REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 701 of 2004

KENNEDY MWITA……..……....…….....…..……...1ST PLAINTIFF

PATRICIA MWITA…….....……..……2ND PLAINTIFF

VERSUS

THE BOARD OF TRUSTEES NSSF.……..…….1ST DEFENDANT

EMMANUEL TUITOEK KIPNGETICH…....…….PROPOSED 2ND DEFENDANT

FAULATA JERUTO KIBET……..…..…PROPOSED 3RD DEFENDANT

RULING

By amended plaint dated 29th June 2004 and amended on 2nd August 2006 the plaintiffs aver that they are the proprietors of LR No. KIT/101/175 which they accepted to purchase from the defendant on a tenant purchase basis on 13th September 1999. The said transaction entailed the plaintiffs paying a deposit of 10% of the purchase price of Kshs. 4,000,000.00 after which the defendant was to construct the said property to 30% level of completion. However, the defendant subsequently unilaterally re-valued the purchase price by a further Kshs. 900,000.00 thereby compelling the plaintiffs to pay a further sum of Kshs 90,000.00 being 10% of the enhanced figure. Despite compliance the defendant went quiet and subsequently invited the plaintiffs to take possession of the suit premises subject to execution of the contract. However, the defendants unilaterally reactivated the plaintiffs' account without notice in breach of the terms of the terms of offer and acceptance. The defendant has continued to interfere with the plaintiffs' quiet enjoyment of the suit premises with threat of eviction without complying with the terms of the contract despite demand and notice of intention to sue. Accordingly, the plaintiffs pray for *inter alia* an order of specific performance and permanent injunction restraining the defendant from interfering with their quiet enjoyment of the suit premises.

The defendant in its amended defence filed on 17th October 2006 while admitting that it invited offers for purchase of the suit premises at Kshs. 4,000,000.00 contends that the said offer was accepted by the plaintiffs after which it was agreed that they pay 10% thereof. However the defendant offered to upgrade the suit premises by providing basic facilities and infrastructure for a further Kshs. 900,000.00 which the plaintiffs accepted. It is the defendant's contention that the premises were 30% complete at the time of the offer and was under no obligation to undertake any further construction. It is the defendant's contention that it is in fact the plaintiffs who are in breach of the terms of the offer and acceptance and therefore if there is any interference with the plaintiffs' occupation the same is justified.

By a Notice of Motion dated 17th July 2012, the proposed 2nd and 3rd defendants (hereinafter referred as the applicants) seek to be joined in these proceedings as defendants. The basis for their seeking to be joined is contained in the grounds and the supporting affidavit sworn by **Emmanul Tuitoek Kipngetich** the proposed 2nd defendant herein. According to the applicants they entered into an agreement with the defendant for the purchase of LR No. KIT/101/175B which was allotted to them vide a tenant purchase scheme contract. However, despite making payment in accordance with the said agreement they have not been able to access the said premises although they have been ready to move in. According to them they have sufficient interest in the suit premises being LR No. Kit/101/175B despite being excluded from these proceedings. In their view they will suffer prejudice if the suit proceeds in their absence hence it is necessary that they be joined so that all issues in controversy are effectually and completely adjudicated upon.

In the replying affidavit sworn by **Kennedy Mwita**, the 1st plaintiff on 19th July 2012, the plaintiffs aver that the suit premises Nairobi/Block 101/175 New Kitsuru, Nairobi was sold to them on 27th April 2000 long before the purported sale to the proposed defendants. According to the plaintiffs their claim against the defendant is for breach of contract and has nothing to do with the applicants' claim who are free to sue the defendant, whose claim seem to be caught up by limitation. According to the plaintiffs they have no claim against the applicants hence there was no need to join them. According to the plaintiffs the applicants' claim is meant to give them a footing to ride on the back of the defendants against whom they may make separate claims yet they have been in occupation of the suit premises since 2005. According to them the applicants do not qualify to be joined as defendants but may be termed as interested third parties subject to establishing their interests and have no registrable interest and will suffer no loss as they can direct their claim against the defendant. According to them the application ought not to be allowed.

By a supplementary affidavit sworn by **Emmanual Tuitoek Kipngetich** on 6th August 2012, the applicants reiterate the contents of the supporting affidavit that the house in LR No. Kit/101/175B is his hence the issue of limitation does not arise. According to him they have always laid claim to the suit premises but were only awaiting the outcome of the court case. In their view order 1 rule 10(2) of the Civil Procedure Rules allow for the addition of parties.

In their submissions, the applicants, apart from reproducing the contents of the supporting affidavit and the supplementary affidavit *in extenso*, contend that the issues in dispute revolve around the ownership of house No. LR No. Kit/101/175B and that the orders sought by the plaintiffs will legally affect the interest of the applicants and is central to the proceedings herein. In support of their submissions the applicants have cited **Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd [1999] 1 EA 55** and **Kingori Vs. Chege & 3 Others [2002] 2 KLR 243.** These two cases were cited in **Laisa Mpoye & Others vs. Kajiado Central Milk Project & Others Nairobi HCCC No. 155 of 2012** in which this court allowed an application made by the applicants to be joined as interested parties.

On the part of the plaintiffs it is submitted that the applicants lack legal capacity since they did not pay the plaintiff any money and their claim lie against the defendant in whose name the legal title still resides. According to the plaintiffs the applicants claim is time barred and their application is meant to scuttle the plaintiffs' claim since they have been aware of the plaintiffs' claim since 2005 without laying any claim. It is further contended that the dispute between the plaintiffs and the defendant has nothing to do with the proposed claim by the applicants who are free to institute their own claim if they so wish since they have no counterclaim against the plaintiffs. Therefore, it is submitted that the application is frivolous, misconceived and intended to interfere with the plaintiffs' claim and is an afterthought that deserves dismissal.

