REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

CIVIL SUIT 292 OF 2007 (OS)

<u>CIVIL</u> Party seeks to be joined in an action after judgment

IN THE MATTER OF: AN APPLICATION FOR A VESTING ORDER FOR PLOT NO. 1109/VI/M.N

AND

IN THE MATTER OF: KITUI RMCC 171 OF 1997

MULI MUTONGOI

VERSUS

MATIKU KYENGO KAVINGO

BETWEEN

RUMAD ENTERPRISES LIMITED…….....…….PLAINTIFF

VERSUS

MATIKU KYENGO KAVINGO *through* NZELI MATIKU *the legal Representative*…….DEFENDANT

BEAUTY COLLECTION LIMITED…….....APPLICANT

<u>RULING</u>

This court by the judgment dated 20th May, 2011 of Ibrahim J. as he then was, ordered a vesting order to issue in favour of the plaintiff over plot number 1109/VI/M.N and ordered that the plaintiff be put in possession therefore. An application dated 10th February 2012 is filed by Beauty Collection Limited. Beauty Collection Limited (BC) was not a party in this suit when judgment was pronounced. Only the plaintiff and BC participated in that application. By that application, BC seeks to be joined in this proceedings, after judgment, as a defendant that is, as the 2nd defendant. In another prayer BC seeks to have the judgment of this court set aside. The main reason that BC seeks those prayers is because it alleges that it became the registered owner of the property by an alleged transfer registered on

3rd December 2008. Both the plaintiff and BC agreed to canvass only the prayer seeking that BC be made a party whilst holding the other prayer in abeyance. The judgment of Ibrahim, J was in respect pf the plaintiff's claim that it had purchased the property by public auction. It therefore sought a vesting order to be issued over that property in its favour. That vesting order was issued as stated above. In addition the plaintiff was granted possession of the suit property. The plaintiff in its affidavit has deponed that it is now and has been in possession of the suit property. BC seeks an order that it be joined as the second defendant on the basis that BC purchased the suit property in the year 2008; that the said BC was unaware during the purchase of the existence of this suit; that the execution of the judgment of 20th May, 2011 will adversely affect it and that the judgment although would affect it, however did not participate in the hearing. BC stated that had the ownership being brought to the attention of the court, the court would have delivered a substantially different judgment. In submissions, in support of the prayer before the court, BC stated that the reason it sought to be joined as a party is to enable it to seek review of the judgment of the court. BC submitted that to allow the prayers that are sought would be in compliant with the principle of *audi alterem partem* (hear the other side). BC also relied on the provisions of Article 25 (c) and Article 50 (1) of the constitution of Kenya 2010. These are the provisions that guarantee every person the right t have their dispute resolved by the application of the law. The plaintiff relied on its replying affidavit and the written submissions. In the replying affidavit, the plaintiff termed the alleged purchase of the property by BC as fraudulent because:

· The alleged vendor (Matiku Kyengo) died in 1993 a certificate of his death was attached. The transfer of the property to BC in the year 2008 was allegedly executed by the deceased.

· That the transfer of the property into the name of BC was undertaken contrary to prohibitory order registered against the title. The extract of title annexed by the plaintiff did indeed show that there was prohibitory order.

· That the Land Registrar had requested the return of the title registered in favour of BC by his letter dated 30th January 2012. Its important for the content of that letter to be reproduced hereof as follows:

"Ref: Temp CF 1863/3 ***30th January, 2012-04-24***

CFC Stanbic Bank Ltd,
P. O. Box 30550-00100,
NAIROBI.
RE: CHARGE OVER MN/VI/1109-CR.9706

The above referenced charge was registered against the above quoted property in favour of Beauty Collection Limited.

It has since been established that the transfer of the above property to Beauty Collection Limited was founded on fraud as there was a court case pending in court against the purported seller.

This is to formally call you upon your bank to release the title document as it was found on fraud.

R. M. INGONGA
SENIOR REGISTRAR OF TITLES
MOMBASA

CC
Khatib & Co. Advocates,
P. O. Box 80118,
MOMBASA."

BC relied on the case Hussein V Kakiiza & another [1995-98] 2 EA 117 (SCU) this was a case decided in the Supreme Court of Uganda. In that case the appellant was a Ugandan Asian who had his property taken by a board during the regime of Amin. That board allocated that land to a person who obtained a loan from a financial institution. On failing to repay the loan, the financial institution auctioned the property and the property was purchased by the respondent. On his return to Uganda, the Asian sued the Attorney General seeking the return of the property. He and the Attorney General entered into a consent judgment for the return of that land. The respondent obtained an order of review of the judgment on the basis that although he was the registered owner having purchased it in an auction he had not been involved in the proceedings. The High court proceeded to make final orders declaring the respondent as the owner of the property. When considering the appeal, the Supreme Court upheld the High Court's review of the consent judgment but faulted the final determination on ownership.

I have considered that decision as I make the following determination of the matter before me. BC in its affidavit in support of the application carefully, I believe, failed to state who sold the suit property to him in the year 2008. It was not until the plaintiff attached a copy of the transfer that it became clear that the vendor was Matiku Kyengo who died in 1983. For BC to seek to be joined in this action without the person who sold the property to him being a party would be an exercise in futility. Such a person would be an essential person in such proceedings. Having considered the party's affidavits and their written submissions, I come to a conclusion that the joining of BC in this action would not serve the interest of justice. For this court to make that holding, it does not lead to the infringement BC's rights to be heard because BC would be free if it chooses to do so to file a fresh action against the vendor who sold the property to it and against any other party. It is for that reason that prayer (b) of the notice of motion dated 10th February 2012 is dismissed with costs to the plaintiff.

RULING BY:

MARY KASANGO
JUDGE

DATED and **DELIVERED** at **MOMBASA** this ***17th*** day of **May**, 2012**.**

……
JUDGE