



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 18 OF 2017

DONALD MUHONDA ANDOLOPLAINTIFF

VERSUS

PINNACLE DEVELOPERS LIMITED....1ST RESPONDENT/DEFENDANT

DOUGLAS OKEYO OLUOCH.....2ND RESPONDENT/DEFENDANT

BON ARCH ASSOCIATES LIMITED1ST APPLICANT

PETER OLUOCH OJWANG2ND APPLICANT

RULING

This ruling is on two applications dated 6th November 2017 and 20th November 2017. The first one dated 6th November 2017 is by the applicant Donald Muhonda Andolo seeking the following orders:

- 1. seeking injunctive orders restricting the Respondents by themselves, their agents or servants from continuing to infringe on his Architectural designs, drawings and plans used on property title number Kajiado/Kaputei North 32248 or any other property or land, pending the hearing and determination of the main suit.**
- 2. An order directed at the defendants/respondents to deliver up to the plaintiff/applicant all Architectural designs, drawings and or plans in soft copy or hard copies relating to or similar to the Architectural plans used on property title number Kajiado/Kaputei North/32248 and approved by the County Government of Kajiado under application previously approved under application Number P/761/2015 pending the determination of the suit.**

This respective application was brought in terms of the provisions of section 3A of the Civil Procedure Act, order 40 Rules 1 and 2, clause 4 of the 4th schedule of the Architects and Quantity Surveyors Act, section 35 of the Copyright Act and other enacting provisions of the law.

In the second application dated 20th November 2017 the applicants acting through Ochich TLO & Associates filed this notice of motion in which they seek the following reliefs:

- 1. That this Honourable court be pleased to strike out the 1stapplicant/ 3rd defendant from the suit since they have been improperly joined as party in to this suit.**
- 2. That this Honourable court be pleased to strike out the 2nd applicant/ 4th defendant from this suit since they have been improperly joined as a party in to this suit.**
- 3. The plaintiff does meet the costs of this application and the suit for the applicants**

It is brought Pursuant to Sections 1, 1A, 3 and 3A of the Civil Procedure Act, chapter 21 Laws of Kenya, Order 1 Rule 10 (2) and rule 14 of the Civil Procedure Rules, 2010, Article 159 (2) (b) & (d) of the Constitution of Kenya, 2010 and all other enabling provisions of Law)

The factual background:

The crux of Donald Muhonda Andolo's plaint filed in court on 6th November 2017 is that he was the sole Architect and author of the Architectural plans registered and approved by the County Government of Kajiado under application Number P/761/2015; which was being used by **Nature Green Holdings Limited**. That on or about September 2017 the 2nd defendant/Respondent, a director of the 1st defendant

without the plaintiff's authority (Donald Andolo) instructed the 3rd and 4th defendants/respondents to reproduce the plaintiff's Architectural drawings without his knowledge and consent by measuring an existing Maisonnete designed by the plaintiffs near property title number Kajiado/Kaputei North/32248.

The plaintiff applied for a permanent injunction and general damages against the defendants for fraudulent, illegality actions and breach of trust. The applications dated 6th November 2017 and 20th November 2017 are anchored on this claim.

On the application dated 6th November 2017 Mr. Donald Muhonda Andolo depones that in the year 2015 he provided Architectural services to **Nature Green Holdings Limited**. That owing to the instructions the drawings were designed and submitted to the County Physical Planner for approval under reference No. Application P/761/2015. Mr. Donald Andolo depones further that owing to the fraudulent claims of the 2nd respondent in regard to the management of **Nature Green Holdings** he moved to court under Civil Case No. 1 of 2017 for the winding up of the company. It is the affidavit evidence of Mr. Donald Andolo that a complaint on the use of the Architectural designs by the respondents has been lodged with the National Construction Authority vide letter dated 16th October 2017. By his letter, the National Construction Authority commenced an inquiry as supported by preliminary report annexed as DMA – 5(a). that the defendants/respondents' actions jointly and severally continue to infringe on his copyrights for the use of the Architectural designs without his consent and authorization.

