



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 312 OF 2014

MICHAEL ODHIAMBO OPIYO..... PLAINTIFF

VERSUS

EQUITORIAL COMMERCIAL BANK LTD.....1ST DEFENDANT

JOHN M. MBIJIWE (an auctioneer trading as

BEALINE KENYA).....2ND DEFENDANT

JOSEPH MUNGAI (an auctioneer trading as

GIKONYO GARAM INVESTMENT)..... 3RD DEFENDANT

EVANSON KAMAU WAITIKI.....4TH DEFENDANT

STEPHEN K. KANGETHE (an auctioneer trading as

DALALI TRADERS).....5TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 10th March 2014 in which the Applicant/2nd Defendant in the Counterclaim sought for the following orders:

1. That the Counterclaim filed herein by the 4th Defendant against the Plaintiff and the Applicant/2nd Defendant in the Counterclaim be excluded and/or severed from this suit.
2. That until the determination of this Application, the need for the Applicant/2nd Defendant in the Counterclaim to file a Reply to the said Counterclaim be suspended and/or stayed.
3. That the costs of this Application be awarded to the Applicant/2nd Defendant in the Counterclaim to be borne by the 4th Defendant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of John Wananda, the Applicant/2nd Defendant in the Counterclaim, sworn on 10th March 2014 in which he averred that he had been unilaterally enjoined into this suit without a formal application being

filed to seek the court's leave for such joinder. He further averred that the main suit and the Counterclaim deal with mutually exclusive causes of action and the two cannot conveniently be heard and determined simultaneously in the same suit. To illustrate that point, he averred that the main suit deals with recovery of a security by a Bank while the Counterclaim deals with boundary disputes and allegations of encroachment, that while the main suit belongs to the Commercial and Admiralty Division of the High Court, the Counterclaim belongs to the Environment and Land Court, that while the main suit deals with the property Kajiado/Kaputei-North/4730, the Counterclaim deals with developments allegedly made in a separate neighbouring property Kajiado/Kaputei-North/4731 and further that the parties involved in the main suit are separate and different from those involved in the Counterclaim. He further averred that although the said neighbouring property Kajiado/Kaputei-North/4731 is still registered in his name, the 4th Defendant is fully aware that he is not in occupation thereof as he is in the process of selling and transferring the same to the Plaintiff, that after eviction of the Plaintiff by the 4th Defendant sometime in April 2013, a group of the Plaintiff's friends approached him and beseeched him to allow the Plaintiff and his family to stay on his said neighbouring property, that the same group of the Plaintiff's friends requested him to sell his said property to them to enable them to permanently settle the Plaintiff thereon, that he accepted the said proposal and accordingly allowed the Plaintiff to take possession of the property pending the completion of the sale and transfer.

The Application is unopposed.

I will consider each of the points raised by the Applicant/2nd Defendant in the Counterclaim to arrive at a decision as to whether to grant him the prayers he seeks.

1. The first point is that the causes of action in the main suit and the Counterclaim are different. From the pleadings filed herein, it is clear to me that the main suit involves the purported exercise of the statutory power of sale by the 1st Defendant over the property identified as Kajiado/Kaputei-North/4730 (hereinafter referred to as the "suit property") which the Plaintiff had charged to it. However, the Counterclaim is an action commenced by the 4th Defendant against the Plaintiff and the Applicant wherein the 4th Defendant seeks to stop the Applicant from carrying on certain activities on the parcel of land known as Kajiado/Kaputei-North/4731 (hereinafter referred to as the "neighboring property") which lies adjacent to the suit property. With this background, it is clear to me that the cause of action in the main suit is distinctly different from the cause of action in the Counterclaim.
2. The second point is that the main suit belongs to the Commercial & Admiralty Division while the Counterclaim should be determined in the Environment and Land Court. To this point, I would say that the entire suit including the Counterclaim can be heard and determined in the Environment and Land Court. Both matters are therefore before the right court.
3. Apart from the causes of action in the main suit and in the Counterclaim being different as I have stated above, it is also true that the parcels of land forming the subject matter of the main suit is different from the subject matter of the Counterclaim. The main suit deals with the suit property while the Counterclaim deals with the neighbouring property.
4. The last point made by the Applicant is that the parties in the main suit and in the Counterclaim are different. I agree. The parties in the main suit are the Plaintiff, the Bank which holds a charge over the suit property, the auctioneers engaged by the Bank to sell off the suit property and the party that purchased the suit property in the public auction. The Counterclaim on the other hand has the Applicant as one of the parties.

From the foregoing, it is clear to my mind that the Applicant has been wrongly joined into this suit as a party. The causes of action are different, the property the subject matter of the main suit and Counterclaim is different and the Applicant has no business being made a party to this suit. If the 4th Defendant wishes to pursue the Applicant in respect of his activities in the neighboring property, he is at liberty to file a fresh suit against him.

However, it is not tenable to maintain the Applicant in this suit and I do hereby allow the Application and further order that the 4th Defendant bear the costs of this Application.

DELIVERED AND SIGNED AT NAIROBI THIS 24TH

DAY OF APRIL 2015.

MARY M. GITUMBI

JUDGE