



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 2908 OF 1987

G. CRITICOS & COMPANY LIMITED 1ST PLAINTIFF/RESPONDENT

NENKA DEVELOPERS..... 2ND PLAINTIFF/RESPONDENT

VERSUS

JOHN NJENGA KINUTHIA 1ST DEFENDANT/APPLICANT

JOEL BOB SIRENGO 2ND DEFENDANT/APPLICANT

PAUL ANDREW OKWARO 3RD DEFENDANT/APPLICANT

RULING

This is a very protracted matter that has been pending in court since 1987. The record shows the matter was part-heard before **Ojwang', J** (as he then was) who took evidence by some witnesses. Unfortunately the matter was interspersed with interlocutory applications and the hearing of the substantive matter has not made any progress since sometimes in June 2006. On 7th October, 2011, the defendants who are plaintiffs in **HCC No. 1318 of 2002 (OS)** that was consolidated with this case, filed a chamber summons under **Order 1 Rule 10 (2), (4), 14 and 25 of the Civil Procedure Rules**.

The applicants seek for an order that **HYRO DEVELOPERS LIMITED** be enjoined in this suit as the 2nd defendant in the counterclaim. This application is supported by the grounds stated on the body thereto, and the matters deposed to in the supporting affidavit, that was sworn by **Nicholas Njenga Kinuthia** with the authority of the other co-defendants.

According to the applicant, the plaintiff purported to transfer the suit property that is; **LR No. 10090/14** to **Hydro Developers Limited** during the pendency of this matter. The applicants annexed a copy of the transfer that was registered in the Land Titles Registry Nairobi on 12th November 2009. It was submitted that the presence of **Hydro Developers Limited** is necessary for this court to adjudicate and settle all the questions involved in the suit.

The applicants claim is for adverse possession of the suit premises as per their suit in **HCC 1318 of 2002 (OS)**. This application was opposed; based on the grounds of opposition, counsel for the plaintiff submitted that the prayers sought by the applicant are *res-judicata*. A ruling delivered by **Dulu, J** on 29th July, 2011 settled similar issues. The applicants had sought to enjoin **Neneka Developers ltd** who were presumed to have been purchasers of the suit premises which matter was determined and the court declined to grant the orders.

Mr. Nyaga, learned counsel for the intended 2nd defendant also opposed this application. It was submitted that this suit was filed twenty five [25] years ago, the claim for adverse possession goes back to 1971 that is, forty [40] years back. Essential witnesses have died, thus joining the 2nd defendant in this suit would render them defenceless. Moreover, it was further argued that there was inordinate delay in filing this application.

In determining this application, it is appreciated that this matter was filed twenty five [25] years ago. It has not been determined thus this court should focus on how the main suit can be determined as soon as possible. Does the application to enjoin Hydro Developers have merit? The applicants attached a copy of an extract of title which shows a transfer was registered in favour of; **Hydro Developers Limited** on 12th November, 2009.

Under the provisions of **Order 1 Rule 10(2)** it is provided as follows:

“10. (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

The issue of *res-judicata* was raised by the respondents. I have carefully read the application dated 12th April, 2010, which sought to enjoin **Neneka Developers Limited**. The court found that the applicants intended to enjoin them as plaintiffs and there was nothing on record to show that **Neneka Developers Limited** had consented to being plaintiffs in the matter.

In this case, the applicants seek to join a different party and there is evidence on record that indeed **HYDRO- DEVELOPERS LTD** were registered as proprietors of the suit premises the subject matter of this litigation. The intended defendant opposes the joinder, but I am not sure that a defendant has an option on whether it should be sued or not. The intended 2nd defendant was registered as proprietor of the suit property during the pendency of this suit.

A glance at the copy of the title shows there was a caveat placed by the applicants to prohibit any dealing with the suit property by the time the intended 2nd defendant was registered as proprietor. I am satisfied that this application has merit; the issues raised in this application are different from the ones which were determined by the ruling of 29th July, 2011. As regards the issue of delay, the record shows that this file has been in court throughout on these interlocutory applications.

Accordingly, I allow prayer No. 1 and order that M/S Hydro Developers Ltd be enjoined as 2nd defendant in counterclaim in **HCC 2908/87** and 2nd defendant in **HCC 1318/02 (OS)**.

The applicants are ordered to amend and serve the 2nd defendant with pleadings within fourteen [14] days. The 2nd defendant is also given fourteen [14] days to file its defence. The plaintiffs will also be at liberty to file a reply to the 2nd defendant's defence if any. Thereafter parties to file and exchange additional documents (if any) and witness statements within thirty [30] days.

Mention of this matter on 9th February, 2012 to fix a date for hearing.

Costs of this application shall be in the cause.

Ruling read and signed this 3rd day of February, 2012.

MARTHA KOOME

JUDGE OF APPEAL

Note:

This application was heard and concluded on 14th November, 2011, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed as a Judge of the Court of Appeal. I proceed to write and append my signature thereto in my new capacity.