It is Mr. Donald Muhonda's contention that the defendants/respondents have completely ignored his demand from wrongful acts.

In the affidavit by the objector to the application Mr. Douglas Okeyo Oluoch deposes as follows: that I am a director of the 1st respondent company. That there are no Architectural designs, drawings and or plans on the property registered as title Number Kajiado North 32248 which are authored, prepared and or owned by the applicant. Moreover, the respondent deponed that the applicant has not availed any letter of appointment as an Architect or terms of engagement with Nature Green Holdings Limited.

Similarly, Mr. Douglas Okeyo averred that if there were any such Architectural plans/designs drawn in favour of Nature Green Holdings Limited by the applicant, he was duly compensated on such as required under the law. That, the fact of the matter is the applicant's intention to file this claim is to frustrate the on-going projects including malicious prosecution in insolvency Cause No. 1 of 2017.

It was also Mr. Douglas Okeyo's contention that the defendants are not liable nor infringed any copyrights as alleged by the applicant. Mr. Douglas Okeyo the respondent herein prayed for the notice of motion to be dismissed for want of merit.

Background in respect of notice of motion dated 20th November 2017

While the resolution of the applicant's application on injunction was pending the respondents filed a notice of motion dated 20th November 2017. This was brought pursuant to section's 1, 1A, 3 and 3A of the Civil Procedure Act and Article 159 (2) (b) and (d) of the constitution.

It is clear from the notice of motion that the main claim before court is for orders to strike out the 1st, 3rd and 4th Respondents from the plaint.

The 2nd respondent has also filed an affidavit in support in this respect. The main averments by the 2nd respondent is that the circumstances leading to the procedure of Architectural consultancy was vested with the 1st defendant. According to the applicant/respondent Mr. Douglas Okeyo there was no breach of procedural order in renewing the designs and plans already paid for by the 1st defendant Mr. Douglas Okeyo further depones that the 1st and 2nd defendants are the main parties to the dispute with the plaintiff and not the 3rd and 4th defendants. He therefore sought leave of this court to strike their participation in these proceedings.

In a lengthy replying affidavit by Mr. Douglas Muhonda Andolo filed in court on 1st December 2017 he gave the genealogy of the claim he has pleaded against the defendants.

Essentially, Mr. Donald Muhonda's contention is that there is sufficient narrative facts behind the present suit and notice of motion dated 6th November 2017.

On the 1st defendant/respondent Mr. Douglas Muhonda denies ever being engaged as an Architect to design and draw plans for them as alleged by Mr. Douglas Okeyo, 2nd defendant/respondent. That the Architect taking over the project was under obligations to communicate with the previous Architect on record according to Donald Mahonda. Following the naming of the defendants/respondent to the main suit as the culprits in the claim the striking out of the 3rd and 4th applicants would prejudice the outcome of the matter which is to be heard on the merits.

Peter Oluoch Ojwang, the 2nd applicant to the notice of motion dated 20th November 2017 filed a further supplementary affidavit on his own behalf and the 1st applicant. According to the deponent he denied the factual matrix as presented by Mr. Douglas Muhonda in the affidavit filed in court on 1st December 2017. The deponent reiterated that the plaintiff has not laid cogent evidence why he has sued them as defendants in the main suit. That the issues in dispute can be resolved between the plaintiff, the 1st and 2nd defendant without their participation.

The defendant further delved into the main dispute on infringement of copyright as claimed by the plaintiff. It was the deponent contention that there was proper communication which ensured that the Architectural designs and plans were legally obtained for use as required under the Laws of Kenya.

That by taking over the project from the previous Architect does not in any way occasion copyright infringement of the designs as alleged by the plaintiff. To the deponent his presence and that of the third defendant is misjoinder on the part of the plaintiff. This according to him was unfair and oppressive in being dragged into a suit which no clear nexus has been established.

