



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.248 OF 2018

IRENE KEMUNTO ONGORI.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....DEFENDANT

RULING

1. The application before me is brought pursuant to provisions of the law on the face of the application and basically seek the following orders:-

- 1) That this Honourable court be pleased to grant the Plaintiff leave to amend the Plaintiff as proposed in the annexed copy of the Amended Plaintiff.
- 2) That this Honourable court be pleased to enjoin Isaack Mwise as a Defendant in this suit.
- 3) That the costs of this Application be provided for.

2. The application is based on the grounds on the face of the application and supported by affidavit of Irene Kemunto Ongori dated 1st December 2017.

3. The intended 2nd defendant is opposed to the application and has filed Replying affidavit dated 3rd May 2018.

4. The court directed that the application be determined by way of written submissions giving the Plaintiff/Applicant 14 days to file written submissions and serve the 2nd intended Defendant; who was also given 14 days to file his response. The Plaintiff/Applicant filed submissions on 13th August 2018 and by the time of mentioning this matter on 3/10/2018 to confirm filing of submissions and setting date for ruling the 2nd intended defendant had not complied with the court's order; hence the matter was set down for ruling on 22/11/2018.

5. I have perused the Plaintiff/Applicant's application, affidavit in support dated 1st December 2017; the 2nd intended Defendant Replying affidavit dated 5th May 2018 as well as the submissions by the Applicant dated 10th August 2018 and annexures thereto. The issues for consideration in this application are as follows:-

- a) **Whether the Plaintiff/Applicant has established sufficient grounds to warrant leave to amend the plaintiff?**
- b) **Whether the Plaintiff/Applicant has met the threshold for warranting granting orders for enjoining of the 2nd intended Defendant as a party in this suit?**

A) Whether the Plaintiff/Applicant has established sufficient grounds to warrant leave to amend the plaintiff?

6. The Plaintiff/Applicant seeks leave of this court to amend the plaintiff to seek relief for the impugned sale and transfer of **L.R No. 13869/5** by the defendant Bank to Isaac Njiru Mwise, the proposed 2nd defendant, in the alleged exercise of its statutory power. It is further averred that the proposed 2nd Defendant is proper and necessary party in the proceedings to enable this court effectively and completely adjudicate and settle all the material questions arising and involved in the suit. It is also urged the proposed amendment is necessary in order to determine the real issues in controversy between the parties as well enable the court to adjudicate the matter justly and conclusively. That the defendant would not suffer any prejudice from the proposed amendments, which can't properly be compensated with costs. That the court has jurisdiction to grant the Applicant leave to amend the plaintiff at any stage of the proceedings.

7. The application is opposed and the proposed 2nd Respondent urges that he is a bona fide purchaser for value; that he was not privy to the charge agreement between the plaintiff and the defendant hence a stranger in this suit; that section 99 of the Land Act encompassed the right of the chargor prejudiced by unauthorized, improper or irregular exercise of power of sale to have a remedy in damages against the person exercising the power; that the redress sought by the plaintiff on improper exercise of statutory power of sale in this case should be obtained against the defendant; the application is ill timed and misguided and that no benefit whatsoever would be derived from such enjoining as the plaintiff has not disclosed any reasonable cause of action against the 2nd proposed defendant and lastly the application is frivolous, vexatious and scandalous.

8. In the draft annexed plaint paragraph 11, the applicant has asserted that the process leading up to the purported sale and transfer of the suit property to the proposed 2nd defendant is tainted with impropriety, fraud and illegality, particulars whereof the fraud, conspiracy and malice attributed to both the defendant and the proposed 2nd defendant are well set out. On the basis of the aforesaid allegations of facts it is asserted that the alleged sale is null and void; challenging the subsequent transfer of the suit property to the 2nd proposed defendant on grounds of fraud, illegality and impropriety for which the Applicant has indicated she would be seeking to set aside the impugned sale and cancel the transfer in favour of the proposed 2nd defendant.

9. Order 1 Rule 10(2) of the Civil Procedure Rules provides:-

"(2) 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 as 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."

10. The proposed 2nd defendant's argument is that no reasonable cause of action has been disclosed against him to warrant his enjoinder in these proceedings and in support of this argument referred to the case of **Mary Wambui Njuri Vs. Cooperative Bank of Kenya Hccc No. 1552 of 2001**. The Applicant, in the above mentioned case was the purchaser of the Suit Property following the bank's exercise of its statutory power of sale. She moved the court for orders to strike out the suit on the grounds that it did not disclose a reasonable cause of action against her. The Applicant alleges that since the property had been transferred pursuant to Section 77 of the Registered Land Act, the Plaintiff's remedy, if any, lay in damages against the Chargee and the Auctioneer. Pointedly rejecting that argument, the Hon. Justice Ochieng, held; that court decisions suggest that the fact of registration of a transfer to a purchaser does not always provide full proof protection. If the process leading up to the sale and transfer was illegal or fraudulent, the transfer could be challenged and the Plaintiff may adduce evidence to prove fraud or conspiracy at the trial.

