



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 284 of 2003

**KOMASSAI PLANTATIONS LIMITED.....PLAINTIFF**

**VERSUS**

**BANK OF BARODA (KENYA) LTD.....DEFENDANT**

**R U L I N G**

The Plaintiff's application is by way of chamber summons brought under Order VIA Rules 3, 5 and 8 of the Civil procedure Rules. The Plaintiff seeks leave to amend its plaint which was dated 19<sup>th</sup> May, 2003. The Plaintiff relies on the following grounds:-

- 1. The amendments are necessary to enable the court to effectually and completely determine all the issues in dispute between the parties.**
- 2. That while taking full instructions on facts and evidence on this matter it has become necessary to amend the plaint in terms of the amended plaint and the proposed amendments do not cause any prejudice to the Defendant but will only help in setting out clearly the issues in dispute.**
- 3. That the suit property was sold below the market value resulting in loss and damage to the Plaintiff.**
- 4. That the amendments are necessary for the purposes of enabling this honourable court to determine all the issues and the real question in controversy between the parties.**
- 5. The Defendant has miscalculated the redemption amount thereby inflating the same excessively.**

The Plaintiff's application was supported by an affidavit sworn by Sobhajyachand Popatlal Shah. He deponed that the Plaintiff was previously the owner of the suit property comprising of five (5) acres and consisting of development of 8 Godowns. This property was sold by the Defendant on 5<sup>th</sup> January, 2006 in exercise of its statutory power of sale under the Transfer of Property Act. He said that the market value of that property was Kshs.84 million. The said sale realized a price of Kshs.37.5 million. He deponed that the property was sold at an under value due to the Defendant's careless and negligent act which acts did not take into consideration the interest of the Plaintiff as the mortgagor. He further deponed that the Defendant in calculating the redemption amount had inflated the same excessively. That as a

consequence of the Defendant's sale the Plaintiff had suffered a loss and damage and it was therefore necessary for the Plaintiff's claim to reflect that loss. He said that it was in the interest of justice for the amendment to be applied for as prayed. He was of the view that the amendment would not prejudice the Defendant but would indeed set out clearly the issues in dispute. The Plaintiff further relied on another affidavit sworn by the same person filed in court on 11<sup>th</sup> April, 2006. This affidavit essentially exhibited the valuations carried out on the suit property by Estate agents. It further stated that the redemption amount had been recalculated on behalf of the Plaintiff by Interest Research Bureau (K) Ltd. He annexed the recalculations statement. In oral submissions by the Plaintiff's counsel in support of the application counsel stated that the proposed amended plaint was annexed to the application and he drew the court's attention to the various amendments. He said that the amendment was based on the Defendant's purported exercise of statutory power of sale. That the original plaint had pleaded that the statutory notice effected on the Plaintiff was defective and on that basis the Plaintiff had sought an injunction by an interim application which injunction was granted by Justice Nyamu. He said however the property was sold on 5<sup>th</sup> January, 2006 following another ruling of this court. He said that the amendments that are sought arise out of that exercise of statutory sale. Counsel relied on the case of **Eastern Bakery v Castelino (1958) E.A.** He quoted the holding as follows:-

***“(ii) amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs.”***

The Plaintiff also relied upon the case of **Kenya Commercial Bank Limited v James Osebe (1982-88) 1 KAR.** He said that this case was identical to the Plaintiff's case in that the Plaintiff sought to amend the plaint after the sale of his property. That amendment was allowed. He further submitted that the law allows pleadings to be amended if the amendments arise from the same facts. He therefore stated that the court should note that the Plaintiff's property was sold at an under value and it was necessary to amend the plaint to reflect this.

That application was opposed by defence counsel and in so doing defence counsel relied on the affidavit of Mukhtiar Singh. The deponent accepted that indeed the Defendant had sold the Plaintiff's property in exercise of its statutory power of sale. He also confirmed that the sale price was Kshs.37.5 million. He however denied that such a sale was an under value and he also denied that the Defendant had inflated the redemption amount. He deponed that the Plaintiff's application to amend the plaint was actuated by malice and that the same does not meet the ends of justice. He also stated that to allow such an amendment the Defendant would be highly prejudiced. The Defendant also had a further replying affidavit which was filed in court on 25<sup>th</sup> April, 2006. This affidavit sought to respond to the Plaintiff's further affidavit in regard to valuation of the suit property and in regard to the recalculation of the redemption amount by the Interest Research Bureau (K) Ltd. Defence counsel in oral submissions accepted that amendments can be allowed to pleadings but she stated that such amendment should be looked at with regard to the original claim. In this case she said the Plaintiff had sought an injunction to restrain the Defendant from selling its property. The present amendment however, now seeks damages of Kshs.49.3 million and this she submitted was a new relief which was being introduced and which would offend Order VIA Rule 3(5) of the Civil Procedure Rules. Defence counsel sought to rely on the case **HCCC 739 of 2003 Jane Wambui Macharia vs Giro Commercial Bank Ltd** where it was held as follows:-