Submission by the Plaintiff

Mr. Kimani learned counsel spearheaded the case and presented the following arguments. Mr. Kimani submitted and reiterated the contents of the affidavits and annexures in support of the application. According to Mr. Kimani the Plaintiff has brought and filed suit against the defendants on infringement of copyrights.

According to Mr. Kimani the facts from the affidavits demonstrate that the applicant is the rightful holder of the copy right in the disputed Architectural drawings being used by the 1st and 2nd respondents.

It was submitted by Mr. Kimani that based on section 26(1) 2, (i) (b), 35 (c), 35, (7) of the copy right Act Cap 130 of the Laws of Kenya. The plaintiff has a right to protect his copy right infringement by other users where there has been no license, consent or authorization. On reproduction, translation or adoption of any copyright works. Mr. Kimani submitted it was the owner who retains such rights. He relied on the principles in the cases of Alternative **Media Limited Versus Fancon Limited 2005 EKL.R.**

Designers Guild Limited Versus Russel Willerms Texfeles (2001) I ALLER 700 at 708. Mount Kenya Sundries Limited Versus Macmillan Kenya (publishers) Limited 2016 EKL.R. Mr. Kimani further argued and submitted that the applicant has met the legal threshold for the orders of injunction to issue pending the hearing and determination of the main suit.

In support of the courts exercise of discretion to grant the orders sought Mr. Kimani relied on the following cases. **Nevin Jiwani Versus Going out Magazine & Another Court Suit 336 of 2002 John Boniface Maina Versus Safaricom Limited 2013 EKL.R, Kenya Hotels Limited Versus Kenya Commercial Bank and another 2004 IKLR Gella Versus Cassaeen Brown & Co. Limited 1973 EA 358, Aikman Versus Muchoki [1984] KLR 353, Joseph Siro Mosioma Versus Housing Finance Company of Kenya and others Nairobi High Court Case 265 of 2007 [2008] e KLR.**

According to Mr. Kimani submissions the legal threshold for grant of injunctive orders has been met by the applicant who has established a prima facie case with a probability of a success at the trial. In the contention of Mr. Kimani unless the orders sought in the notice of motion dated 6th November 2017 are granted the plaintiff will suffer irreparable harm not compensatable in damages arising from the infringement.

The Respondent submissions

Mr. Okoth for the respondents' case the interest of the respondents' argument is that the application does not merit injunctive reliefs as presented by the copy right law. According to Learned Counsel section 31 of the copy right act provides the framework on ownership and transfer of such works to another third party. He further submitted that the affidavit evidence has laid down the originator of the Architectural plans and the party alleged in possession of the works. Learned Counsel further pointed out in setting up the relationship between the plaintiff and defendants there is a gap as to the role of the 1st and 2nd applicants. This court according to Learned Counsel eventually has to decide the case between the plaintiff with the 1st and 2nd defendants. In that case the 1st and 2nd applicants in the motion dated 20th November 2017 seeking to be struck out of the proceedings has merits. On the peculiar facts of the case in counsel's view the 1st applicant is an agent or servant of the 1st defendant. He explained that in the said agency relationship he cannot be held responsible for acts of omission or commission of the principal. It was further argued by Counsel that the plaintiff's claim against the 3rd and 4th defendants is an abuse of the court process which only apply to the deep-rooted dispute between the plaintiff, 1st and 2nd defendants. It was further contended by Learned counsel that the relief sought in the claim falls within the Board of Registration of Architects and Quantity surveyors established under section 4 of the Architects and Quantity Surveyors Act Cap 525 of the Laws of Kenya.

According to Learned Counsel the claims by plaintiff border on professional misconduct. He therefore argued that it is clear that the High Court has no jurisdiction to entertain the matter. On the 4th defendant, Learned Counsel submitted and invited the court to interrogate the transactional relationship to disqualify or bar the 4th defendant from being a party to the suit.

This court was therefore urged to allow the application to struck out the 3rd and 4th defendants.

