



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

HIGH COURT CIVIL CASE NO. 423 OF 2009

CAPTAIN MOSES KARIUKI WACHIRA.....PLAINTIFF
VS
JOSEPH MURIITHI KANYITA.....1ST DEFENDANT
MONICA JAMES2ND DEFENDANT
JOHN MBURU.....3RD DEFENDANT
INVESTMENT AND
MORTGAGE BANK LTD.....4TH DEFENDANT

RULING

1. By a Chamber Summons application dated 23rd November 2009 and expressed to be brought under Order 1 Rule 10(4); Rule 10A; Rule 13; Order VIA Rule 3; Rule 5(1) and Rule 8 of the Civil Procedure Rules, the plaintiff/applicant seeks the following orders of this Court:

- 1) That leave be granted to the plaintiff/applicant to amend his pleadings.
- 2) That Mr. Michael Mwangi Ngugi and the Chief Land Registrar be added as the 5th and 6th Defendants in this suit and that summons do issue immediately.

2. It is the Applicant’s case that it is necessary to amend the plaint for the purposes of determining the real questions in controversy. That it is in the interest of justice that the parties be joined in these proceedings. In that regard, the plaintiff has confirmed that Notice has been served on the Attorney General as the legal counsel for the intended 6th defendant.

3. The application is supported by the affidavit of Captain Moses Kariuki sworn on 12th November 2009. In the affidavit, the deponent exhibits a transfer of lease marked ‘MKWB’ which demonstrates that the intended 5th defendant participated together with the 1st defendant in an elaborate and fraudulent scheme through forgery and making of false documents to effect transfer of the property known as Nairobi/Block 94/170 (hereinafter called “the suit property”) and deprive the plaintiff of his property.

4. With regard to the application to amend the pleadings, the Applicant has annexed a draft amended plaint in which the proposed amendments are captured in paragraph 6, 7, 11, 26 (d) and (e), 28, 29 and particulars (i) to (vi) of paragraph 29, paragraph 30 (a) – (e) paragraph 31,32,33 and all the particulars from (i) – (ix), paragraph 40. These amendments essentially seek to incorporate the proposed new defendants and the attendant roles of each in the transaction the subject of this suit.

5. With regard to the proposed enjoinder of the Chief Land Registrar, it is the plaintiff’s case that the

fraudulent transfer was perpetrated in circumstances indicating that the defendants were aided and abetted to by the office of the Chief Land Registrar, hence the need to add the party as a defendant. The addition of the Chief Land Registrar is also seen as necessary as one of the orders the plaintiff seeks is cancellation of the fraudulent transfer and certification of the title deed.

6. The application is opposed. In a replying affidavit sworn on 7th December 2009, the 1st Defendant Joseph Muriithi Kanyita deposes that the Plaintiff is not and has never been the registered owner of the suit property at the time the property was sold to him, hence he lacks locus standi to institute the present suit. The deponent further avers that he has applied for the Plaintiff's suit to be struck off against him for not disclosing a reasonable course of action. It is further deposed that the 2nd defendant testified on oath and admitted donating a power of attorney to Mr. Michael Mwangi Ngugi to enable the latter effect the sale and transfer of the property to the 1st Defendant. In addition Mr. Kanyita avers that the Plaintiff has already filed a suit in the Superior Court of the State of California in the County of San Diego against the 2nd defendant and himself claiming a sum of US\$. 1 Million, being the claimed value of the suit property. He therefore finds the present application by the Plaintiff an abuse of the court process.

7. In his submissions, learned counsel for the first Defendant Mr. Havi told the court that for the application to be allowed, the Applicant must show that the two parties sought to be enjoined are necessary in terms of whether a relief flows from those parties to the plaintiff. He submitted that this is the test provided for in Order 1 Rule 10 of the Civil Procedure Rules. He referred the court to the case of **Kingori vs. Chege & 3 Others Civil Case No. 136 of 2000** where the court (**Nambuye J**) extrapolated the guiding principles from Order 1 Rule 10(2) and held that the intended party to be enjoined must be:

- 1) A necessary party;
- 2) A proper party;
- 3) In case of a Defendant a there must be a relief flowing from the defendant to the plaintiff.
- 4) The ultimate order or decree cannot be enforced without his presence in the matter; and,
- 5) His presence is necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.

