



REPUBLIC OF KENYA

High Court at Machakos

Civil Suit 58 of 2008

NYWERI DEVELOPMENT GROUP & 16 OTHERS.....PLAINTIFFS

VERSUS

1. MATUMAINI VENTURES LIMITED

2. KENYA COMMERCIAL BANK.....RESPONDENT

RULING

The plaintiffs' application dated 26th May, 2010 and filed in court on 2nd June, 2010 seeks in the main to have **Gachiri Kariuki** and **Martin Kiai Nuthu** t/a **Gachiri Kariuki** and **Kiai Advocates** enjoined as a party to this suit. Secondly, it seeks that leave be granted to the plaintiffs to amend the plaint in terms of the draft amended plaint annexed to the application. The application is anchored on grounds as well as a supporting affidavit.

The grounds advanced in support of the application are that it will be in the interest of justice to have the intended 3rd defendant enjoined in the proceedings since it was directly liable on issues of fact and concealment of material facts in the cause of discharging its professional duties on behalf of the intended 3rd defendant as against the plaintiffs. That the presence of the intended 3rd defendant will be necessary to determine the issues before court in order to mete out substantial justice. Lastly, it is stated that the amendment of pleadings was necessary since there are propositions of fact and law which were inadvertently overlooked and or omitted by the previous advocates on record and must be pleaded for a proper and better determination of issues between the parties.

The supporting affidavit sworn by 2nd plaintiff reinforced the foregoing. Suffice to add that previously, the plaintiffs were being represented in this action by **Messrs Kiugu & Co Advocates**. In drawing up the plaint the said law firm had failed to show *in-te-alia* that the plaintiff had enforceable interest in the suit premises and it was therefore necessary to amend the same to reflect this fact. It was also necessary to show that the 1st defendant acting as agents and with authority of the 2nd defendants lawfully assigned proprietary rights to the defendants with regard to the suit premises. This pertinent fact was omitted from the pleadings before court. Finally, in order to establish the vendor/purchaser relationship between the parties requires the calling for new proposition of facts which were not included in the plaint, hence the need to bring on board, the intended 3rd defendant. So much for the need to amend the plaint.

With regard to the need to enjoin in the suit, the intended 3rd defendant, it is the case of the Plaintiffs that at all material times to suit, the intended 3rd defendant acted for the 1st defendant in all transactions touching on the suit premises and the manner in which it discharged its professional duties was highly questionable and this position ought to be reflected in the pleadings. The intended 3rd defendant being

enjoined in the suit was necessary for the effectual and complete adjudication of the real questions in controversy on their true and substantive merits.

Served with the application, the 2nd defendant through **Messrs Sichangi & Company Advocates** filed grounds of opposition stating that the application was *ex-facie*, incompetent and bad in law. Secondly, the application should fail in the face of basic agent and disclosed principle law. On its part, the intended 3rd defendant through **Messrs John Mburu** filed a Notice of Preliminary Objection to the application. In its view, there was a pending application dated 13th May, 2009 filed by the plaintiff which application ought to be determined first. Otherwise the draft amended plaint had no merit, was poorly drafted and disclosed no cause of action against it.

This was followed by grounds of opposition in which it claimed that there was absolutely no cause of action against it and its presence in the proceedings was not necessary. There was no privity of contract between the plaintiffs and it. In any event, the alleged cause of action was time barred. Since it never acted for the plaintiffs, it owned them no duty of care. The plaintiff had all along during the alleged contractual period and in this litigation been represented by a competent lawyer and any complaints should be raised against their said lawyer. Lastly, no third party notice had been issued to it by the plaintiffs.

When the application came before me for *intepartes* hearing on 26th April, 2012, **Mrs Madahana, Mrs Ratemo** for **Mr. Liko** and **Mr. Mburu**, learned counsel for the plaintiff, defendants and intended 3rd defendant respectively agreed to canvass the application by way of written submissions. However, it was not until 16th July, 2012 that the respective written submissions were on board. I have since carefully read and considered them alongside cited authorities.

It is common ground that the 1st defendant has not filed any submissions in opposition to the application. It is also common ground that though the 2nd and proposed 3rd defendants filed notice of preliminary objection and grounds of opposition, they filed no replying affidavits. It is also not in dispute that the intended 3rd defendant acted for the 1st defendant in the transactions leading to this suit. It is also not denied that the 1st defendant was acting as the estate agent of the 2nd defendant.

