



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL SUIT 599 OF 2011**

**KWAME KARIUKI .....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**RUTH ABRAHAM KARIUKI ..... 2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**MOHAMED HASSANALI**

**ALIMOHAMED JANMOHAMED ..... 1<sup>ST</sup> RESPONDENT/DEFENDANT**

**HAMIDA MOHAMED HASSANALI .**

**JANMOHAMED .....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**RULING**

- 1.** Kwame Kariuki the 1<sup>st</sup> applicant/plaintiff and Ruth Abraham Kariuki the 2<sup>nd</sup> applicant/plaintiff have sued the Respondents Mohamed Hassanali Alimohamed Janmohamed 1<sup>st</sup> respondent and Hamida Mohamed Hassanali Janmohamed for declaratory and injunctive orders as per their plaint dated the 1/11/11. In their Notice of Motion dated 1/1/ they seek an injunctive orders against the defendants for a temporary injunction to be granted restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents their servants and or agents from constructing, erecting building or in any other manner developing any structure and buildings and the premises known as Portion Eleven (11) on the property known as L.R No. 1160/42 pending the hearing and determination of the suit. The applicants also seek that costs be provided for.
- 2.** The applicants were granted interim orders of injunction on the 14/11/11 pending hearing and determination of the application. On the 24/11/11 the applicant filed another Notice of Motion dated the 23/11/11 under order 40 rule 3 of the Civil Procedure Rule section 3A of the Civil Procedure Rule and section 5 of the Judicature Act. The applicants in their application sought the Courts leave to prosecute the respondents for being in contempt of the Court order given on the 14/11/11. The applicants also sought to have the respondent convicted and detained in prison for a term of six months or as per the Court directs on their release.
- 3.** On the 1/12/11 Mr. Kyalo Associates Advocates for the interested party filed a Notice of appointment of advocates. He also filed the Notice of Motion application dated 1/12/11 the subject of this ruling. In the said application the interested party is seeking the following orders.
  - i. That there be a stay of the proceedings herein pending the arbitration of the dispute between the plaintiff and the interested party/applicant.
  - ii. That costs be awarded to the interested party/applicant.

There are 4 grounds on the face of the application as follows;

- i. That the lease the subject matter of dispute herein provides in pertinent part that in the event of a dispute between the vendor and the purchaser the same shall be referred to a single arbitrator whose decision shall be final and binding upon the parties.
- ii. That the interested party herein is the purchaser of Town House No. 11 situate on L.R. No. 116/42, Ndege Road Karen from the defendants herein.
- iii. That the interested party is the party likely to suffer the greatest loss and damage most from the orders of Court likely to issue in these proceedings.
- iv. That it's mandatory that the plaintiff do comply fully with the terms and provisions of the lease herein for the quick and expeditious resolution of the dispute herein.

The application is supported by the affidavit of the interested party Mr. Karanja Kabage the purchaser of House No. 11 on L.R. No. 1160/42. The interested party also filed a supplementary affidavit dated the 30<sup>th</sup> of December 2011 and filed on the 9/1/12 in response to the replying affidavit of the 1<sup>st</sup> plaintiff filed on the 16/12/11.

The interested party and the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed herein list of authorities.

The interested party's application dated 1/12/11 was heard on the 23/2/12 parties made oral submissions. Mr. Kyalo for the interested party submitted as follows; the suit property the subject of this application is property in a gated community known as Ndege Garden along Ndege Road in Karen. Each of the proprietors have a lease agreement with conditions. That clause No. 4.2 of the said lease agreement states that in the event of any dispute which shall arise between the parties herein touching on the lease or the construction or application thereof of any clause or thing herein contained on the rights or liabilities of any party under the lease shall be referred to the decision of a single arbitrator to be appointed in accordance with the provisions of the Arbitration Act 1995 or any Act or Acts amending or replacing the same. That the decision of the Arbitrator shall be final conclusive and binding on the parties. That the plaintiffs have now preferred proceedings against the defendants alleging that the defendants have interfered with House No. 11 within the development. That the said house No. 11 has been sold to the interested party and therefore he is directly affected by the proceedings. That being an affected /interested party he has the locus to appear in Court and to urge the Court to order the parties to abide by the arbitration clause. Counsel referred to the following case of Achells Kenya Limited vs. Philips Medical Systems Nederland B. V & another (2007) eKLR and Corporate Insurance Company Vs. Loise Wanjiru Wachira Civil appeal No 151 of 1995. The facts in this case are at four's with the said two cases.