Before I deal with the merits of the application I have observed that the supplementary affidavit is replete with legal analysis or arguments and conclusions. Dealing with a similar affidavit **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** had this to say:

"The plaintiff's affidavit has fallen into error of purporting to speak the advocate's language of submission. Deponents making affidavits have no business doing such a thing; because the affidavit

is the evidentiary basis of an application which itself claims to rest on legal grounds. Therefore the substance of an affidavit should be placing before the court the factual evidence to validate such legal arguments as will be articulated in the advocate's submissions in court. The replying affidavit in a number of paragraphs contains contentious matters, which properly belongs to the stage of submission by counsel".

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I wish to say no more on the issue.

The principles guiding the court's exercise of discretion are well known. Under Order 1 rule 10(2) of the Civil Procedure Rules, "the court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added".

Under the foregoing provision the Court has powers to order the name of any party improperly joined whether as plaintiff or defendant to be struck out and then proceed to add the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence is necessary in order to effectually and completely adjudicate upon and settle all the questions in the suit. Accordingly, there are three types of persons who may be joined to the suit. The parties may either be a plaintiff, a defendant or a person whose presence is necessary in order to effectually and completely adjudicate upon and settle all the questions in the suit. The last type of person is usually termed as "interested party".

In **Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd** (supra) it was held:

"A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter…For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. *Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit*. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."(Emphasis mine).

In this case the applicants contend that the orders which the plaintiffs seek in the suit, would affect their interests. It follows that they fall in the category of interested parties rather than defendants. Apart from the foregoing, it must be recognized that the joinder of a party as a defendant has cost element and therefore the Court will seldom join a party as a defendant to a suit especially where the plaintiff opposes the application since it is not for the Court to decide for the plaintiff who to sue. See **Santana Fernandes vs. Kara Arjan & Sons [1961] EA 693**.

Whereas it is true that in the interpretation of the provisions of the Civil Procedure Act and the Rules made thereunder, the Court is now obliged under sections 1A and 1B of the Civil Procedure Act to take into account the overriding objective provided thereunder, it is also important to note that the decision whether or not to join a party is an exercise of judicial discretion which must be exercise judicially and hence the conduct of the applicant must be considered. In this case the applicants' case is that they attempted to take possession of the suit premises but were repulsed by security guards stationed at the said premises by the plaintiffs. They do no disclose to the Court when this action took place. It is

therefore clear that the applicants have not disclosed all the material facts to enable the Court exercise discretion in their favour. In my view a party who genuinely intends to be joined as a party to civil proceedings must do so at the earliest opportunity and where there is a delay in doing so which delay is not explained the Court would be disinclined to allow the application if to do so would derail and delay expeditious disposal of the case and leave the applicant to pursue his interest in a separate cause.

In **Gurmukh Singh Dhanjal & 2 Others vs. Jaykrishan Morzeria & 3 Others Kisumu HCCS No. 343 of 2002, J R Karanja, J** while setting aside an order joining parties to a suit cited **Agricultural Finance Corporation vs. Lengelia Ltd [1985] KLR 765** and expressed himself *inter alia* as follows:

"Under Order 1 rule (2) of the Civil Procedure Rules, where it appears to the Court that any joinder of parties may embarrass or delay the trial of the suit, the court may on its own motion or on application of any party order separate trials or make such other order as may be expedient. Order 1 of the Civil Procedure Rules generally applies to parties to a suit who in normal circumstances are described as plaintiffs and the defendants. However, it is the court's view that the provision would apply, *mutatis mutandi,* to any other party who may be joined to a suit as interested party to the matters under consideration...The need to maintain the interested parties in this suit...would only serve to delay speedy disposal of the suit. If anything the interested parties are at this point busy bodies merely applying "gate-crushing" tactics under the pretext of having interest in the sale agreement subject of the suit...As a general rule, a contract affects only the parties to it and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it... The affairs of the interested parties club ought not be introduced and sucked in a straightforward contractual transaction. It is only fair that the interested parties be "evicted" from this suit by setting aside of the *ex parte* order granted in their favour".

The relevant test for determination whether or not to join a party in proceedings as a defendant according to **Nambuye, J** (as she then was) in the case of **Kingori vs. Chege & 3 Others [2002] 2 KLR 243** is whether there is a relief flowing from that defendant to the plaintiff.

In this case the applicants have not sufficiently shown what relief if any is likely to flow from the plaintiff to the defendant and vice versa since there does not seem to be any contract between them and the plaintiffs. Their claim against the plaintiffs if any would be in respect of trespass which is a tort unlike the plaintiffs' claim against the defendant which is a claim in contract. To join the two claims would in my view unnecessarily increase costs and on occasion confuse issues.

I am in agreement with the plaintiffs and hold that it would defeat the overriding objective to join the interested parties to this suit which has been pending since 2004. The overriding objective requires the Court to *inter alia* timely dispose of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties while ensuring that cases are dealt with expeditiously and fairly. The interested parties if so minded are free to institute their own proceedings against either the plaintiffs or the defendant since a counterclaim is in law separate suit and is only filed in the suit for the purposes of convenience.

In the premises I find no merit in the application dated 17th July 2012 which I hereby dismiss with costs to the plaintiffs.

Dated at Nairobi this 25th day of October 2012

G V ODUNGA
JUDGE

Delivered in the presence of:

Mrs Kahindi for Mr Arusei the applicants

Mrs Omondi for Mrs Guserwa for the plaintiffs/respondents