8. Arising from the above guiding principles, Mr. Havi submitted that it was not necessary to enjoin Michael Ngugi as he was a donee of a Power of Attorney from the 2nd defendant who is already in the suit and who shoulders principal liability, if any. He submitted that where the principal is disclosed, the agent cannot be sued, as was held in the case of **Antony Francis Wareham T/A A.F. Wareham & 2 others Vs Kenya Post Office Savings Bank HCCC No. 3161 of 1997 (unreported)**. Mr. Havi submitted further that the request to enjoin Mr. Ngugi was an abuse of court process as similar proceedings had been instituted by the Plaintiff in the Supreme Court of San Diego in the United States of America and had been heard and dismissed. An appeal had also been heard and dismissed. He submitted that Section 6 and 7 of the Civil Procedure Act prohibit the pursuit of a suit that relates to a matter already adjudicated upon by a court of competent jurisdiction. The hearing of the matter at the Supreme Court in San Diego rendered the present suit *Res Judicata* on the intended joinder of Chief Land Registrar.

9. In further submissions, Mr. Havi told the court that the present application was also incompetent as under the Registered Land Act, the proper party in any claim against the Land Registrar is the Attorney General, not the Land Registrar. He relied on the holding in the case of **Nemchanda Laghir Shah & 2 others Vs Appollos Hiram Muna & Another HCCC No. 14 of 2007 (unreported)** where this position was set out. He submitted further that the intended joinder of the Chief Land Registrar was of no use as the claim would be time –barred, in view of the one year limit that this court (Koome J.) had allowed for the determination in this matter. The challenge herein had been made on 6th March 2007. Koome J. made an order for this suit to be prosecuted within one year from 25th June 2010 which time span had lapsed. The suit was therefore mute and the request to enjoin the other defendants did not lie.

10. On his part, Mr. Munyi, learned counsel for the 4th Defendant associated himself fully with Mr Havi's submissions, and told the court that in view of the holding in the **Nemchand Shah case**, it was not feasible to enjoin the Chief Land Registrar in this matter. With regard to Mr. Michael Ngugi, Mr.

Munyi submitted that there was no prayer sought against that party.

11. For Plaintiff/ Applicant, Mr. Kibunja clarified that the intended 5th defendant Mr. Michael Ngugi was not an agent of the 2nd defendant as the Power of Attorney relied upon had been denounced by the Advocate who had purportedly drafted it. The lawyer had also denied that the 2nd defendant and the intended 5th defendant had appeared before him to execute the Power of Attorney. The same was therefore a forgery. Mr. Kibunja further submitted that the intended 5th defendant and the 1st defendant were presently facing criminal proceedings hence the principle that a donee cannot be sued could not apply in the present case.

12. With regard to the proceedings in San Diego, Mr. Kibunja submitted that the same related to different issues, and that, in any event, the court ruled that it could not hear evidence on matters relating to a property in Kenya. No evidence was taken about the suit property in this matter and no determination was made on the property hence the claim that the matter was *res judicata* did not hold.

13. On whether the application to enjoin the Chief Land Registrar was brought on time, Mr. Kibunja submitted that Notice to the Attorney General of the claim was issued 30 days prior to filing of the amended pleadings in the year 2009 which is the year the fraud was discovered. There was no delay in filing the notices and the intended joinder was therefore competent. On the holding in the case of **Kingori Vs Chege & 3 Others**, Mr. Kibunja submitted that the Plaintiff had served the Attorney General as the lawyer for the Chief Land Registrar. He added that that this court had the power to order that the Attorney General be joined as a defendant and no prejudice will be suffered by any party.

