



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO.84 OF 2008

LOUIS ROGER OUANDJI.....PLAINTIFF

VS

BANK OF INDIA & ANOTHER.....DEFENDANTS

AND

LAXMANBHAI CONSTRUCTION

COMPANY LIMITED.....INTENDED 2ND PLAINTIFF

INTERESTED PARTY

RULING

1. Before me is an application brought by way of a Chamber Summons filed by the Intended 2nd Plaintiff/Interested Party. The application is dated 22nd November 2011 and is brought under Order 1 Rule 10(2) of the Civil Procedure Rules.
2. The application is based on one main ground namely that the Intended 2nd Plaintiff/Interested Party/Applicant has possession and lien over the structure erected on the suit property namely, L.R. No. 330/417 arising out of unpaid fees amounting to Kshs. 20,961,916.90 together with interest thereon.
3. The application is further supported by the affidavit of MukeshHalai, the Manager Operations of the Applicant sworn on 22nd November 2011. Through the affidavit, the applicant's case is that it entered into a contract for building works with the plaintiff on 20th May 2005 whereby the plaintiff engaged the Applicant to undertake erection of apartments on L.R. No. 330/417 situate along Riara Road Nairobi. Under the contract, the plaintiff agreed to pay for all certified works done. In default, the Applicant was entitled to terminate the contract and demand payment for all the work done. The plaintiff defaulted in paying for certified work done and in other conditions of the contract whereupon the Applicant

terminated the contract. Upon termination the Applicant engaged a quantity surveyor who evaluated the work done and established its value to be in the sum of Kshs. 47,221,702.20. The plaintiff has paid a sum of Kshs. 28,579,785.30 leaving a balance of Kshs. 20,961,916.90 which he has refused to pay. This has necessitated commencement of arbitration proceedings which are pending before the arbitrator. The Applicant therefore seeks to be enjoined in the present suit so as to ventilate its claim against the plaintiff through preservation of the suit property. The Applicant claims that it has no recourse against the plaintiff who it claims has no other known assets in the country.

4. The plaintiff did not support or oppose the application although it was represented by counsel at the hearing of the application.

5. The application is opposed by the 1st defendant through a replying affidavit sworn on 8th February 2012 by Doraiswami Reddy Devados, its Assistant General Manager, Nairobi Branch. The contention by the 1st defendant is that it was not a party to the construction agreement between the Applicant and the plaintiff dated 25th May 2005; that there is no privity of contract between the Applicant and the 1st defendant and that any claim that the Applicant has should be directed to the plaintiff. The 1st defendant further contends that the suit in this matter arises out of sale of the suit property by public auction which sale it claims was completed and the property transferred to the 2nd defendant. The Applicant therefore has no rights arising out of the sale and transfer of the suit property as there is no connection between such sale and the construction agreement of 20th May 2005

6. On its part, the 2nd defendant opposes the application through an affidavit sworn by one of its directors Njama Wambugu on 31st January 2012. It echoes the position taken by the 1st defendant that it is not a party to the agreement between the Applicant and the Plaintiff and is not privy to the claim between the two. The suit property having been duly transferred to it, the 2nd defendant contends that the Applicant has no right or relief as would draw from the transactions leading to the sale and transfer of the property, which is the subject matter of the suit. The Applicant is therefore not a person whose presence before the court is necessary to enable the court effectively adjudicate upon the dispute before it.

7. At the hearing of the application, counsel for the Applicant Mr. Mogeni submitted that the construction carried out by the Applicant on the suit property created a lien over the property until its outstanding fees was paid. As the suit in this matter sought to determine who would eventually own the property, the Applicant had a real interest in the proceedings as its lien would survive determination of the true owner of the property until the outstanding fees was paid. Even if the Applicant did not qualify for joinder under Order Order 1 Rule 10(2), counsel for the Applicant urged the court to allow the application in the interest of justice under Article 159 of the Constitution of Kenya, 2010. He argued that the interested party was affected by the proceedings and should therefore be allowed to join either as a party or an interested party.

8. On his part, counsel for the 1st defendant Mr. Issa submitted that the only reason the Applicant sought to be enjoined was that it had no recourse to the plaintiff. The Applicant had no lien over the property except common law lien which could not supersede the 1st defendant's interest in the property. The property having been transferred, the pursuit by the Applicant of its claim against the plaintiff was unsustainable. He submitted further that the Applicant's claim against the plaintiff was contractual and could not be resolved in the present suit as there was no privity of contract between the Applicant and the 1st and 2nd defendants.

9. For the 2nd defendant, learned counsel Ms. Munyendo fully associated with the submissions of counsel for the 1st defendant.

10. I have carefully considered the application and the affidavit evidence tendered in support and in opposition to the application. I have also considered the submissions made by counsel for the respective parties.

11. Order 1 Rule 10 (2) of the Civil Procedure Rules allows the court to order that a person be added to a

suit either as a defendant or a plaintiff where, *inter alia*, the presence of that person as a party is necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

12. What constitutes a necessary party was ably considered in the case of **Kingori vs. Chege & 3 Others Civil Case No. 136 of 2000** where the court (**Nambuye J as she then was**) 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.