Analysis and Resolutions

I have carefully considered the submissions by the Learned Counsel to all the parties. Before I proceed I want to restate the issues which I consider appropriate to determine at this stage.

1. Whether the jurisdiction of this court is ousted by the provisions of the Architects and Quality Surveyors Act cap 525 of the Laws of Kenya?

The Constitution 2010 of the Republic has provided for the jurisdiction of the High court under Article 165 3(a) (b) (c) (d) and (6) and (7). In addition to such order jurisdiction as conferred upon it by the National Assembly in the HIGH COURT (Organization and Administration Act No. 27 OF 2015)

In the realm of jurisdiction our jurisprudence is settled as articulated in the principles in the cases of **"the owners of motor vessel "Lillian Versus Caltex Oil Kenya Limited 1989. Samwel Kamau Macharia Versus Kenya /Commercial Bank Limited and 2 others 2012**

EKLR, Karisa Cheugo & 2 others Versus Republic 2015 EKLR. The minimum legal principle in these cases is that a court must have the power to hear a case and enforce its judgement over the parties in the dispute. The jurisdiction of the High Court is therefore preserved by the Constitution and by enactment of Acts of parliament conferring on the court any other such jurisdiction.

The plaintiff brought an action against the defendants seeking orders of permanent injunction and general damages for infringement of copy right. In the rejoinder the 3rd and 4th defendants argue that this is a case of professional misconduct to be handled by the Board of Registration of Architects and Quantity surveyors. The issue that is raised in the plaint is not that of professional misconduct but quite clearly on copyright infringement.

The question to be tried at the trial is whether the plaintiff has adduced sufficient evidence to be granted the reliefs against the defendants.

Does the court have the jurisdiction to make the orders sought? What then are the facts to be applied in determining the orders sought? It is trite that a judgement delivered by a court without jurisdiction is *void ab initio*.

From the pleadings and affidavit evidence in support of the claim all facts related to the jurisdiction are asserted. Defence of lack of jurisdiction by the applicants over the subject matter has not be rendered in the fullest sense of the term. The fact that the plaintiff and 2nd applicant are professional Architects by itself does not oust the jurisdiction of this court to properly fulfil its task. As clearly defined by the Constitution and references to the statute. There is no evidence that the Architects and Quantity Surveyors Act Cap 525 ousts the jurisdiction of this court in matters as the ones filed by the plaintiff. The essence of the plaintiff's claim is based on permanent injunction and award of general damages to be proved at the trial. I find no iota of evidence that the pleadings as filed have raised any determinable issues on professional misconduct. That therefore disposes the ground on jurisdiction.

2. Secondly, whether the applicant/plaintiff Donald Muhonda Andolo has satisfied the legal threshold to be granted temporary injunction reliefs pending the hearing and determination of the suit.

The legal preposition is that a writ of injunction may be defined as a judicial process, operating in personam and requiring the person to whom it is addressed to do or refrain from doing a particular thing in its capacity it may be restorative or preventive.

(See Article on leading cases where injunctions may be granted <http://scholarship.law.Cornell.Edu/Cgi/>)

In the Kenya legal system for an injunction to be granted the following criteria must be met.

- 1. Prima facie case with substantial likelihood of success on the merit at the trial**
- 2. Balance of convenience**
- 3. The likelihood of irreparable harm and non-availability of an adequate remedy or the compulsory award of damages would not suffice**
- 4. Consideration of the public interest**

To this case the superior courts have articulated the above principles in the following cases:

In the **American Cyanamid 60. And Eaicn Limited 1975 AC 396**, the court set out the guiding principles in the following passage:

That before granting an injunction the plaintiffs case against the defendants must be one which shows that there is a serious and real question to be tried at the trial. Secondly, if the test of a prima facie fails, the court should go for the balance of convenience. In this condition the inadequacy to compensate the plaintiff by way of damages for the harm suffered is a significant consideration; in the event the injunction is not granted at the pretrial stage.