11. Similarly in the case of **Elegant Freighters Vs Oriental Commercial Bank (Formerly Delphis Bank Limited) Hccc 66 of 2005**; the Applicant moved the court for orders to amend the Plaint and to enjoin 2 new parties as Defendants in the suit. Granting the Orders, Hon. Mr. Justice Ochieng made the following terse pronouncement:-

"...since the Plaintiff's have indicated an intention to plead fraud in the draft amended plaint, I find that there is a possibility that it may have a claim that could be sustainable against the defendant and the proposed additional defendants. I say so because a sale that was otherwise deemed valid, can be set aside on the grounds of fraud. As fraud has been alleged, I hold the view that it is best to allow the plaintiff to enjoin the proposed new defendants, and also to amend the Plaint, so that all the matters in issue can be conclusively determined. By being made parties to the suit, the purchasers would have the opportunity to prove that they acquired title lawfully, rather than fraudulently."

12. In the instant application; the proposed 2nd defendant objects to the amendment of the plaint and to being enjoined on the grounds of being a bona fide purchaser for value and for not being privy to the charge between the plaintiff and the defendant herein and for having been registered as the proprietor of the suit property and pointing out the chargor who is prejudiced by unauthorized, improper or irregular exercise of power of sale has remedy in damages against the person exercising the power of sale. I have considered the pleadings in this matter in which the Applicant alleges the sale was tainted with impropriety, fraud and illegality, conspiracy and malice attributed to both the defendant and the proposed 2nd defendant. I do not agree with the assertion by the proposed 2nd defendant that all sales and transfer always insulates the purchaser from any action for his wrongs (*if any*). That if it can be proved the whole process leading to the sale and subsequent transfer was illegal or was secured through fraud: conspiracy or malice, the sale and transfer could be cancelled. In such a situation the court may consider granting orders for amendment and enjoining a proposed party so that all real matters in dispute or issues may be determined and ensure fair and just trial is conducted in the interest of substantive justice.

13. In the case of **Martin Wesula Machyo Vs. Housing Finance Company of Kenya & Njiru Enterprises ELC 665 of 2013**, the Hon. Mr. Justice Mutungi not only enjoined the purchaser but also granted the Applicant leave to amend the Plaint the Hon. learned Judge stated as follows:-

"The Plaintiff has made allegations of fraud against the Defendants and has further contended that the purported sale of the suit property was irregular, unlawful and null and void ab initio. A determination thereof and the remedies available to the Plaintiff can only be discerned after a full trial. The 1st Defendant contends that the proposed 3rd Defendant is an innocent purchaser for value who is protected by Section 99 of the Land Act. That section does not offer protection to a purchaser where there is fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which the purchaser had actual or constructive notice. These issues can only be determined at the trial where the proposed 3rd Defendant is afforded an opportunity to participate and respond to the issues. It is therefore only fair and just to join the proposed 3rd Defendant to avert a situation where adverse orders affecting his title be issued without him being given an opportunity to be heard. The proposed 3rd Defendant will not be prejudiced in any way since any defence available to him will be open to him as if the proceedings are being instituted at the time of allowing the amendment. Atieno Vs. Omoro (1985) KLR 677."

14. In view of the serious allegations made in this application against the defendant and the proposed 2nd defendant, being allegations of fraud and illegality in the process of sale and transfer of the suit property levelled against the defendant and the proposed 2nd defendant, and which allegations cannot be fully determined in this matter without involving both the defendant and proposed 2nd defendant I find that the allegations are sufficient grounds to warrant enjoining the proposed 2nd defendant so that all matters in controversy can be effectively and conclusively determined at the trial. I find further the proposed 2nd defendant would not be prejudiced being enjoined in this matter as he will have an opportunity to give his story and defence.

B. Whether the Plaintiff/Applicant has met the threshold for warranting granting orders for enjoining of the 2nd intended Defendant as a party in this suit?

15. Order 8 Rule 5(1) of Civil Procedure Rules provides:-

"(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."

16. In the case of **Central Bank of Kenya Limited Vs. Trust Bank Limited [2000] 2 E.A 365 at page 368**; it was stated as follows:-

"It is also trite law that as far as possible a litigant should plead the whole of his claim which he is entitled to make in respect to his cause of action. Otherwise, the court will not later permit to re-open the same subject of litigation. (See Order 11, Rule 1 of the Civil Procedure Rules), only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend, that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendments or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."

17. In the view of the above, I find, that the Civil Procedure allows amendment of the pleadings and joinder of parties and that leave to amend, the pleadings can be granted or allowed at any stage of the pleadings, on conditions such amendments, or joinder as the case may be, will not result in prejudice or injustice to the party being joined which cannot be properly compensated for his costs. The principle as I understand it is to do substantive justice to the parties in a suit.

18. The upshot is that I find the application dated 1st December 2017 meritorious and allow the same. I proceed to make the following orders:-

- a) **The Plaintiff/Applicant is granted leave to amend the plaint as proposed in the annexed copy of the Amended plaint; which amended plaint should be filed and paid for with 15 days from the date of the ruling.**
- b) **The Plaintiff/Applicant is allowed to enjoin ISAAC NJIRU MWIGE as a 2nd defendant in this suit.**
- c) **Costs of the application be in the cause.**

Dated, signed and delivered at Nairobi this 29th day of November, 2018.

J .A. MAKAU

JUDGE