



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 702 OF 2011

SAMUEL M. MACHARIA..... PLAINTIFF

VERSUS

KENYA INDUSTRIAL ESTATES LTD.....1ST DEFENDANT

BIMACH ENGINEERING CO. LTD..... 2ND DEFENDANT

JAMES MBERA MACHARIA.....3RD DEFENDANT

RULING

The Plaintiff is seeking orders to stay proceedings in H.C.C.C No. 1719 of 1996 until this suit is heard and determined. This application is in a Notice of Motion dated 26th January 2012 and is based on the grounds that it is alleged in H.C.C.C No. 1719 of 1996 that the Plaintiff is a director of the 2nd Defendant herein which is not the case, that the 2nd Defendant company is non-existent in law, and that the suit in H.C.C.C No. 1719 of 1996 was instituted without the necessary resolution of the 2nd Defendant as required by law. Further, that the Plaintiff is the original and *bonafide* allottee of the suit property that is the subject of H.C.C.C No. 1719 of 1996, and applied to be enjoined in the said suit, but that his application was disallowed to his prejudice and he has been shut out of the proceedings.

The Plaintiff has deponed to these facts in a supporting affidavit sworn on 26th January 2012, and a further affidavit he swore on 23rd February 2012. He attached the pleadings filed in H.C.C.C No. 1719 of 1996 with regard to his application to be enjoined as a party, and the Memorandum and Articles of Association of the 2nd Defendant company. He stated that the only relationship between the 1st Defendant and 2nd Defendant was that of a tenancy, and that that the 1st Defendant who was the allocating authority has admitted both in its defence and testimony in court that the initial allocation of the suit property was to the Plaintiff and not the 2nd Defendant.

The Plaintiff also attached minutes of a meeting of the 2nd Defendant dated 31st December 1989, where he alleges the Directors agreed to go separate ways but utilize the company's funds to pay for their personal assets and liabilities. Further, that it is in this context that payments of the suit property were made from the company's accounts and not because it was the allottee.

The 2nd Defendant opposed the Notice of Motion in a replying affidavit sworn on 14th February 2012 by its co-Director, James Mbera Macharia. He stated that HCCC No. 1719 of 1996 has been in court for sixteen (16) years, and that both the Plaintiff's and Defence cases have been substantially heard and only one expert witness is yet to give his evidence. He contended that the Plaintiff has admitted that he is a

director of the 2nd Defendant Company in his supporting affidavit, and has been aware of HCCC No. 1719 of 1996. Further, that as a Director of the 2nd Defendant the Plaintiff is already a party to the earlier suit, and its determination and conclusion will not pose any threat to him in so far as possession of the suit property is concerned.

The deponent admitted that that the 2nd Defendant is duly registered under the Companies Act as Bi-Mach Engineers Limited, and that the name Bi-Mach Engineering Company Limited which appeared on the plaint of HCCC No. 1719 of 1996 was an inadvertent error on the part of the 2nd Defendant's advocates on record. The deponent attached copies of a tenancy agreement between the 1st and 2nd Defendants, receipts issued in the 2nd Defendant's name of the payment of loan installments to the 1st Defendant, a sample of the 1st Defendant's invoices to the 2nd Defendant, a computer print-out on the loan repayment, and of correspondence exchanged between the 2nd Defendant and the 1st Defendant on the loan repayment. This evidence was attached to illustrate that it is the 2nd Defendant who is the *bona fide* allottee of the 1st Defendant.

This application was substantially heard before Khaminwa J. who reserved it for ruling on notice on 19th June 2012. Following the exercise of vetting of judges between 2012- 2013 it was not possible for Khaminwa J. to deliver the ruling, and the parties sought directions as to the delivery of the said ruling on 11th June 2013. The parties at the said hearing submitted that they wished to rely entirely on the submissions already filed and requested for a ruling date.

The Plaintiff's Counsel in submissions dated 10th February 2013 and 26th March 2013 reiterated the arguments made herein, and argued that should HCCC No. 1719 of 1996 proceed to determination before the present case, he would be prejudiced as he is not a director of the 2nd Defendant. Further, that even if pleadings in HCCC No. 1719 of 1996 are amended to reflect the correct position, he is only a holder of 25% shares in Bi-mach Engineers Co. Ltd in which he is a Director, and the remaining director who is pursuing the said proceedings holds a majority share of 75%. He also stated that the said suit would still be untenable despite any amendments as no resolution was ever reached by Bi-Mach Engineers Ltd to institute the suit, and relied on the decision in **Affordable Homes Africa Ltd vs Ian Henderson & 2 Others, Nairobi HCCC No. 524 of 2004** in this regard.

