



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC NO. 1136 OF 2004

JOSEPH KOTONYA AKETCH.....PLAINTIFF

VERSUS

N.S.S.F BOARD OF TRUSTEES.....DEFENDANT

AND

JOHN NGARUIYA.....INTERESTED PARTY

RULING

The dispute between the parties is in respect of two properties in Mountain View Estate LR No. 12948/172 and LR No. 12948/173 (suit properties). The Interested Party on 3/12/2003 entered into a Tenant Purchase Agreement with the Defendant for the purchase of the two premises. During the pendency of the Purchase Agreement between the Defendant and the Interested Party, the latter let out the premises to the Plaintiff and subsequently entered into a Purchase Agreement on 4/6/2004. Thereafter, the Defendant on 10/6/2004 sought to levy distress for rent arrears resulting to the Plaintiff filing this suit seeking to restrain the Defendant from levying distress. Following the attempt to levy distress, the Plaintiff instituted a suit against the Interested Party **HCCC No. 786 of 2004 Joseph Kotonya Aketch v John Ngaruiya & Rosemary Njeri Ndenderu**. In turn, the Interested Party instituted a suit against the Defendant **HCCC 1147 OF 2005 John Ngaruiya & Rosemary Njeri Ndenderu v NSSF Board of Trustees** wherein the Interested Party sought orders of injunction against the Defendant from selling the suit properties to a third party and a declaration that he is a beneficial owner of the same by virtue of the existing Tenancy Agreement.

Notably, **HCCC No. 786 of 2004** and **HCCC 1147 OF 2005** pend determination. However, this suit was dismissed for want of prosecution and this court ordered the Plaintiff to yield vacant possession and in default, the Defendant to instruct a licensed Auctioneer to undertake the repossession. Following this order, the court directed the Defendant to file a formal application to enable the Auctioneer to gain access to the property. Subsequently, the Interested Party filed an application seeking to be joined to the Defendant's application. It is these two applications that are coming up for determination before the court.

Defendant's Application

The Defendant filed an application dated 10/3/2014 brought under **Rule 9(1)(a) (b) & (c) and Rule 9(2) of the Auctioneers Rules, Section 1B, 3A and 63(e) and Order 51 Rule 1 of the Civil Procedure Act**

and Rules, respectively. The Defendant seeks orders that:

1. ***Spent***
2. ***The court be pleased to grant Ms. Dikemwa Auctioneers, appointed by the Defendant, authority to break into and gain forceful entry into LR No. 12948/172 and LR No. 12948/173 situated at Mountain View Estate Nairobi in execution of the Orders of the Court on 17/12/2013.***
3. ***The Court be pleased to order that the OCS, Kabete Police Station or any other officer of the said station of the rank above an Assistant Inspector of Police to provide security and police assistance of the execution of Order 2 above.***
4. ***Costs of the application and the execution process form part of the decree herein and be recoverable against the Plaintiff.***

The application is premised on grounds that on 17/12/2013 the Court issued orders for the Plaintiff to yield vacant possession of the suit properties and that the Defendant appointed Ms. Dikemwa Auctioneers to execute the said order. The Defendant avers that attempts to gain ingress into the premises by the Auctioneers have been unsuccessful because the gate to the adjoining properties is locked and the properties seemingly abandoned. It is averred that the grant of the orders shall assist realization and full enforcement of the orders issued by the Court.

The application is supported by an affidavit sworn by Austin Ouko, the Acting General Manager Corporate Affairs and Company Secretary with the Defendant. He deposed that the Plaintiff was ordered to yield vacant possession of the suit properties and that in the event of resistance, the Defendant does employ the services of a licensed auctioneer. Following the court order, the Defendant instructed the firm of Ms. Dikemwa Auctioneers to enforce the said court order. It is deposed that during two visits on 29th and 31st January 2014, it became apparent that the Plaintiff does not reside in the house and compound and therefore he was not personally present to yield vacant possession. The deponent states that in view of this revelation, it has become necessary to seek appropriate break-in orders to enable the Auctioneers access property to take an inventory as well as hand over vacant possession to the Defendant.