The proposed 3rd defendant on the instructions, I would imagine if both defendants drew up sale agreements between the 2nd defendant and the plaintiffs with regard to the suit premises. It oversaw the signing of the sale agreement between the plaintiffs and the 1st defendant and was also to effect the eventual transfer of the suit premises to the plaintiffs. The proposed 3rd defendant also received payments from the plaintiff's advocates. The intended 3rd defendant by so acting must have guaranteed the plaintiffs and or their counsel that its client was in a position to pass good title to them at the end of the day, and if the transaction was successfully concluded. The 1st and 2nd defendants have all argued that the intended 3rd party had no duty of care to the plaintiff and that it only owed loyalty to its clients. I am not certain that such an argument holds water. However, that is an issue for another day, perhaps during the plenary hearing of the suit.

There is a serious allegation made against the intended 3rd defendant that may well go beyond advocate/client relationship or even principle/agent relationship. They may even touch on criminality. The intended 3rd defendant was in the know of the alleged rescission of the contract, by the 2nd defendant but still nudged. The intended 3rd defendant continued receiving payments from the plaintiffs without informing them that the 2nd defendant had resiled from the transaction and had in fact rescinded the same. Further that there was non-disclosure of the fact that the defendants were embroiled in suits with other buyers. Indeed in the draft plaint annexed to the application, it is pleaded that the intended 3rd defendant in collusion with the other defendants intended to sell the suit premises to other persons who were offering higher prices. In view of the foregoing, I doubt that defence of disclosed principle/agent can come to the aid of the intended 3rd defendant. Again I do not think that the doctrine

of privity of contract is available to the intended 3rd defendant on the foregoing uncontested facts. The doctrine of privity of contract cannot be used to steal a match on another party from whom material facts were concealed. Indeed it would be unjust and immoral to uphold such proposition. The proposed 3rd defendant was duty bound to disclose to the plaintiffs and or their counsel the alleged rescission of the sale agreement by the 2nd defendant. It is instructive that counsel now appearing for the proposed 3rd defendant was acting for the 2nd defendant when he purportedly wrote rescission letters to the 1st defendant, hence claims of fraud and collusion. All these issues can only be addressed by bringing on board all those who in one way or another were involved in the transaction. It was incumbent upon the proposed 3rd defendant, and I repeat, to disclose to the plaintiffs the alleged rescission of the transaction by the 2nd defendant as well as delay occasioned by suits with other buyers which inevitably delayed the transactions so that the plaintiffs could have decided on a favourable course of redress before commencing payments for the suit premises. Since the intended 3rd defendant was in the thick of things, I do not see how it can possibly escape from being a party to the suit. It will have to explain some of these things at an appropriate time.

Order 1 rule 10(2) of the Civil Procedure rules provides *inter alia*:-

“the court may at any 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 be 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 or questions involved in the suit, be added.”

In my view the intended 3rd defendant must be brought into these proceedings if the court is to effectually and completely to adjudicate upon and settle all questions in controversy in this suit.

The plaintiffs have also sought to amend the plaint. I do not think that this plea is fiercely opposed by the defendants. All that they are saying is that the plaintiffs’ claim against the intended 3rd defendant as depicted in the draft amended plaint was time barred, the plea is an afterthought and malicious in nature. The draft amended plaint was incompetent and argumentative in nature, poorly drafted and bad in law. Whether or not the cause of action is time barred is a matter for evidence. The plaint cannot be incompetent merely because it is poorly drafted or argumentative. Such anomalies if at all can be addressed by subsequent amendments. Amendments can be entertained any time before judgment. Amendments can even bring in a new cause of action as long as it arises out of the same facts. None of the defendants have shown what prejudice they will suffer by amendment. They have a right to file amended defences they so wish.

It is in view of the foregoing that I must allow the application in its entirety. Accordingly, I make the following orders on the application:-

1. The draft amended plaint annexed to the application shall be deemed as filed upon payment of the requisite fees.
2. The 3rd intended defendant has been enjoined in these proceedings as the 3rd defendant
3. The defendants shall within 14 days of service on them of the amended plaint, file and serve their respective amended amended defences and defence respectively on the plaintiffs.
4. If there will be need for reply and defence to the counterclaim if at all raised by the defendants or any one of them, the plaintiffs shall be at liberty to file the same within 7 days.
5. Costs shall otherwise be in the cause

This suit has been the subject of numerous applications with the consequences that the issues are being clouded unnecessary. I am hoping that this will be the last of such applications, so that parties are afforded an opportunity to focus on the main suit which should be heard and determined expeditiously given that it is a 2008 matter.

DATED SIGNED, and DELIVERED at MACHAKOS this 15THday of OCTOBER 2012.

**ASIKE-MAKHANDIA
JUDGE**