In the persuasive authority by the **Supreme Court of Jamaica in Erica Francis Griffiths Versus Patricea Griffiths 2016 JMSC 68**. The court applying the principles in American Cynamid held as

- a. “whether an interlocutory injunction is prohibitory or mandatory, the same fundamental principle is that the court should take whatever course appears to carry the lowest risk of injustice if it should turn out that the court turns out (SIC) to be wrong or which seems likely to cause the list irremediable prejudice to one party or to the other.**
- b. whether an interlocutory injunction is prohibitive or mandatory the claimant must demonstrate that there is a serious issue to be tried before any injunction will be granted.**

There is no usefulness to be derived from arguments based on semantics as to whether an injunction is prohibiting or mandatory what is required in each case is to examine the particular facts of the case and the consequences of grantin or withholding of the injunctions is likely to be”

As to what constitutes a prima facie case with a probability of success the court of Appeal in **Mrao Limited Versus Finsel American Bank of Kenya and 2 others 2003 KLR** held:

“A prima facie case in a civil application includes but not confirmed to a genuine and arguable case. It is a case which on the material presented to the court a tribunal properly directing itself will conclude. There exists a *right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter*”.

(See also the principles in *Giella Versus Cassman Brown Company Limited 1973 EA 358*).

In the instant application I have the pleadings and the notice of motion supported by an affidavit from the applicant and a replying affidavit from the respondent. The interim injunction being sought by the plaintiff hinges on the infringement of copyright of his Architectural designs. The plaintiff/applicant has described the infringement and violation against the defendants. According to the affidavit evidence the interim interdict is to restrain and prohibit the use of the designs in the on-going development project undertaken by the 1st and 2nd defendants. The burden of proof in this case exist to warrant grant of interlocutory injunction lies on the plaintiff/applicant. At the outset it will involve presentation of facts and law to support his version of the case. On examination of the respondent and applicant affidavits there are stand alone averments. As to whether this is an infringement of copyright or professional misconduct. I note that in the rebuttal evidence the respondent invited the court to take cognizance of the fact that the injunction is to be targeted at future developments. This is also supported by the applicants' assertion in the declarations and affidavits.

As things stand from rival submissions of both parties is there a copyright infringement or likelihood of being infringed? The answer to this question requires further interrogation which this court is not capable of resolving at the interim stage of the trial. To what extent as the plaintiff applicant shown the court how the 3rd and 4th respondents came to be in possession of his architectural designs. To my mind, there is scanty evidence to resolve this contestation.

Faced with these formulations can one say justifiably that the plaintiff has persuaded this court on the burden of proof on prima facie case as defined in the ***Mrao Limited Versus First American Bank Limited & 2 others 003 KLR 2005, Giella Versus Cassman Brown (Supra)***. In applying the prima facie test serious questions to be tried must emerge at this interlocutory stage. That is why the general requirement is for the applicant to establish a sufficient likelihood of success to justify interim conservatory orders pending the trial. It is clear from this case the plaintiff/applicant has no problem in the designs being used in respect of Kajiado/Kaputiei North 32248 but on future developments. By far the most difficult question to my mind lies on the approval of the Architecture plans under reference number P/761/2015 and the purported subsequent approval under license P/306/2017 dated 29th September 2017. The approval of architectural designs and plans is a matter regulated by law.

In these circumstances it seems to me that entire contest between the parties is tainted with non-disclosure of relevant material facts. Their conduct is therefore in question as they approach the Equity court for a relief on injunctions to enforce and protect the plaintiff's primary rights. If the architectural plans in dispute have received necessary approvals by relevant organizations and institutions under whose authority was application made. Is the injunction being sought speculative or is based on really threats of infringement or violations of infringement of copyright. Am not sure whether the applicant in my view has placed before this court an answer to that question. In exercising the equitable jurisdiction, the nature of the evidence presented to vindicate the rights by way of an injunction is relevant.