The deponent urged the court to grant the orders deposing that failing to do so would render the order issued on 17/12/2013 unexecuted. Further that there is no prejudice that shall be occasioned since the Plaintiff appears to have abandoned the premises. It was also deposed that the Defendant had suffered loss to the tune of 40 Million of unpaid rent since the filing of the suit and that unless the Defendant regained possession, it would continue to suffer loss.

The application was made *ex-parte* and when it came for hearing, the court directed the Defendant to serve the same upon the Plaintiff. After service was effected upon the firm of J.A.B Orenge Advocates for Plaintiff, the said firm filed an application dated 4/4/2014 to cease acting for the Plaintiff, which application was unopposed and thus granted. The court thereafter directed that the Plaintiff be served the application in person. On 29/4/2014, the firm of Lumumba & Lumumba Advocates came on record for the Plaintiff and sought leave to file a response to the Defendant's application. The Court on 30/4/2014 granted the Plaintiff's advocate a chance to file a response within 7 days. However, on 8/5/2014 when the application came up for hearing, Learned Counsel Gitonga appearing for the Plaintiff informed the court that the Plaintiff would not be opposing the Defendant's application. In that regard, no response was filed and the application herein is thus unopposed.

Interested Party's Application

The intended Interested Party (referred to as the Applicant) filed an application dated 30/4/2014 seeking an order for joinder as an interested party to the Defendant's application dated 10/3/2014. The application is premised on grounds that the Applicant purchased the suit properties and therefore has proprietary interest over the same. He avers that the Defendant is seeking to evict his client without his involvement and which will occasion him prejudice if the orders sought by the Defendant are granted.

The application is supported by an affidavit sworn by the Applicant on 30/4/2014. The Applicant deposed that he purchased the subject premises through a tenant purchase agreement with the Defendant but that prior to the completion of the sale, the parties got involved in a dispute following which he filed a suit **HCCC No. 1147 of 2005** against the Defendant. Subsequently, he deposed, another dispute arose between himself and the Plaintiff which culminated to a suit **HCCC No. 786 of 2004**. The Applicant annexed copies of the Plaintiffs in each of the mentioned suits deposing that the suits are still pending. It is his deposition that despite the Defendants' knowledge of the existence of the suits, they have moved the court and obtained orders without his participation. The Applicant reiterated that he has an interest in the subject property and that it is thus fair and just to be joined to the proceedings to enable him respond to the application for eviction.

In response to the application one Austin Ouko the Acting General Manager Corporate Affairs and Company Secretary with the Defendant Company filed a Replying Affidavit sworn on 15/5/2014. It was his deposition that by Tenant Agreements dated 3/12/2003 the Defendant agreed to sell the suit premises to the Applicant and his wife, on terms, *inter-alia*, that if they failed to pay the monthly instalments, the Defendant would have a right to terminate the agreements, reposes and re-sell the property. It is deposed that the Applicant failed to meet the payment conditions as agreed prompting the Defendant to terminate the Tenant Purchase Agreements and reposes the premises. Subsequently, the Applicant filed a suit challenging the process and sought to restrain the Defendant's action. The deponent stated that it turned out that the Applicant attempted to sell the suit premises to the Plaintiff without settling their liabilities or seeking the Defendant's approval and that the Plaintiff had filed suit against the Applicant seeking orders to restrain the Applicant from selling the property or evicting him.

It is deposed for the Defendant that both the Applicant and the Plaintiff claim ownership of the property. Further that the Applicant sought to take money from the Plaintiff despite not having any agreement with the Defendant following the termination of the Tenant Purchase Agreements. The deponent stated that the Applicant owes the Defendant Kshs. 30, 986, 631/- and Ksh. 5,509,442.90/- for LR. Nos.12948/172 and 173, Mountain view, respectively, as at 5/6/2012. He deposed that the Plaintiff had failed to prosecute **HCCC No. 1147 of 2005** causing the Defendant to apply for dismissal of the same.

