006 is struck out with costs to the plaintiff and Muhamud S. Hussein for being unsustainable under Cap 304.

The plaintiff and Muhamud S. Hussein are granted costs of the preliminary objection which costs together with costs of struck out documents are assessed at kshs 10, 000 each one. If payment of the said costs is not made the said parties may proceed to execute for the same.

**MARY KASANGO**

**JUDGE**

Dated and delivered this 10<sup>th</sup> day of July 2006.

**MARY KASANGO**

**JUDGE**