



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO 247 OF 2006**

**MURITHI M'MBUI**

**JULIA KAGWANE MURITHI.....PLAINTIFFS**

**VERSUS**

**HOUSING FINANCE COMPANY (K) LTD.....DEFENDANT**

**RULING**

1. The Plaintiffs' Notice of Motion application dated and filed on 7<sup>th</sup> May 2013 was brought pursuant to the provisions of Order 8 Rules 3, 5 and 8 of the Civil Procedure Rules and all the enabling provisions of the law. They sought the following prayers:-

1. **THAT leave be granted to the Plaintiffs/Applicants to amend the Plaintiff herein.**
2. **THAT the amended plaintiff attached hereto be deemed duly filed and served.**
3. **THAT the costs of this application be in the cause.**

2. The application was predicated upon the grounds that the amendments were necessary for purposes of correcting a defect in the proceedings and for the determination of the real questions of controversy in the matter. In the affidavit of Murithi M'Mbui sworn on 6<sup>th</sup> May 2013 and filed on even date, the Plaintiffs reiterated the grounds on the face of the application.

3. In their submissions dated and filed on 8<sup>th</sup> July 2013 and 9<sup>th</sup> July 2013, they contended that that the application was made without undue delay and that no prejudice would be suffered by the Defendant that could not be ameliorated by an award of costs as was reiterated in **Cropper v Smith [1884] 26 ChD 700**. It was their averment that litigants might miss certain particulars at the inception of their cases, but should nevertheless not be denied justice for such an omission.

4. They relied upon the cases of **Steward v North Metropolitan Tramways Co. (1886) 11 QBD 556**, **Waljee's (Uganda) Ltd v Ranji Punjabhai Bugerere Tea Estates Ltd (1971) EA 188** and **General Manager EAR v H A v Thierstein (1968) EA 354**, amongst several other cases, to buttress their argument that the court had the discretion to allow for the amendment in the interests of justice even if the amendment sought introduced a new cause of action that was nonetheless time barred as had been alleged by the Defendant.

5. The Defendant filed its Grounds of Opposition dated 16<sup>th</sup> May 2013 on 17<sup>th</sup> May 2013 in which it contended that the application herein was frivolous, capricious, void of merit and solely intended at delaying the course of justice. Further, it submitted that the application and the amendments sought were intended to belatedly cure the obvious defects in the Plaintiff's suit and defeat the Defendant's defence.

6. In its written submissions dated 22<sup>nd</sup> May 2013 and filed on 23<sup>rd</sup> May 2013, the Defendant submitted that the discretion of the court to allow for amendments should not be exercised arbitrarily and may be allowed, or indeed refused, after the keen and careful consideration of the facts and circumstances of the case as may be- **See Kassam v Bank of Baroda (2002) 1 KLR 294, Kassam v Bank of Baroda (Supra), Mehta v Shah (1965) EA 321, Mowa Publishers Ltd & Another v Attorney General & Another (1991) KLR 46 and Kyalo v Bayusuf Brothers Ltd (1983) KLR 229** relied upon the Defendant in that regard.

### **LEGAL ANALYSIS**

7. After a careful consideration of the application dated and filed on 7<sup>th</sup> May 2013, the Grounds of Opposition dated 16<sup>th</sup> May 2013 and filed on 17<sup>th</sup> May 2013, the submissions dated 8<sup>th</sup> July 2013 and filed on 9<sup>th</sup> July 2013 by the Plaintiff and by the Defendant dated 22<sup>nd</sup> May 2013 and filed on 23<sup>rd</sup> May 2013, the court is of the considered opinion that the amendment that was brought seven (7) years after the filing of the instant suit on 11<sup>th</sup> May 2006 and after the hearing of the case was a delay that would cause great prejudice to the Defendant. The period between 11<sup>th</sup> May 2006 and 7<sup>th</sup> May 2013 is undeniably a long time lapse. A considerable amount of time and resources have been expended by the parties in the litigation of this matter. Indeed, the court declined an application to amend a pleading for having been brought late in the case of **Kyalo v Bayusuf Brother Ltd.**

8. The case of **General Manager EAR & HA v Thierstein**(Supra) relied upon by the Plaintiff was distinguishable for the reason that the parties herein had closed their respective cases and filed their submissions. What was pending was the determination of the court.

9. Having considered the pleadings herein, the affidavits and the written submissions in respect of the parties' cases, the court has come to the conclusion that this would not be a good case for it to exercise its discretion because of the delay in bringing the application herein, the prejudice that would be suffered by the Defendant that could not be compensated by an award of costs and the fact that parties had closed their respective cases and filed their submissions and all that is pending is the delivery of judgment herein.

10. The amendments sought to be made by the Plaintiffs were to introduce a new cause of action after hearing had been concluded. Indeed, allowing the Plaintiffs to amend their Plaintiff would amount to the parties going back to the period before pleadings closed as the Defendant would be entitled to file an Amended Defence. This would change the course of the case herein and further delay the conclusion of the matter and increase the costs of unnecessary litigation.

11. The court has come to the aforesaid conclusion despite it having power to allow amendments at any stage of the proceedings, which includes any time before judgment on such terms as to costs as the circumstances are not those the court considers to be appropriate for it to exercise its discretion to allow the Plaintiffs' application for leave to amend their Plaintiff.

### **DISPOSITION**

12. The upshot of this court's ruling is that the Plaintiffs' Notice of Motion application dated and filed on 7<sup>th</sup> May 2013 was without merit and the same is hereby dismissed with costs awarded to the Defendant.

13. At this juncture the court takes cognisance of the fact that the parties closed their respective cases on 6<sup>th</sup> December 2012 with the Defendant having filed its submissions on the same dated 13<sup>th</sup> March 2013 on

15<sup>th</sup> March 2013, and the Plaintiff filing its Reply to the Plaintiff's submissions dated 8<sup>th</sup> April 2013 on 10<sup>th</sup> April 2013.

14. This being an old matter that was almost at its conclusion, it is imperative that the parties move swiftly to have the matter expedited and determined. The court hereby directs that the parties attend to the registry for the purposes of obtaining a convenient date for the highlighting of the filed submissions as soon as is practically possible.

15. It is so ordered.

**DATED and DELIVERED at NAIROBI** this 16<sup>th</sup> day of October 2014

**J. KAMAU**

**JUDGE**