In respect to the instant suit, the deponent stated that the same was dismissed on 17/12/2013 and it is therefore not in the place for the Applicant to argue the Plaintiff's dismissed suit. Further that there was no provision in law for joinder of a party to a dismissed suit and moreover, that there was no justification for the belated joinder of the Applicant to the proceedings. The deponent stated that the Applicant had no *locus standi* to argue the case herein since he had failed to prosecute a suit that he initiated. It was his deposition that the application for joinder ought to be dismissed particularly because the Plaintiff has confirmed that he has no objection to vacating the suit premises. Consequently, that the Applicant cannot compel the court to deny the Defendant possession of the suit premises whereas he has not been in possession thereof for the past 9 years. The deponent urged the court to dismiss the application deposing that the Defendant continues to suffer loss for the delayed re-possession of the premises.

This application was canvassed by way of written submissions. Learned Counsel Oduk Advocate for the Applicant filed submissions dated 20/5/2014. Counsel referred the Court to **Section 34 of the Civil Procedure Act** and submitted that this Court was the proper forum as it was the court determining all questions arising between parties to the suit relating to execution, discharge or satisfaction of the decree. Counsel submitted that since the suit had been dismissed, what remained are eviction proceedings which are to be treated as proceedings. It was submitted for the Applicant that the delivery of property is an issue of sufficient interest and that it is imperative for the court to allow the Applicant to adduce evidence which may lead to a determination on: whether an eviction can issue and whether it can issue at the instance of the Defendant or the Applicant; and whether the delivery of the property should be to the Defendant or Applicant; and whether the eviction proceedings should be stayed all together pending determination of the other suit. Counsel urged the court to allow the application, submitting that the Applicant has disclosed sufficient proprietary interests to enable it to attend and participate in eviction proceedings.

Macharia – Mwangi & Njeru, Advocates for the Defendant filed submissions dated 21/5/2014 wherein he

submitted that the Applicant has no interest in the subject matter since it is the Defendant which is the registered owner thereof after the Tenant Purchase Agreement was terminated following the default in payment by the Applicant. It was also submitted that a party could not be joined in a suit that has already been dismissed, since there were no proceedings to be litigated upon. In support of this submission, counsel cited the case of Lilian Wairimu Ngatho & Anor. v Moki Savings Co-operative Society & Anor. ELC No. 745 of 2001 (OS) (2014) eKLR where the Court held:

A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.

Counsel submitted that **Order 42 Rule 22** of the Civil Procedure Rules relied on by the Applicant, is in respect to a matter of a matter that is pending appeal which is not the case here and therefore no purpose shall be served by joining the Applicant. Counsel urged the court to dismiss the application.

Before delving on the Defendant's application, it is best to determine the issue of joinder presented to the court by the Interested Party (referred to as Applicant). Whereas the Applicant admits that the residual aspect of the suit is the eviction proceedings, he holds the view that the Plaintiff is his tenant and not the Defendant's. Consequently, issues as to whom vacant possession between he and the Defendant should be handed and whether the eviction proceedings should be shelved altogether pending the outcome of the other suits are sufficient reasons for the court to allow his application for joinder. In support of this submission, the Applicant relied on **Section 34 of the Civil Procedure Act** submitting that this was the proper court to adjudicate over matters incidental to execution and satisfaction of a decree.

In response the Defendant avers that the Tenant Purchase Agreement entered into with the Applicant was rescinded due to default in payment of the purchase price and in accordance with the terms therein. Consequently, the Applicant has no interest over the suit properties and therefore cannot make a claim. In any event, the Defendant submits, the Applicant can prosecute **HCCC 1147 OF 2005** initiated by him which is still pending. The Defendant further submitted that joinder of a party is only available during the pendency of the suit and not when the same has been determined.

