



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Case 122 of 2010

SAMUEL MWAURA FELIX KARIUKIAPPLICANT/PLAINTIFF

VS

EQUITY BANK LTD1ST RESPONDENT/DEFENDANT

LYDIAH WAWERU

T/A PURPLE ROYAL INVESTMENTS.....2ND RESPONDENT/DEFENDANT

CHRISTOPHER MWAURA MWANGI.....3RD RESPONDENT/DEFENDANT

JUDY CATHERINE WAMBUI MWAURA.....4TH RESPONDENT/DEFENDANT

RULING

1. Before me is a Notice of Motion application by the 3rd and 4th Defendant/Applicants dated 31st January 2012 and expressed to be brought under Sections 1A, 1B, 3 3A, 63€ and 80 of the Civil Procedure Act and Orders 45 Rule 1(1)(a) and Order 50 Rule (1) of the Civil Procedure Rules, 2010. The application seeks two principal prayers:

1) That this court reviewsits orders made in its ruling delivered on 15th December 2011; and

2) That the suit against the 3rd and 4th Defendants be struck out with costs.

2. The application is based on grounds set out on the face of the Notice of Motion and is further buttressed by a supporting affidavit sworn by counsel for the Applicants KiingatiNdirangu on 31st January 2012.

3. The basis upon which the application for review is made is that in the court's ruling of 15th December

2011, the court did not address a preliminary objection raised by counsel for the Applicants dated 28th June 2010 and filed on 29th June 2010.

4. The prayer seeking the striking out of the case against the Applicants is based on the court's finding in its said ruling that the Applicants were not at fault in relation to the sale of the property the subject matter of the suit in this matter. The effect of that finding is that the 3rd and 4th Defendants are no longer necessary parties to the suit hence the case against them should be struck out.

5. The application is opposed by the Plaintiff through a replying affidavit sworn on 20th March 2012 and filed on 22nd March 2012. In the affidavit, the Plaintiff contends that the 3rd and 4th Defendants are properly enjoined in the suit as one of the issues for determination in the suit is the party to which ownership of the suit property should be vested. The Defendant's application if allowed would pre-empt this determination. The Plaintiff further avers that the suit would also not be canvassed on the claim of collusion and fraud in the absence of the 3rd and 4th Defendants. Allowing the application, in the Plaintiff's view, would be sanctioning an illegality and would amount to subverting justice.

6. Counsel for both parties put in written submissions to buttress the parties' rival positions on the application before me.

7. I have carefully evaluated the application on the basis of the material placed before me and on the basis of the written submissions by counsel for the parties.

8. With regard to the prayer for review of the court's ruling on 15th March 2012, I have perused the ruling delivered on 15th December 2011 and established that although the court addressed a preliminary objection filed on 21st September 2010 objecting to the firm of Kamande Muturi & Company Advocates acting for the 1st Defendant in this matter, the court did not address the notice of preliminary objection filed on 29th June 2010. However, I have perused the notice and established that the subject matter of the objection was that the suit herein did not disclose a reasonable cause of action against the 3rd and 4th defendants and was therefore bad in law, misconceived, embarrassing and incompetent. In the premises, I find that the preliminary objection is subsumed in the second prayer of this application which seeks to strike out the 3rd and 4th Defendants on the very grounds that the suit does not disclose any cause of action against them.

9. On whether the court should strike out the suit against the 3rd and 4th Defendants, I find it necessary to weigh the prayer against the orders sought in the Plaint and against this court's findings in its ruling of 15th December 2011 to establish if indeed the 3rd and 4th Defendants are necessary parties to the suit in this matter.

10. The Plaintiff filed suit on 2nd March 2010 seeking to enforce a sale in which he had participated as a bidder at an auction but which never completed ostensibly because the chargors to the property had redeemed prior to the auction date. In the suit, he sought orders for preservation of the property as well as for declaration that he had rightly purchased the property. He also sought an order of specific performance and damages.

11. In the court's ruling of 15th December 2011, the court made the finding that sale of the property was incapable of completion as the property had already been discharged to the 3rd and 4th Defendants by the 1st Defendant. The court, in the circumstances concluded that the only claim that the Plaintiff could sustain was for damages against the charge for arranging sale of a property over which it had no statutory power of sale at the time of the auction.

12. Given the foregoing conclusions, I am convinced that the prayers that remain alive in the suit in this matter cannot be enforced against the 3rd and 4th Defendants as the only nexus between them and the Plaintiff was the charge document in favour of the 1st Defendant and which charge was discharged before

the auction sale of the property. This position would not change even if the court were to find that there had been collusion or fraud as between the 1st Defendant as chargee and the 3rd and 4th Defendants as chargors. Such damages would still be borne by the 1st Defendant as the claim by the Plaintiff entirely revolves around its exercise of statutory power of sale.

13. For these reasons, I am inclined to allow the 3rd and 4th Defendant/Applicants' Notice of Motion application dated 31st January 2012 and to hereby strike out the suit as against the 3rd and 4th Defendants with costs.

IT IS SO ORDERED.

DATED AND DELIVERED IN NAIROBI THIS 17TH DAY OF MAY 2012.

J.M. MUTAVA
JUDGE