It is a legal maxim that equity does not act in vain. The court is at pains on how the subject matter of the claim can be protected through an interim order of injunction where circumstances emerging to be insufficient. Is there a possibility that there is no future development in which these designs are capable of being utilized in actualizing the constructions of houses. These are matters within the ambit of the trial court.

This particular Architectural designs and plans are in the Physical custody of a third party. The information discloses that there has been a breach of an obligations and trust held between the plaintiff and the 2nd defendant.

What extent has the plaintiff contributed to such infringement complained of?

Generally, the entire claim invites the court to make reference to contractual relationship between the parties. In my view to prevail on the claim the plaintiff applicant must proof four elements that there is no valid contract existed with the respondent in possession of his designs and plans. The respondent had the knowledge in regards to the architectural resins and drawings were not properly obtained under the contract. That the respondent acted intentionally and improperly in the manner they acquired the designs and plans. The burden is on the plaintiff to proof elements of the claim that the acts of copyright infringement was not justified to be availed equitable relief of injunction. This court is without the benefit of an evidentially hearing to fully clarify out the facts that may be presented in the trial at an inter-partes hearing.

The other consideration is whether damages would be adequate remedy. It is not disputed that the plaintiff is an Architect by profession. He was hired and engaged by Nature Green Limited to provide Architectural consultancy services. The materials and designs subject matter of this suit were apparently meant for use by Nature Green Limited. The plaintiff and the 2nd defendant are directors of Nature Green Limited. Indeed, as stated elsewhere in the affidavit of Douglas Okeyo Oluoch he is also a director of Pinnacle Developers Limited. The 1st defendant to the claim. The task of trying to track down how the 1st defendant came to apply the Architectural designs meant for another project without approval of the plaintiff has not been clearly articulated from the affidavits.

From a practical point of view Architectural designs and plans are statutory protected pursuant to the provisions of the Architects and Quantity Surveyors Act Cap 525. The applicant has to demonstrate that the infringement complained of is not capable of being compensated by way of damages. In copyright law the court arguably engages in the assessment of the likelihood of confusion test between the contested Architectural designs and the copyrighted plans or designs to see whether there are similarities. That examination is unlikely to be established at interlocutory stage where no evidence has not been adduced save for parties' reliance on protracted disposition in affidavits.

Considering the foregoing am of the considered view that the plaintiff/applicant has not established a prima facie case for the ultimate

requested relief of injunction

The second issue is whether the 1st and 2nd applicants (Bon-Arch Associates Limited and PETER Oluoch Ojwang) should be struck out of the proceedings.

A good place to begin the discussion of the application dated 20th November 2017 is to restate the provisions under order 1 of the Civil Procedure Rules.

Rule 6 provides:

The plaintiff may at his option join as parties to the same suit at or any of the persons severally or jointly and severally liable on any one contract including parties to bills of exchange and promissory notes.

to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable and to what extent, may be determined as between all parties.

Rule 8: where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them...

Rule 9: no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every sheet deal with the matter in controversy so far as regards. The rights and interests of the parties actually before it.

Rule 10: where a suit has been instituted in the name of the right plaintiff the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

The court may at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been joined, whether a plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

The Court of Appeal has addressed the general workings of order 1 in significant details most notably in the following decisions.

(Trusted Society of Human rights Alliance Versus Mumo Matemu and 5 others 2014 EKLK) the court stated as follows:

“A suit in court is a solemn process owned solely by the parties. This is the reason why there are laws and rules, under the Civil Procedure Act, regarding parties to suits and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it”.

In a similar case illustrating order 1 Rule 10 (2) in the case of Jan Bolden Nielsen Versus Herman Phillipus Steyn & 2 others (2012) eKLR. The court held as follows:

“in my view, a necessary party is a person who ought to have been joined as a party and in whose absence no effective decree can be passed in a proceeding by the court if a necessary party is not impleaded, the suit may be a non-starter as the reliefs sought is granted may be ineffective.”