13. The application before the court is brought by an intended plaintiff/interested party principally on the basis that the Applicant has a pending claim against the plaintiff in this suit which it wishes ventilated under the ambit of this suit. The Applicant's claim against the plaintiff relates to a building contract entered into on 20th May 2005 between the Applicant and the plaintiff through which the Applicant agreed to carry out building works on the property the subject of the present suit. In that contract, the Applicant claims to have undertaken the construction works which works the plaintiff defaulted in paying as per the contract. The Applicant claims that it has a lien over the suit property until its claim is settled. The Applicant feels that the eventual owner of the property must shoulder the burden in respect of its said claim.

14. On the other hand, the suit herein was filed by the plaintiff against the defendants to challenge the exercise of the 1st defendant's statutory power of sale, which exercise resulted in the suit property being transferred to the 2nd defendant.

15. The issue arising is therefore whether the intended 2nd plaintiff/interested party is a necessary party to this suit within the contemplation of Order 1 Rule 10(2).

16. On the outset, it is not denied by the Applicant that the only basis it wishes to be enjoined to these proceedings is that it cannot have recourse to the plaintiff for enforcement of its claim. This alone renders it obvious that had the Applicant been able to pursue the plaintiff for the claim, there would have been absolutely no nexus between this suit and the pursuit of the plaintiff by the Applicant in respect of the claim. There would have been indeed no necessity for the Applicant to seek to fall back on the property for the settlement of its claim. Can the Applicant in such circumstances then be said to be a necessary and proper party to the present suit? I do not think so as such necessity must draw from the court's assessment that determination of the matter before it would be enriched by the joinder of the party seeking to be added to the suit. Certainly not the other way round where the party seeking to be enjoined is itself in pursuit of some consequential interest in the proceedings.

17. It is my considered view that the determination of this suit does not require the presence of the Applicant in as long as the suit relates to a challenge revolving around sale of the property and in as long as the Applicant is a claimant against one of the parties to the suit which claim is completely distinct. Such claim cannot be superimposed onto the present suit as to do so would connote that the Applicant's claim against the plaintiff is enforceable against the 1st and 2nd defendants.

18. It has been submitted and correctly so that the Applicant's claim against the plaintiff is founded on breach of contract which contract the 1st and 2nd defendants were not a party to. There is therefore no

privity of contract between the Applicant and the defendants as would render it necessary that the Applicant should be allowed to participate in these proceedings either as plaintiff or as interested party. The position is not helped by the fact that the suit property over which the Applicant claims to have a lien has since been transferred to the 2nd defendant which has acquired full legal ownership over the property. The live issue in this suit is whether or not the sale was validly conducted and determination of this issue either way is unlikely to be of any benefit to the Applicant as it is unlikely that the law would allow reversion of ownership of the property to the plaintiff. The most that the plaintiff is bound to achieve is compensation by way of damages, as the horse over the title to the suit property has already bolted. The possibility of the Applicant enforcing its lien over the subsequent owner of the property is not legally feasible, the claim being contractual and therefore being directed at the plaintiff *in persona* as opposed to the property *in rem*.

19. In any event, enforcement of a claim founded on lien cannot override the rights conferred upon the purchaser of the property in a sale conducted pursuant to express statutory provisions. Sale of the suit property to the 2nd defendant was in exercise of the 1st defendant's statutory power of sale and, short of the Applicant having registered an encumbrance against the title prior to the transfer, the title now held by the 2nd defendant is sanctified and fully freed from any encumbrances and interests that may hitherto have attached to it. In the premises, it is no longer feasible that the lien that was feasibly enforceable over the property when registered under the name of the plaintiff and by virtue of the Applicant's claim aforesaid can be enforced in equal measure against the present owner of the property. I do not think that there is any law that allows umbilical attachment of a right or interest in a property capable of surviving change of ownership of the property. All such rights and interests decimate on the strike of registration of a transfer in favour of the new owner.

20. The other conditions for joinder as set out in the **King'ori case** aforesaid are, firstly, that there must be a relief flowing from the defendant to the plaintiff and, secondly, the ultimate order or decree of the court cannot be enforced without the presence of the party intended to be added to the suit. On the first condition, I have little doubt that if the Applicant is joined as a plaintiff, there would be no relief flowing from the defendants to it due to want of privity of contract. On the second condition, the presence of the Applicant is not necessary from the standpoint of enforcement as the suit is specific to the present parties, being entirely based on a sale transaction to which the Applicant was not a party.

21. In the end, the Applicant has failed to make a case for joinder that meets the threshold set out in the **King'ori Case**.

22. As to the prayer for joinder based on Article 159 of the Constitution of Kenya, 2010, while the article seeks to promote justice for all, and justice that is not delayed, and while the Article requires this court to overlook undue regard to procedural technicalities, I take the view that the Article would not permit the Applicant to be enjoined in these proceedings if to do so would defeat expedient disposal of this suit as between the present parties. The Applicant's claim is fairly remote to the subject matter of the present suit and is likely to clog the matter unnecessarily. The Applicant would have to find space within the present proceedings for a claim that is easily pursuable distinctly. That is why in my humble view, the option of arbitration which the Applicant has already invoked against the plaintiff and which Article 159 of the Constitution of Kenya expressly encourages, must remain the best bet for the Applicant.

23. For these reasons, the Intended 2nd Plaintiff/Interested Party's Chamber Summons application dated 22nd November 2011 fails and is hereby dismissed with costs.

IT IS SO ORDERED.

DATED, SIGNED and DELIVERED in Nairobi this 26th day of April 2012.

J. M. MUTAVA

JUDGE