14. I have carefully considered the application, the replying papers, the court record and the submissions made by counsel for the respective parties. I have also carefully reviewed the authorities cited by learned counsel.

15. In my view, the issues for my determination are whether the intended defendants, being Mr. Michael Mwangi Ngugi and the Chief Land Registrar are necessary parties in this suit and, subject to that determination, whether the Plaintiff/Applicant should be allowed to amend the pleadings as proposed. To inform my decision on the issue, I find it necessary to answer the following questions that will guide the conclusion in this matter:

- 1) Whether or not Michael Mwangi Ngugi would be a necessary party to these proceedings irrespective of whether or not he held a bona fide Power of Attorney donated by the 2nd Defendant.
- 2) Whether under the Registered Land Act, the Chief Land Registrar can be enjoined as a party to this suit, or whether the proper party would be the Attorney General.
- 3) Whether the proceedings in the Superior Court of the State of California in the County of San Diego related to ownership of the suit property and whether therefore determination of those proceedings render the present proceedings *res judicata*.
- 4) Whether therefore the Plaintiff has met the conditions for joinder of parties as espoused in the case of **Kingori vs. Chege & 3 Others (supra)**.

16. With regard to the question of whether Mr. Michael Mwangi Ngugi should be enjoined as a defendant in this suit, the basis for the Plaintiff's wish to enjoin him is that the said Michael Ngugi was involved in the transfer of the property from the 2nd Defendant to the 1st Defendant as a holder of Power of Attorney donated by the 2nd Defendant, which Power of Attorney is alleged to have been fraudulent. The Defendant's reply to this assertion is that Mr. Ngugi was a holder of a Power of Attorney of a disclosed principal who is already a party to the suit and hence no liability can attach to him in the capacity of agent. My take on these rival arguments is as follows:

a. It is not disputed that prior to the purchase of the suit property by the 1st Defendant, the property herein was registered in the name of the 2nd Defendant pursuant to a Certificate of Lease given on the 19th July 2005. That registration, made under the Registered Land Act, conferred to her the sole proprietorship of

the leasehold interest in the property for the remainder of the term of 99 years from 1st February 1981, the date of commencement of the lease term stated in the title. At the time of sale of the property to the 1st Defendant therefore, and given that the leasehold interest in favour of the 2nd Defendant had not expired, the 2nd Defendant had an unfettered legal proprietorship over the property and was at liberty to sell or otherwise deal with the property. Upon acquisition of this legal proprietorship over the title, it thereafter mattered little how such ownership was acquired by the 2nd Defendant. The title could not be defeated by issues antecedent to acquisition of such ownership. In any event, nowhere in the said title or by any other legal instrument availed to this court was a trust in favour of the Plaintiff expressed or inferred. In that regard, whether or not the sale of the property to the 1st Defendant was fraudulent is a matter that can only interest the 2nd Defendant as the proprietor to the title. It therefore does not matter if the Power of Attorney under which Mr. Ngugi sold and transferred the property to the 1st Defendant was fraudulent as it is clear that even if the transfer was to be revoked, the title would still revert to the 2nd Defendant.

b. Even if Mr. Ngugi was a donee of a Power of Attorney from the 2nd defendant which Power of Attorney is disputed, I do not think that he would be a necessary party to these proceedings as his principal, the 2nd Defendant is already a defendant to this suit and no orders of the court implicating on Mr. Ngugi would be effected otherwise than upon the Principal. It is trite law that where the principal is disclosed, the agent cannot be sued, as was held in the case of **Antony Francis Wareham T/A A.F. Wareham & 2 others Vs Kenya Post Office Savings Bank HCCC No. 3161 of 1997** aforesaid. The inclusion of Mr. Ngugi to the present proceedings would therefore be superfluous and would burden both the parties and this court unnecessarily.