The counsel further argue that the parties in the two suits are the same and that as the issue is one of ownership of the same subject matter, the Plaintiff should be heard before the finalization of in HCCC No. 1719 of 1996 so that a decision is not made in error. The counsel urged the court to be guided by the overriding objective of dispensing justice to all the parties and not by technicalities.

The 2nd Defendant's Counsel in his submissions dated 20th February 2012 argued that the Plaintiff has filed his Notice of Motion under Order 38 Rules 1 and 2 of the Civil Procedure Rules, which provides for selection of a test case where several plaintiffs have sued the same defendant in different suits which arise out of the same acts or transactions and raise a common question of law. However, that the defendants in the present suit and in HCCC No. 1719 of 1996 are not similar, and that although the subject matter of the two suits is the same namely the suit property, the prayers sought by the Plaintiffs in the two suits are different. The counsel submitted that the Plaintiff in HCCC No. 1719 of 1996 who is the 2nd Defendant in the present suit is seeking a declaration that it is the lawful owner of the suit property, while in the present suit the Plaintiff herein is seeking a declaration that he and one of the directors of the 2nd Defendant are the lawful owners of the suit property.

The 1st Defendant herein did not respond to the Plaintiff's Notice of Motion.

I have read and carefully considered the pleadings, evidence and submissions made by the Plaintiff and 2nd Defendant. The issue to be determined is whether the suit in HCCC No. 1719 of 1996 should be stayed pending the hearing and determination of this suit. I have perused the court record for HCCC No. 1719 of 1996 and note that the suit therein was initially filed by the 2nd Defendant herein in a Plaint dated

15th July 1996 filed on the same date, and was seeking among other orders a declaratory order against the 1st Defendant herein for ownership of two plots namely LR 209/11471 and LR 209/11472. I also note that the ground raised of the mistake in the name and description of the 2nd Defendant in that suit was corrected in an amended Plaintiff dated 21st September 2012 and filed on 24th September 2012, where the 2nd Defendant's name was amended to read "Bi-Mach Engineers Limited".

The present suit which commenced by a Plaintiff dated 9th December 2011 filed on the same date is on the other hand seeking an order that instead of the 2nd Defendant being declared owner of the said properties, the Plaintiff herein and one James Mbera Macharia be declared the owners. The other orders sought in the present suit are similar to those in HCCC No. 1719 of 1996. The Plaintiff was later amended on 23rd February 2012 to add the said James Mber Macharia as the 3rd Defendant in the suit herein.

The Plaintiff seeks to stay HCCC No. 1719 of 1996 pursuant to the provisions of Order 38 Rules 1 and 2 of the Civil Procedure Rules which provide as follows:

"1. Where two or more persons have instituted suits against the same defendant and such persons under rule 1 of Order I could have been joined as co-plaintiffs in one suit, upon the application of any of the parties with notice to all affected parties, the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.

2. Where a plaintiff has instituted two or more suits, and under rule 3 of Order 1 the several defendants could properly have been joined as co-defendants in one suit, the court, if satisfied upon the application of a defendant that the issues to be tried in the suit to which he is a party are precisely similar to the issues to be determined in another of such suits, may order that the suit to which such defendant is a party be stayed until such other suit shall have been determined or shall have failed to be a real trial of the issues."

I am of the view that these provisions are inapplicable to the present case as they envisage a situation where either the same Plaintiff has sued different Defendants in several suits, or where different Plaintiffs have sued the same Defendant in several suits, and the issues in the several suits are similar. One of the parties in the several suits must be the same for Order 38 Rules 1 and 2 of the Civil Procedure to be applicable, either as a Plaintiff or Defendant, before one of the suits can proceed to be heard as a test case. However, both the Plaintiffs and Defendants in the present case and in HCCC No. 1719 of 1996 are different, and the said rules are therefore not applicable.

It appears that what is in contention in the present suit is the respective entitlement to the suit property by the Plaintiff and 3rd Defendant herein, either as directors of the 2nd Defendant or individually. This is an issue that can be determined either during the hearing and determination of HCCC No. 1719 of 1996, or thereafter if still outstanding. The ideal situation would have been to consolidate the two suits for purposes of being heard and determined together as they are dealing with the same subject matter, but bearing in mind that HCCC No. 1719 of 1996 is substantially part-heard, this is not possible in the present circumstances.

This suit is therefore stayed pursuant to the provisions of the section 6 of the Civil Procedure Act pending the hearing and determination of HCCC No. 1719 of 1996 or until further orders. The Plaintiff's Notice of Motion dated 26th January 2012 accordingly fails and he shall bear the costs of the said application

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___18th___ day of

___September___, 2013.

P. NYAMWEYA

JUDGE