



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 277 OF 2012

NATIONAL BANK OF KENYA LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFF

- VERSUS -

JOSEPH KITTONY ::::::::::::::::::::::::::::::::::: DEFENDANT

J U D G E M E N T

1. Before the court is a **Notice of Motion** application dated **25th May 2012**. It seeks as the substantive prayer an order that leave be granted to **Kipruto Kandie** and **Kiptui Kandie** to be joined to the suit as Defendants. The application is grounded on allegations that the suit property is vested in the estate of the late **Aaron Kimosop Kandie** whose surviving administrators are the Applicants and Kigen Kandie, and that the Applicants have not authorized Kigen Kandie to take over the property in any manner whatsoever as indicated in the Plaint. It is alleged that the said administrators should be joined to assist the court in arriving at a just decision since they are vested with all the properties of the estate of the late Aaron Kimosop Kandie by grant of letters of administration dated **9th November 2004** and it would be unjust to deal with the suit property in exclusion of the Applicants. The application is supported by affidavit of **KIPRUTO KANDIE** dated **25th May 2012** with annextures.

2. The application is opposed through a replying affidavit of **Z.K. MOGAKA** dated **31st May 2012**.

3. The brief history of the application is that the Plaintiff, a bank, is registered as chargee over the suit property **L.R. No. 209/8336/128** pursuant to a charges dated **30th December 1977, 10th May 1984, 9th June 1993** and **23rd March 1994** following financial advances granted by the Plaintiff to the registered owner, one Aaron Kimosop Kandie, now deceased. Due to several default in loan repayment terms the suit property, was in **1999**, sold to the Defendant at a public auction. The Defendant paid the requisite **25%** deposit but failed to pay the balance leading to further negotiations with the Defendant where the Plaintiff agreed to sell the suit property to the Defendant at a total sum of **Kshs.6,000,000/=** but again the Defendant failed to comply with the terms of the sale, pursuit to which the Plaintiff revived the sale of the suit premises by way of public auction which sale was scheduled on **3rd June 2004** but was halted by the court after the chargor's wife filed suit on behalf of the chargor's estate against the bank being **MILIMANI HCCC NO. 283 OF 2004 – RHODA CHELANGAT KANDIE – VS – NATIONAL BANK OF KENYA LIMITED** which case is still pending. The Plaintiff alleges that on or about **26th February 2009**, one Kigen Kandie, a son of the chargor and a beneficiary of the estate of the chargor to whom the suit premises devolves pursuant to a Certificate of Confirmation of Grant dated **30th January 2008** issued in **HIGH COURT SUCCESSION CASUE NO. 991 OF 2003**, approached the Plaintiff and offered to redeem the suit property on behalf of the estate whereupon pursuant to an agreement between the parties the Plaintiff agreed to discharge the suit premises upon *inter-a-alia* payment of

Kshs.6.3 million. It is alleged that the Commercial Bank of Africa Limited has agreed to extend a loan to the said Kigen Kandie of **Kshs.6.3 million** to purchase the said property subject to the registration of a charge against the suit premises in favour of the Plaintiff bank. The Defendant in this suit **JOSEPH KITONNY** currently occupies the suit premises. In order for the Plaintiff to proceed as agreed with Kigen Kandie, the Defendant is required to vacate the suit premises. This is the purpose to be achieved by this suit and the Plaintiffs' application dated **26th April 2012** is in part intended to secure interim preservative orders in respect of the suit premises.

4. The Applicants now seek to join this suit as Defendants. Their expressed fear is that the Plaintiff has, as per the Plaintiff, chosen to deal with one of them, the said Kigen Kandie, who is one of the three surviving representatives of the aforesaid estate, and not with all of them. The Applicants allege that the confirmation of grant of letters of administration dated **30th January 2008**, purportedly issued in **HIGH COURT SUCCESSION CAUSE NO. 991 OF 2003** were declared null and void having been obtained through misrepresentation and fraud, and the court on **14th October 2011** declared it null and void. The Applicants state that the deal entered into by the Plaintiff and Kigen Kandie is dishonest and has been done secretly without informing the other administrators. The Applicants submit that the decision by the bank to sell the suit property to Kigen Kandie on the allegation that the property has been passed over to him upon the confirmation of the grant is wrong and amounts to the Plaintiff supporting an illegality.

5. On their part, the bank has submitted that the Applicants are busy bodies and should not be joined to the suit. It is submitted for the Bank that the Plaintiff seeks no remedy from the Applicants, and that the case before the court is simply between the Plaintiff and the Defendant and allowing the application will only clog the issues in dispute. Mr. Ngugi counsel for the Plaintiff extensively, and quite ably, demonstrated with authorities why the Applicants have no business in this matter.

Citing the case of **CLLR OMONDI KOKORE – VS – THE TOWN CLERK AND MUNICIPAL COUNCIL OF KISUMU** the counsel submitted that there is no issue to be determined between the Plaintiff and the Applicants. In that case the court had this to say:-

“The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not of course merely that he has relevant evidence to give in some of the questions involved. That would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some questions involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately . . . The only reason which makes it necessary to make a person to an action is so that she should be bound by the result of the action and the questions to be settled therefore must be a question in the action which cannot be effectively and completely settled unless he is a party.”

6. I agree with the legal reasoning and the logic of Mr. Ngugi's submissions on the matter. Under ordinary circumstances I would fully be bound by those submissions. However, in my view, the matter before the court is not that ordinary. It is true that the issue to be determined, as per the Plaintiff, is between the Plaintiff and the Defendant. It concerns vacant possession of the suit premises, and looked at in isolation, the Applicants appear to be real busy bodies. However, in paragraph 9, 10, 11, 12 and 17 of the Plaintiff, and in the supporting affidavit of the application dated **26th April 2012**, the Plaintiff itself states that they are ready to sell the suit property to one Kigen Kandie. Now, it is absolutely clear that the said Kigen Kandie, together with the Applicants are the surviving personal representatives of the late Aaron Kimosop Kandie. If the bank has decided to deal with one, the bank must also deal with the others. However, matters get worse upon the allegations, which appear to be true, that the bank has chosen to deal with Mr. Kigen Kandie on the strength of a confirmation of grant, which is disputed. The Ruling of Justice Nambuye on **14th October 2011** confirms beyond doubt that the said confirmation of grant was fraudulent. She declared it null and void. The bank itself, at paragraph 12 of the replying affidavit, acknowledged that the confirmation may be null and void, but insists that the same is not an issue between the Plaintiff and the Defendants in this suit. In my view, it is the duty of this court to protect the property of deceased persons. To the extent that a part of this suit hinges on a transaction on such property where there are serious conflicts and pending court matters, the tenets of justice require that

before such a property can be alienated all interested parties be given a chance, if they so wish, to make a say. The joining of the Applicants to this suit will not clog the issues between the Plaintiff and the Defendant. Those issues are clear, but it will ensure that any dealing between the Plaintiff bank and the said Kigen Kandie are done in a transparent way which respect the existing legal structures and matters related to the same which may be pending in court.

7. To that extent I allow the Notice of Motion application dated **26th May 2012** as prayed and also direct that the said Kigen Kandie, also joins the suit as a Defendant. The costs of this application are given to the Plaintiff.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 19TH DAY OF JULY 2012

E. K. O. OGOLA

JUDGE
PRESENT:

Ngugi for the Plaintiff

Kimeto for the Defendant

Teresia – Court Clerk