c. The question of whether or not Mr. Ngugi was a bona fide holder of a Power of Attorney and therefore a necessary party in the challenge of the transfer of the property to the 1st Defendant is, to me, of little relevance to the suit herein as the Plaintiff's intention of including him to the proceedings is geared at re-opening the debate of whether or not the Plaintiff can possibly reverse the various transfers of the property all the way back to himself, by virtue of his allegation that the 2nd defendant was registered as a proprietor in trust for him. In my view, it appears to be now be very late in the day for this argument to still linger before this court, as the court (Kimaru J) in its ruling of 24th July 2009 considered the argument and conclusively resolved the same in the following terms:

“It is clear that the plaintiff has an uphill task to establish a prima facie case in respect of a property that has passed hands several times. In the case of the plaintiff, the horse has already bolted out of the stable. Other persons have already acquired legal rights to the suit property pursuant to the transfers that are, prima facie, superior to that of the plaintiff. The Plaintiff's remedy, in my view, lies in damages”.

d. In any event, it is not contested that the Plaintiff has never been the registered owner of the suit property although it is evident that he financed its purchase. The consideration for the Plaintiff to have chosen to have the property registered in the name of the 2nd Defendant is also well documented and also deposed to on oath to be that 1st Defendant was the mother of his two children. Unfortunately, the registration of the title in favour of the Defendant superseded the considerations that the Plaintiff had in having the title registered in her name. Section 27 of the Registered Land Act clearly stipulates that ***“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto”***. In the circumstances, the Plaintiff would struggle to show *locus standi* to pursue a seeking recovery of the property.

The upshot of the foregoing is that the request for the joinder of Mr. Ngugi fails as he is not a necessary party for purposes of the suit in this matter.

17. With regard to the intended joinder of the Chief Land Registrar, the Plaintiff claims that the proposed Defendant is a relevant party in that the fraudulent transfer of the property was perpetrated in circumstances indicating that the defendants in this matter were aided and abetted to by the office of the

Chief Land Registrar. As with the case of Mr. Ngugi above, my take is that even if the sale of the suit property to the 1st defendant was tainted with fraud, the Plaintiff still faces the hurdle of legal standing to recover the property, for the reasons that he has never been a registered owner and neither has he provided evidence of ownership of the property by the 2nd Defendant in trust for him. The pursuit of fraud in this matter would therefore only serve to safeguard the interests of the 2nd defendant as the registered proprietor of the property. However, even if the joinder of the Chief Land Registrar were to be shown to be merited in the present case, the holding in the case of **Nemchanda Laghir Shah & 2 others Vs Appollos Hiram Muna & Another** is sacrosanct that the proper party in any claim against the Land Registrar is the Attorney General, and not the Land Registrar. In that case, Ang'awa J held at paragraph 31 as follows:

“Under the Registered Land Act, cap 300 Laws of Kenya, the person to sue is the Attorney General but the requisite notice under Section 13A is required to be issued”.

I do not have any basis, legal or otherwise to hold a contrary view.

18. On the contention that the proceedings in the Superior Court of the State of California in the County of San Diego related to ownership of the suit property and therefore determination of those proceedings render the present proceedings *res judicata*, I think this is a matter that would best be considered at the trial of the main suit, as the exact nature of the proceedings in the United States and their relevance to the present proceedings is hotly contested and may not be fully interrogated by way of affidavit evidence.

19. For these reasons, I am inclined to order that the Plaintiff's Chamber Summons dated 23rd November 2009 be and is hereby dismissed with costs to the defendants.

20. I further direct that the parties do prepare the suit for trial by complying with the pre-trial matters stipulated in Order 11 of the Civil Procedure Rules within 30 days from today and that the suit be fixed for hearing within 14 days thereafter.

IT IS SO ORDERED.

DATED and DELIVERED at Nairobi this 19th day of January 2012.

J. M. MUTAVA
JUDGE