4. Counsel argued further that the same issues are raised by the defendants in their preliminary objection. On the issue of legal impediment counsel argued that plaintiff's replying affidavit has not pointed out any legal impediment and that the only issue raised is that the plaintiff argues that they are not a party to the lease agreement between the interested party and the defendants, that this is a gated community and they operate under a certain set of rules, the developments are similar, each home owner is a shareholder in Ndege Gardens Management Limited and that Mr. Kariuki a director of the defendant of the said company consented to the transfer of the property to his client. Counsel argued that the suit therefore should be stayed and referred to arbitration in accordance with section 6(1) of the Arbitration Act as they do not wish to wait until the proceedings start to raise the issue of the said clause 4.2. That the suit relates to ownership of the said properties, and are all governed by the lease.

5. Mr. Ndambiri for the respondents/plaintiffs opposed the application. In his reply he stated that he was relying on the affidavit of Mr. Kwame Karuiki filed on the 16/12/11. He gave a history of how the matter started. Counsel argued that from the beginning the Court had issued an interim injunction and when the interested party came into that after an order of status quo was issued to remain in force. Counsel argued that the Court has jurisdiction to hear that matter before it as the applicants are seeking injunctive orders in their notice of motion. That the applications have not sought orders to vacate the interim orders and

therefore the prayer they seek to stay the proceedings would be adverse to the injunctive orders granted, that in the transfer of lease filed as Exhibit No. 'C' in the applicants application there is reference to arbitration which the applicant is referring to in the agreement are not relation to his suit, that the injunctive orders were granted on the evidence and law submitted to the extent of the construction work that was going on that was undertaken by the two respondents. Counsel argued further that even if there would be a stay of the proceedings the illegal, irregular acts by the defendant should and cannot be ignored and that the injunction reliefs prayed for ought to continue being in place pending the hearing and determination of the dispute between the parties. On the authorities cited and argued that he issues they covered are materially different from the facts and the circumstances this case relates too. He asked the Court to ignore her and to order that the application is without merit and dismiss it.

6. In reply Mr. Kyalo for the applicant argued that the basis of the Notice of Motion dated 1/12/11 is the lease that was executed by the vendors and it has the arbitration clause and it makes no mention that a party can come to Court for interim relief and that the document that has clause 26.5 which the learned Counsel referred to is agreement for sale between the respondent and the interested party and it has nothing to do with the rights and obligations of the 14 owners of Ndege Gardens whose terms and conditions are in their respective leases which all have clause No. 4.2 that deals with disputes, with no mention of the Courts intervention. On the interim orders, counsel argued that it was made in relation to the Notice of Motion and was given exparte and was to be in force until the hearing of the application on the 2/12/11. That the said order was not extended on the 2/12/11. That section 6 of the Arbitration Act seeks to annul the said order, it relates to jurisdiction. That the Court cannot stay a matter and yet at the same time extend an order of a suit that it has stayed. Mr. Kyalo argued that the applicants can make an application under section 7 of the Arbitration Act to grant the injunctive orders.

7. I have carefully considered counsels submission in this matter. I have also considered the provisions of the Arbitration Act. The plaintiffs filed a complaint and an application and hereafter the applicant filed his notice of motion. As I considered the application dated the 1/12/11, I noted the following; the applications counsels filed a notice of application to act for the interested party. In the interested party's application dated 1/12/11. The applicant seeks a stay of the proceedings. It is evident that the applicant did not seek to be enjoined as a party in this suit but filed only an application to stay. For any order to be given to a party in a matter they must first be a party in the matter. An interested party in any suit must first seek to be enjoined to in suit before they can even seek an order. The applicant should have sought to be enjoined as a party in the suit. The application the interested party has filed has vital issues to determination; however at this state I find that even though this Court allowed the parties to submit on the application it was erroneous to do so. The application as it is incompetent. The interested party ought to have sought order to be enjoined and then seek the stay orders. If I were to give the stay order this Court would be doing so on an incompetent application. In my view it is not a procedural technicality that can be cured either by sections 1A, 1B, 3A of the Civil Procedure Act or Article 159 (2), (d) of the Constitution. It is indeed unfortunate that I have noted this anomaly at this stage but the proper thing must be done. I therefore find the application dated 1/12/11 is incompetent on the reasons given. I will not go into the merits of the application though the issues are summarized in this ruling. I have stated the submission made by the parties. I therefore strike out the application dated 1/12/11 with costs to the plaintiff/respondent. I do note that the defendants have raised the issue the interested party has raised in this matter.

Orders accordingly.

Dated, signed and delivered this 29<sup>th</sup> day June of 2012.

**R. OUGO**

**JUDGE**

In the Presence of:-

..... For the Applicant

.....For the Respondent

..... Court Clerk