



REPUBLIC OF KENYA
THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT. NO 12 OF 2016

ZENITH REALTORS CO. LTD.....PLAINTIFF

- VERSUS -

NGENDA LOCATION RANCHING CO. LTD.....1ST DEFENDANT

STIMA INVESTMENT CO-OP SOCIETY.....2ND DEFENDANT

R U L I N G

1. The application dated 22nd December 2016 was filed by the 2nd defendant. It seeks orders that the name of the 2nd defendant be struck from the proceedings and that the plaintiff bear the costs of the application and suit. The application is brought on the grounds that the plaintiff has sued the defendant wrongly and that the defendant continues to suffer financial prejudice and injustice as a result of the suit.

2. The background to the suit as set out in the plaint and the present application is that the 2nd defendant purchased land parcel LR No.9264/2 measuring approximately 251.24 acres from the 1st defendant. The plaintiff alleges that prior to the sale agreement the 1st defendant contracted the plaintiff to source buyers for the said parcels at a reserve price of Kshs.450,000 per acre. That on the basis of that agreement the plaintiff got the 2nd defendant to buy the said land at a negotiated price of 650,000 per acre. They allege that subsequently the 1st and 2nd defendants directly entered into a sale agreement whereby the 2nd defendant purchased the land at Kshs.640,000 per acre thereby denying the plaintiff a possible commission amounting to Kshs.47,735,600/=. The plaintiff consequently filed suit to enforce the payment of the said commission.

3. The 2nd defendant feels that they have been wrongly sued and have brought the present application seeking to be removed from the proceedings. **Nelson Irungu**, the CEO of the 2nd defendant has sworn a supporting affidavit. He avers that the 2nd defendant was a stranger to all allegations in the suit; that it was not party to any agreement made between the plaintiff and 1st defendant regarding any payment of commission fees; that the sale agreement between 1st and 2nd defendants did not include a term for payment of a commission to the plaintiff. Finally, he deposes that the suit was misconceived, bad in law and legally untenable as against the 2nd defendant and ought to be dismissed; and, in the alternative, the 2nd defendant be struck out of the suit for being wrongly enjoined.

4. The application is opposed by the plaintiff/respondent. **Francis Muriuki Kinyua**, a director of the plaintiff company swore a replying affidavit objecting to the removal of the 2nd defendant stating that

such an action had no basis in law and that the law only provides for striking out of a suit. He deponed that the 2nd defendant was well aware of the commission contract between the plaintiff and the 1st defendant. At paragraph 14 of the Replying Affidavit he admits that the 2nd defendant was not party to the said contract but was culpable for the tortious conduct of inducement to breach the commission contract and was therefore a proper party to the suit.

5. In oral submissions, **Ms. Mumbi** learned counsel for the applicant stated that under **Order 4 Rule 4**, the plaint must show the defendant's liability in the claim and that in the present case, there was no cause of action against the 2nd defendant. She further submitted that the claim disclosed no relationship between the plaintiff and the 2nd defendant and further that the applicant never sought the services of the plaintiff.

6. **Ms. Alwala** learned counsel for the respondent relied on the Replying Affidavit of **Francis Muriuki Kinyua** sworn on 23rd March, 2017. While admitting that the 2nd defendant was not a party to the agreement for payment of commissions, counsel submitted that the 2nd defendant was aware of the existence of such an agreement between the plaintiff and the 1st and 2nd defendant and circumvented the commission contract. **Ms. Alwala** cited **Bamburi Portland Cement Company Ltd –V- Imranali Chandbhai Abdulhussein (1996) eKLR and Gideon Angachi Anyinya & 10 Others –V- West Kenya Sugar Limited (2012) eKLR** to support the submission and proposition that it was a violation of the plaintiff's legal right to interfere with contractual relations without justification.

7. The issue before me as far as I can discern from the opposing affidavits and oral submissions by respective counsel is whether the 2nd defendant has wrongly been enjoined in the suit and therefore deserving of the orders sought.

8. **Order 2 R 15** which the applicant relies on relates to the striking out of pleadings. Any pleading may be struck out or amended where it discloses no reasonable cause of action or defence in law; or is scandalous, frivolous or vexatious or may prejudice, embarrass or delay the fair trial of the action; or is otherwise an abuse of the process of the court. A more relevant provision in his application would however be **Order 1 Rule 10 (2)** which expressly provides for the removal of a party in the following terms:-

“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.”

Order 1 Rule 16 on the other hand provides that the plaintiff may at his option join as parties to the same suit all or any of the persons severally or jointly while **Order 1 Rule 7** provides that where the plaintiff is in doubt as to whom to obtain redress, the plaintiff 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 the parties.

9. It is clear from the pleadings that there was a land sale agreement executed between the 1st and 2nd defendants wherein the 2nd defendant purchased land from the 1st defendant. It is also clear that there was some communication between the plaintiff and the 1st defendant with respect to the plaintiff being made a commission agent of the 1st defendant. This agency is however disputed and is at the heart of the suit. It is as it were a matter for determination by the trial court. Whether the said agency attracts or attaches any liability if at all to the 2nd defendant is also a matter for resolution by the trial court. It is not clear to the court at this interlocutory stage whether or not the 2nd defendant would be liable in any manner on the agreement between the plaintiff and 1st defendant. In a clearer case (which this case is

not), the court would have no hesitation in allowing the application as provided by **Order 1 Rule 10 (2)** above.

10. Following the above, and in view of the provision of **Order 1 Rule 7**. I find it premature for the court at this stage to deny the plaintiff the right to sue the 2nd defendant. Clearly **Order 1 Rule 7** aforestated gives the plaintiff that right. In the event that the 2nd defendant would have been wrongly enjoined, the inconvenience visited upon it would be compensable in costs.

11. The application dated 22nd February 2016 is thus not merited and is dismissed. Costs shall be in the cause.

Ruling delivered, dated and signed in open court this 24th day of October, 2017

R. LAGAT- KORIR

JUDGE

In the presence of:

C/A Emojong

Mr. Kambo for applicants

N/A for respondent