***“The next issue is whether the amendments sought are necessary to enable the court to ventilate the real issue between the parties. In that regard, counsel for the applicant says that if the amendments are allowed they will stand the Plaintiff in good stead in challenging the sale. However a look at the proposed amended plaint belies that. Why do I say so? The substantive relief sought is a permanent order of injunction restraining the defendants from alienating, subdividing, changing, transferring or parting with the possession of the suit properties. There is no prayer for a declaration that the sale was invalid or for an order that it be cancelled. Neither is there a prayer for damages. The argument that the amendments are sought as procedural props for challenging the sale is this baseless. In those premises, it cannot be said that the amendments are necessary to enable the right question to go for trial.”***

Counsel reiterated that the amendment being sought by the Plaintiff was changing the whole nature and substance of the reliefs in the original plaint. She further stated that the draft amended plaint even if it was allowed had not sought a declaration that the sale was being illegal. Counsel also relied on **Mulla The Code of Civil Procedure** and relied on the following portion:-

***“2. Leave to amend will be refused if the plaintiff’s suit would be wholly displaced by the proposed amendment.”***

Counsel for the Defendant further submitted that the valuations relied upon by the Plaintiff were dated year 2003 and that accordingly the Plaintiff was well aware of the value of the property and yet in so knowing had failed to complain or to seek to restrain the sale of the suit property. On prejudice that the Defendant alleges they will suffer if the amendment is allowed counsel submitted that the Defendant bank held monies belonging to members of public and the claim being sought by the Plaintiff by the proposed amendments was not a small amount of money and this would prejudice the Defendant.

The general principles in regards to amendments of pleadings which have been accepted by the courts are that pleadings sought before hearing of a suit ought to be freely allowed subject to the injustice or prejudice to the opposite side. With regards to the Defendant’s submission that the Plaintiff was seeking to introduce new relief different from the reliefs in the original plaint I have perused the proposed amendments and I am of the view that the same are not new reliefs. The reliefs being sought are part and parcel of the original claim in the plaint. These amendments therefore do not go against the spirit of Order VIA of the Civil Procedure Rules. The Defendant in submissions stated that the Plaintiff had failed to make a claim that the sale was illegal. Looking at the amendments that indeed is not the Plaintiff’s claim. What I understand to be the Plaintiff’s claim is that the Defendant sold the Plaintiff’s property in exercise of its statutory powers of sale but in so selling sold the property at a gross under value. The amendments being sought by the Plaintiff reflect that. It is therefore not necessary for the Plaintiff to claim that the sale was illegal in order to support the proposed amendment that the sale was at an under value. The defence also did submit that the Plaintiff had not claimed general damages and yet were claiming for Kshs.49.3 million. I have perused the proposed amendments and the Plaintiff’s claim is that the damages suffered as a consequence of under sale were Kshs.49.3 million. It is not my mind material when the valuation of the suit property was prepared at least at this stage. That to my mind would be necessary at the hearing of the main suit. It suffices that the Plaintiff has annexed those valuation with a view to showing the court at this stage that the property was sold at under value. On the issue raised by the Defendant that to allow the Plaintiff’s amendments would prejudice the Defendant in terms of the deposits held by the Defendant on behalf of the members of public that argument I wholly reject. To accept that it would mean that because the Defendant receives deposits from members of public they are immune from any claim of negligence or recklessness. I therefore do not accept the argument raised by the Defendant. I feel I ought to mention that the arguments raised by the Defendant in opposition to the Plaintiff’s application took the application to a dimension that ought not to be taken. The issues raised by the Defendant ought to be raised at the full hearing. I am of the view that the amendments sought by the Plaintiff are merited they would in my mind be necessary to properly adjudicate on the dispute between the parties. I will therefore allow the amendments as prayed. I grant the following orders:-

1. That the Plaintiff is hereby granted leave to amend its plaint as per the proposed amendments annexed to the chamber summons dated 1<sup>st</sup> March, 2006. Such amended plaint to be filed and served within seven (7) days from this date hereof.
2. The Defendant is hereby granted leave to file any amended defence within fourteen (14) days of service of such amended plaint.
3. Costs of the chamber summons dated 1<sup>st</sup> March, 2006 shall be in the cause.

**MARY KASANGO**

**JUDGE**

Dated and delivered this 18<sup>th</sup> day of October 2006.

**MARY KASANGO**

**JUDGE**