

REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 63 of 2004

JOHN NDARA KONES PLAINTIFF

V

BEN NICODEMUS OMAMBIA MOGAKA DEFENDANT

RULING

This is a ruling in respect of an application dated 19th March, 2013. The Applicants seek to be enjoined in this suit as Defendants. The first Applicant Agricultural Finance Corporation advanced a loan to the Defendant herein on the basis of security of LR No. Trans Nzoia/Kipsoen/11. The Defendant failed to repay the loan advanced to him and the 1st Applicant exercised its statutory power of sale and sold the security IN a public auction where it participated and emerged the highest bidder. The security was sold to it. The 1st Applicant then sold the property to the 2nd Applicant Simplex Kenya Limited. When the 2nd Applicant took possession of the property, it ploughed it ready for planting for the 2013 season only to realize that there was an injunction which was consented to by the Plaintiff and the Defendant in which the Defendant was restrained from interfering or dealing in any way with the suit property.

The application was opposed by the Plaintiff through the Replying Affidavit of the Stanlous Mutai Kones one of the administrators of the original Plaintiff herein. The application by the Applicants was however not opposed by the Defendant herein. The Plaintiff/Respondents contend that if the orders are granted, it will be highly prejudicial to the Plaintiff's case as the Plaintiff had already testified and has since passed on. The Respondents also contend that the Applicants have not come to court with clean hands as they have not explained how the said charge on the property came to be registered and that the Applicants sole intention is to defeat the interest of the Plaintiff in this suit.

I have carefully considered the application herein as well as the opposition by the Respondent. The Applicants in their application have shown that they have a common issue with the Plaintiff and the Defendant which the court has to decide. The issue between the Plaintiff and the Defendant is ownership of Plot No. Trans Nzoia/Kipsoen/11. The first Applicant also claims that the said property was charged to it and after the loan was not repaid. It sold it to the 2nd Applicant. This clearly shows that there are issues which the court can deal with if the dispute herein is to be effectually determined. The Applicants should not bring separate suits on a matter which can be finally determined in these proceedings. The fact that the application has been made when the case is part-heard will not occasion any prejudice to the Plaintiff. The fact that the Plaintiff has died does equally not prejudice the Plaintiff's case. There are administrators who have been appointed in respect of his estate who can continue with the case. The Civil Procedure Act provides that an application for joinder of parties can be made at any stage of proceedings. All issues which touch on the charge to the 1st Applicant including its legality or otherwise are all matters which can be disposed off during the hearing. I find that this application is merited. It is not in any way compelling the Plaintiff on how to proceed with his case as claimed in the Replying Affidavit. I allow the application and direct that the two Applicants be joined as Defendants. The Plaintiff herein shall be accordingly amended and summons as well as the amended Plaintiff served on the new Defendants only. The amendment should be done within 14 days from the date hereof. Costs of this application shall be in the cause.

It is so ordered.

Dated, signed and delivered in Open Court on this 25th day of April, 2013.

E. OBAGA

JUDGE

In the presence of Mr. Kiarie for Applicant and Mr. Tigogo for Mr. Gatune for Respondent.

CC: Joan.

E. OBAGA

JUDGE

25/04/2013