



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 574 OF 1998**

**LUSTER LIMITED .....**  
**PLAINTIFF**

**VERSUS**

**NADHIA LIMITED ..... 1ST**  
**DEFENDANT**

**INDUSTRIAL AND COMMERCIAL**

**DEVELOPMENT CORPORATION ..... 2ND**  
**DEFENDANT**

**RULING**

The plaintiff who is the applicant herein instituted this suit against the two defendants on 8.10.1998 for the following reliefs:-

- (a) Specific performance by the defendants of their contract to execute a transfer of L.R. No. 12495/13 (I.R.34882) Lang'ata Nairobi to the plaintiff and in the event the defendants decline to execute the transfer, the same to be executed by the Deputy Registrar of this Honourable Court.
- (b) A permanent injunction restraining the Defendants jointly and severally from dealing, transferring or disposing of the said property.
- (c) Costs.

The defendants filed their joint defence to the suit on 3.11.1998 in which they contended that they failed to transfer the suit property as they lacked capacity to do so by reason of certain factors which they describe in paragraphs 4, 5, 6 and 7 of the defence. Those reasons included:-

- (a) a claim that the title documents relating to the property were held by Kenya Finance Corporation who held a first charge over the property, the 2nd defendant having held only a second charge therein.
- (b) a claim that the purchase price had been refunded to the plaintiff/applicant;
- (c) the fact that the 2nd defendant had discharged its interest over the property upon the redemption of the mortgage account; and
- (d) that the plaintiff did not have the capacity to bid at the auction.

By an application dated 11th January, 1999 the plaintiff sought to strike out the defence and for judgment to be entered in favour of the plaintiff as prayed in the plaint together with costs. The application was heard by myself on 11.2.1999 and a ruling delivered on 17.3.1999 striking out the defence. The ruling was silent as regards the second part of the application which as aforesaid sought to enter judgment as prayed in the plaint.

The plaintiff has now lodged this application for leave to amend its plaint on the ground that the 2nd defendant has deliberately and unlawfully executed a discharge of the said property which said discharge was subsequently registered on 4.9.1998. The plaintiff also complains that while this suit was pending the property was transferred to one Vijay Morjaria without its knowledge. It is also claimed that the discharge of the charge by the 2nd defendant over the said property and subsequent sale to Mr. Morjaria was unlawful.

Because of the transfer of the property to a third party, the plaintiff contends that the only remedy available to it now is a claim for damages; hence the necessity to amend the plaint to introduce a relief for damages

I think it may be useful to observe that the issue of the discharge of the charge and the redemption of the mortgage account is not a matter which was not in the knowledge of the plaintiff. It was pleaded in the defence and the plaintiff should have been aware of the potential legal problems that could therefrom arise immediately the defence was served upon it. One of such problems would of course be the possibility of the property being sold to an innocent third party who was not aware of the dispute between the plaintiff and the defendant. The question that arises from this is what steps the plaintiff took in that respect and did it not sleep on its rights? These are some of the factors which I am obliged to take into account when considering whether or not to exercise the wide discretion conferred upon the court by O. VIA Rules 3, 5 and 8 of the Civil Procedure Rules.

As against those considerations, I must of course consider the conduct of the 2nd defendant who, naturally, opposes the application to amend on the ground that any amendments at this stage will be prejudicial to it. One of the factors which heavily weigh against the 2nd defendant is the discharge of the charge registered in its favour after what appears to have been a proper auction sale of the charged property. Given that position and considering that this court will not suffer a wrong to be without a remedy and for that purpose as well as others, will readily exercise the discretion conferred upon it to allow at any stage of the proceedings any party to amend its pleadings, I think it will be in the interests of justice to allow the amendments sought in this application so that in the event the plaintiff establishes wrongful actions on the part of the 2nd defendant, the plaintiff may not remain uncompensated for those wrongful actions. However, since the practical effect of allowing the application will be to permit the plaintiff to plead twice in the same cause, the same right should be availed to the 2nd defendant so that it can respond to the proposed amended plaint in whatever manner it considers appropriate. Accordingly, the application is allowed and the plaintiff granted leave to amend the plaint as per draft amended plaint annexed to the application. The defendants are at liberty to file an amended defence limited however to a response to the averments introduced by the amended plaint; such amended defence, if any, to be filed within 7 days of this ruling. Costs of this application will be in the cause.

Dated at Nairobi this 21st day of February, 2001.

**T. MBALUTO**

**JUDGE**