



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

Civil Case 159 of 2000

CYRUS NYAGA KABUTEPLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.....1ST DEFENDANT

SAMUEL P. GACHORA2ND DEFENDANT

RULING

This case had been fully heard and was awaiting the parties submissions when the Plaintiff moved the court by Chamber Summons dated 22nd September, 2006 seeking to amend the Plaintiff. The Plaintiff in the affidavit in support stated that the amendments sought to ensure that the prayers sought by him would not be misleading. He stated that he had initially filed this suit against the two defendants but subsequently the suit against the 2nd defendant was discontinued. For that reason he sought an amendment to clearly indicate that this suit is only against one defendant that is the 1st defendant. Further that the prayers sought in his plaintiff sought some declarations from the court and it was necessary to seek the discharge of his property if those declarations were in his favour. He therefore concluded by saying that if the amendment sought in his proposed amended plaintiff is allowed the issues to be decided by the court would be clear. He was of the view that such amendments would not prejudice the defendant. In oral submissions plaintiff's counsel stated that the amendments sought would not change the character of the suit. That by merely removing 'S' from the word defendant does not change the character of the suit. He was also of the view the amendments sought both in removing the 'S' and in seeking the discharge of the property of the plaintiff would not lead to the amendments of the defendant's pleadings. The application was opposed. The defendant relied on the documents which had been submitted during the trial. Counsel drew the attention of the court to the various suits that the plaintiff had previously filed against the Defendant. She concluded by saying that these suits and the amendments now sought were an abuse of the court process. Counsel further said that the character of the suit will be altered and that would prejudice the defendant since the evidence has already been concluded and in deed written submissions have been filed. She said that the plaintiff initially in its plaintiff sought an injunction because of the accounts that had been kept at the defendant's bank. That the Plaintiff now by the proposed amendments sought to add that the defendant's conduct over the managements of those accounts was fraudulent. The defendant counsel said when giving evidence at the trial the Defendant had restricted itself to the pleadings as they were and did not submit evidence on the management of those accounts. Counsel was of the view there would be prejudice to the defendant if the amendment was allowed. Defendant's counsel was also of the view that the Plaintiff needed to explain why he had delayed for so long in making the present application. Counsel said that this suit was filed in the year 2000 and that the charge which is the subject of the suit was registered in 1993. Counsel was also of the view that the present application was misconceived. Counsel also submitted that even if the defendant was to be

compensated by an award of costs the previous suits that had been filed by the Plaintiff had been struck off with costs to the defendant and that up to date the Plaintiff had not paid those costs to the defendant. Defendant therefore was of the view that the Plaintiff would most probably not pay costs that would be awarded in this matter. Defendant's counsel relied on the case of **Kassam v Bank of Baroda (Kenya) Ltd [2002] 1 KLR** in the following passage:-

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

- a) the party applying is not acting mala fide;**
- b) the amendment will not cause some injury to the other side which cannot be compensated by costs;**
- c) the amendment is not a device to abuse the court process;**
- d) the amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;**
- e) and that the amendment will not alter the character of the suit.”**

The Plaintiff when he first filed the claim against the defendants was indeed going against two defendants. Subsequently the claim against the 2nd defendant was discontinued. I find that there would be no problem in allowing the Plaintiff to amend the prayer of the Plaint to indicate the judgement is only against the 1st defendant. Prayer No. (ii) of the Plaint had initially sought orders in the following terms:-

- i. An injunction restraining the Defendants jointly or severally from interfering with ownership, or possession of the Plaintiff in suit land and/or transferring the suit premises to any person whatsoever until determination of the suit herein.**
- ii. A declaration that the conduct of the 1st Defendant is tainted with fraud and inequities as to disentitle them to carry and exercise their statutory powers under the charge herein, and that Account be taken forthwith.**

In seeking an amendment the Plaintiff has changed that prayer to be as follows:-

- iii. A declaration that the conduct of the 1st Defendant in managing the subject mortgage Account is tainted with fraud and inequities as to disentitle them to carry and exercise their statutory powers under the charge herein, and property Gichugu/settlement scheme/232 be discharged forthwith.**

Considering the above amendment which is sought by the Plaintiff I find that I am in agreement with the defendant's counsel when she submitted that the character of the case would change if the amendment was allowed as prayer. It is one thing to say the conduct of the defendant is tainted with fraud but it is altogether a different thing to say that the defendant's management of account is tainted with fraud. The defendant when it presented its evidence through the witness that was called did not address its mind to this change of pleading. To allow the amendment after the evidence has been submitted in my view would be prejudicial to the defendant and such prejudice cannot be compensated by an award of costs. Similarly to add a prayer seeking for discharge of plaintiff's property takes the case to a very different dimension and makes the claim depart from the original claim the Defendant had to meet. I also find that I am in agreement with the defendant that it was necessary for the Plaintiff to explain why in a suit which was filed in year 2000 he failed to apply for an amendment earlier on particularly before witnesses submitted their evidence. I find that in regard to the prayer sought in (ii) the court cannot grant such an amendment. The order of the court therefore is that:

- 1) The Plaintiff's prayer to amend the Plaint to read that the Plaintiff's claim is only restricted to**

the 1st Defendant is allowed.

2) The Plaintiff prayer to amend prayer (ii) seeking to add the words '*in managing the subject mortgage Account*'

'and property Gichugu/settlement scheme/232 be discharged forthwith' is hereby dismissed.

3) The costs of the Chamber Summons dated 22nd September, 2006 are hereby awarded to the defendant.

MARY KASANGO

JUDGE

Dated and delivered this 26th October, 2006.

MARY KASANGO

JUDGE