



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 326 OF 2015

ANNE NAANYU KILELE.....CLAIMANT

VERSUS

CASE TRADING COMPANY LIMITED.....RESPONDENT

BERNARD KIPLANGAT KILELE & RONALD KILELE.....INTERESTED PARTIES

RULING

1. The application before me is for joinder of 2 persons, who have described themselves as “*Interested parties?*”. The said 2 persons are **BERNARD KIPLANGAT KILELE** and **RONALD KILELE**.
2. **RONALD** and **BERNARD** are brothers. They assert that they had picked out from the open market, the 2 apartments which are the subject matter of this case.
3. Thereafter, the Applicant, **ANNE NAANYU KILELE**, is said to have appointed the Law Firm of **W.G. WAMBUGU & COMPANY ADVOCATES** to act on behalf of the Interested parties, in relation to the purchase of the 2 apartments.
4. After the agreements for sale had been executed, it is said that a deposit of 50% of the purchase price was remitted.
5. The Interested parties described themselves as the beneficiaries of the 2 apartments. I understand that to mean that the apartments were being purchased for their benefit.
6. The concern of the Interested parties was that the Applicant was holding the balance of the purchase price, but was not remitting the same to the vendor.
7. It is alleged that the Applicant had no interest in concluding the sale agreement.
8. Therefore, the Interested parties wish to be enjoined to the suit, so that they could thereafter be in a position to exert pressure on the Applicant, to remit the balance of the purchase price.
9. The Interested parties would, in the alternative, wish to have the opportunity to ask the court for orders to compel the Applicant to pay rents for them, from the interest accruing from the balance of the purchase price “*in their control if any or at all?*”.

10. Unless the court intervenes and allowed them to fight for their rights, the Interested parties say that they would be highly prejudiced and that they will suffer injustice.

11. As far as the Interested parties were concerned, the court should permit them to be enjoined to the suit because they had been vigilant: they had not been indolent.

12. The Interested parties' view was that the Applicant had not handled the case with the integrity it deserves, in spite of the Respondents willingness to transfer the 2 apartments, upon receipt of the balance of the purchase price.

13. In their written submissions, the Interested parties made it clear that their reason for wishing to be enjoined into the suit was that that would enable them to ensure the expeditious disposal of the suit, and;

“that they can fight for their rights and interests?.

14. The rights and interests of the Interested parties are said to stem from the fact that they were beneficiaries.

15. The Applicant and the Respondent did not file any replying affidavits or grounds of opposition. Therefore, the Interested parties urged the court to treat the application as un-opposed.

16. Whereas no replying affidavit or grounds of opposition were lodged in court, that did not necessarily mean that the application was unopposed.

17. A respondent who fails to file a notice of preliminary objection and/or a replying affidavit; and/or a statement of grounds of opposition, risks having the application against him heard *ex-parte*.

18. Order 51 Rule 14 (4) of the Civil Procedure Rules provides that;

“If a respondent fails to comply with subrule (1) and (2), the application may be heard *ex-parte*?.

19. In this case the Applicant filed written submissions, to respond to the application. The said submissions were filed after the Applicant had sought and had been granted leave by the court to do so.

20. Through the submissions, the Applicant gave a factual background to the case. In my considered opinion, the use of submissions as a medium through which to canvass factual evidence is inadmissible.

21. Evidence should be tendered either orally or by way of affidavits.

22. Accordingly, any evidence which the Applicant has presented to court, packaged as submissions, will be completely disregarded.

23. However, the court will take into consideration the submissions on issues of law.

24. The court records show that the dispute between **CASE TRADING COMPANY LIMITED and ANNE NAANYU KILELE** was in relation to apartments A5 and B5 at the **WATERSIDE APARTMENTS**.

25. The dispute was about the validity and the performance of obligations spelt out in the Sale Agreements dated 30th December 2009. The records show that **ANNE NAANYU KILELE** was the claimant, whilst **CASE TRADING COMPANY LIMITED** was the respondent.

26. The dispute was referred to arbitration, and on 11th December 2014, the arbitrator notified the parties that he had made a determination.

27. In his award, the arbitrator held that the respondent was obliged to complete the Sale Transaction.
28. As soon as the arbitrator determined the issues between the parties, the matters in dispute were concluded.
29. The next step was to have the arbitral award recognized as a judgement of the court, so that it could thereafter be executed.
30. The applicant moved the court with an application for the recognition of the arbitral award.
31. Meanwhile, the respondent moved the court with an application seeking to set aside the award.
32. Whilst those applications were still pending, the Applicant learnt that the 2 apartments which were the subject matter of the arbitral award, had been disposed of. At that stage, the Applicant sought the leave of the court to cross-examine the respondent.
33. The court granted leave to the applicant to cross-examine the respondent.
34. On 4th February 2016, the cross-examination of **Mr. JOSEPH CIIRA**, a director of **CASE TRADING COMPANY LIMITED**, commenced.
35. Whilst the cross-examination was still pending, the Interested parties filed their application.
36. The reason I have set the record straight, using information obtained from the court file, is because it is evident that the Applicant has consistently been pro-active in the cases between her and the respondent.
37. Secondly, the Interested parties have not indicated the nature of any legal issue or issues which they would wish to canvass, if they were enjoined to the case.
38. They are not parties to the arbitral award, and therefore, they cannot participate in proceedings seeking to either adopt the award or to set aside the said award.
39. It would appear that the Interested parties have some misgivings about the pace at which the applicant was moving the case forward.
40. From the particulars which I have obtained from the court records, the misgivings of the Interested parties do not appear to have any foundation.
41. But even if the Applicant had been slow in taking steps to resolve the dispute between her and the company, I hold the considered view that that would not constitute a good enough reason for ordering that the Interested parties be enjoined to the suit.
42. Assuming that the Applicant was being deliberately slow in moving forward the case, and that the said slow pace was prejudicial to the Interested parties, that could, (*if true*), give reason to the Interested parties to take action against the Applicant only. It would not be a reason to warrant the joinder of the Interested parties to this suit.
43. Before concluding this ruling, I note that the Interested parties expressed the view that the respondent was ready and willing to transfer the 2 apartments, as soon as the balance of the purchase price was paid. That belief appears to me, to be based on anything other than the material currently before the court.
44. At the moment, it does appear that the hindrance to the transfer of the 2 apartments is the fact that the said apartments had already been transferred to a Third Party, **THATCH LIMITED**.
45. The directors of Thatch Limited are;

a) Joseph Ciira; and

b) James Njuguna

46. According to Joseph Ciira, his co-director, James Njuguna, is his son.

47. Considering that Joseph Ciira is also a director of **CASE TRADING COMPANY LIMITED**, I find it amusing that the Interested parties should believe that Case Trading Company Limited were ready to transfer to the Interested parties a property which Case Trading Company Limited had already transferred to Thatch Limited.

48. In the result, I find no merit in the application by the Interested Parties. Therefore, the court rejects their request to be enjoined tot his suit.

49. The Interested parties are ordered to pay to the Applicant, **ANNE NAANYU KILELE**, the costs of the application dated 17th December 2015.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of September 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kirumbi for Mrs. Wambugu for the Claimant

Waweru for the Respondent

Waweru for Mutai for the Interested Parties

Collins Odhiambo – Court clerk.