It is no doubt that **Section 34 of the Civil Procedure Act** enjoins a Court executing a decree to deal with all questions arising between the parties relating to execution and not in a separate suit. The Applicant contends that eviction proceedings are meant to be treated as proceedings and as such, he ought to be given an opportunity to ventilate his concerns. I disagree with this submission on the basis that **Section 34**, in my view, does not seek to re-open litigation. The questions envisaged therein are in relation to the execution, discharge or satisfaction of a decree and not questions that will interfere with the findings of the court. In this case, the suit was determined by way of dismissal at the instance of the Defendant to which the Plaintiff has not sought reinstatement. The application is also brought under **Order 42 Rule 22** of the **Civil Procedure Rules**. **Order 42** makes provision for procedure of matters on appeals. **Rule 22** thereof gives the court discretion to direct a party to be made part of the suit where such person was a party to the suit in the court from whose decree the appeal is preferred and has not been made a party. This provision is irrelevant in the circumstances herein because the matter is not on appeal.

Joinder of a party to a suit is provided under **Order 1 Rule 10 of the Civil Procedure Rules** which makes it possible for a party to be made part thereof at any stage of the proceedings. "Proceedings" are defined in **Black's Law Dictionary 9th (ed.)** at page 1324 as "**the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment**". The purpose of joinder is to enable the court to effectually and completely adjudicate upon and settle all questions involved in a suit. As it stands now, the suit has been determined and there are no questions to be adjudicated upon.

The Applicant contends that he has proprietary interest over the suit property by virtue of the Tenant Purchase Agreement entered into between him and the Defendant. Further that the Plaintiff is his tenant

and not that of the Defendant. The question put forth by the Applicant is to whom vacant possession of the suit properties should be handed and also whether there is a need to stay the application pending the outcome of the suit **HCCC 1147 OF 2005** between him and the Defendant. The Defendant herein has succeeded in demonstrating to the court that the Plaintiff is a tenant of the Interested Party whose Purchase Agreement was terminated following the default in payment of the purchase price and in accordance with the said agreement. The Applicant's proprietary interest over the suit properties is subject of a pending suit which the Applicant reserves the liberty to prosecute it to its logical end. Such proprietary interest is yet to be determined and as such there no justification as to why the Defendant should not enjoy the fruits of its decree. Needless to say, in the event that the outcome of the Interested Party's suit against the Defendant will be determined in his favour, damages would be an appropriate remedy. On the foregoing, it is my finding that the court having already arrived at its findings, it is unnecessary to allow the application for joinder. There will also be occasioned injustice to the Defendant if the application were to be stayed pending the outcome of **HCCC 1147 OF 2005**. In that regard, the Interested Party's application is dismissed.

In respect to the Defendant's application, the same is in respect to enforcement of an order of this Court dated 17/12/2013 and issued on 23/12/2013. The said order firstly, dismissed the suit for want of prosecution. Secondly, it discharged the interim injunction order granted in favour of the Plaintiff and gave the Defendant the liberty to take vacant possession. It was deposed on behalf of the Defendant that the suit premises seems abandoned and the Plaintiff is not on site to give vacant possession, necessitating the filing of this application. Despite service of the order and this application upon the Plaintiff's advocate, it is worthy to point out that the Plaintiff has not sought to reinstate the suit and through his advocate expressly notified the court that he will not be opposing the application. In support of the application the Defendant annexed a copy of the instruction letter to Dickemwa Auctioneers, and a valid license, in the name of Geoffrey Maina Kamau. I find that the application is merited and allow the same in its entirety.

Dated, signed and delivered this **21st** day of **October** 2014

Costs be in the cause.

It is so ordered.

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff

.....For the Defendant

.....For the Interested Party

.....Court Clerk

L.N. GACHERU

JUDGE