Further in the case of **Marwala Versus Pandia Dwarka NATH HCC EKLR 2012** the court pronounced itself as follows:

“This application under Article 1 Rule 10(2) to strike out the second defendant is misconceived as the ground on which he seeks to be struck out amounts in substance to a defence on a point of law namely his non-liability upon actions in tort at the time when the cause of action arose:

That being so, the proper course would have been to file a defence and to plead this point on it under order 6 Rule 27...”

On the same principles from the **English case of Amon v Raphael Tuck and Sons Ltd [1956] 1 ALL ER 273** it was held as follows:

In an answer to the question, who is a necessary party to the suit?

“the party to be joined must be someone whose presence before the court is necessary as a party. What makes a person a necessary party...” the only reason which makes a party to an action is so that he should be bound by the result of the action, and the question to be settled; therefore, must be a question in the action, which cannot be effectively and completely settled unless he is a party. It is not enough that the intervener should be commercially or indirectly interested in the answer. The person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally. That is by cartelling his legal rights.

That will not be the case unless an order may be made in the action which he is legally interested”.

In the present instant application when applying the above legal principles, the question cause I ask myself is whether it is desirable and necessary that the 3rd and 4th defendants be struck out as parties to the suit?

In answer to this question I found it helpful to review the facts of the plaint filed in court on 6th November, 2017. The plaintiffs’ claim is based squarely under paragraph 9 which read as follows:

“On or around September, 2017, the 2nd defendant as a director of the 1st defendant without the plaintiff’s authority and knowledge included the 3rd and 4th defendants to reproduce the plaintiff’s drawings without his knowledge and consent by measuring an existing maisonette designed by the plaintiff near property title number Kajiado /Kaputiei /32248. The plaintiff prayed for declaration against the defendants jointly and severally on both permanent injunction and award of damages. “

The plaintiff filed an affidavit to challenge the application to strike out the applicant from being struck out as parties in the suit. The main contention by the plaintiff is that he had been consulted to provide Architectural consultancy services for Nature Green Holdings Limited. According to the plaintiff the disputed Architectural drawings are designed for development in suit land other than LR Kajiado/Kaputiei North/32248. In essence, the plaintiff argument is that he has not been consulted nor instructed to provide architectural designs or drawings by the defendant to be used in the current development. This arrangement deposes the plaintiff is an infringement of copyright made under his hand and authority to be used in another site without his consent.

The answer in response to this issue the respondent explained that during the briefing on background information the approved building plans passed on from their former employee Donald Muhonda Adolo were handed over for use in the project. That therefore argued the applicant made them understand that the plans had been obtained for value from the plaintiff.

I have reviewed the application alongside the submissions from the Learned Counsel in this matter. The standard on how order 1 should be articulated in the decisions cited elsewhere in this ruling. Order 1 of the Civil Procedure rules 2010 provides the party classification which now is part of our jurisprudence in this area. In my considered view from the material and affidavits by the parties themselves the claim by the plaintiff cannot go forward in absence of the 3rd and 4th defendants. Weighing the pros and cons of the notice of motion dated 20th November 2017 the 3rd and 4th defendants are indispensable parties and striking them out at this stage will water down the plaintiff’s claim. It is therefore obvious to me in applying order 1 and in exercise of judicial discretion based on the legal principles on joinder or misjoinder of parties to a suit this application falls at the doorstep of the applicant.

I agree with the evidence placed before me that the 3rd and 4th defendants are necessary and indispensable parties who ought to remain in the suit to enable this court to determine the entire dispute and do justice to the claim.

Accordingly, the notice of motions dated 20th November 2017 and one dated 6th November 2017 are hereby dismissed with cost.

Dated, delivered and signed in open court at Kajiado on 21st March 2018.

.....

R. NYAKUNDI

JUDGE

Representation:

Mr. Ojwang Counsel for the 3rd and 4th defendants Mr. Karanu for Kimani for the plaintiff/applicant Mr. Mateli Court Assistant