



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 31 OF 1999

ALICE CIURUNJI NDWIGA.....PLAINTIFF

VERSUS

ANTHONY NJUE MUGERA & ANOTHER.....DEFENDANT

RULING

The 2 plaintiffs in **Civil Suit No. 64 of 1991** filed the suit against one Elisha Ndwiga Mugeru. One of the prayers in the suit was

“A declaration that the plaintiffs are joint and co-owners of Plot No. NGANDORI/KATHANGARIRI/T.208 with the defendant”.

As the matter was still pending in court, the defendant sold the plot in question and this necessitated the filing of the chamber summons dated 13.6.97. The second plaintiff who was the Applicant in that Application asked the court to enjoin Alice Ciurunji Ndwiga as a defendant to whom the said plot had been transferred. The application was opposed but after hearing it, the learned magistrate made the ruling dated 2.12.99 in which he allowed the Application. In allowing the application, the learned magistrate found that the wrong order/rule had been cited on but went ahead to invoke Section 3A of the Civil Procedure Act which had also been cited to allow the Application.

That Ruling is the subject of this appeal. Alice Ciurunji Ndwiga filed this Appeal through I.W. Muchiri & Co. Advocates. They have proffered 9 grounds of appeal. I will not reproduce the said grounds here but I have considered them carefully along with the written submissions by the counsel.

The first ground is that the learned trial magistrate failed to appreciate that the application was bad in law. On this ground, I would not fault the learned magistrate. He did make a finding that the cited Rule was the wrong one but went ahead to invoke his inherent powers under Section 3A of the Civil Procedure Act. In doing so, he was considering a substantive justice rather than the strict adherence to procedure. In doing so, he used his discretion and in my view, he used the said discretion judicially and in furtherance of the large interests of justice.

My finding is that he used, that discretion fairly and judicially. He did not therefore err. I have no basis of interfering with the said discretion. On the other grounds, I agree with counsel for the Respondents and the learned trial magistrate that they raise substantive issues which are arguable and which can only be ventilated at the hearing of the main suit. They have nothing to do with the joinder or otherwise of the Appellant.

In deciding on whether to allow a joinder of a party that has been left out, the court will consider first and foremost whether the said joinder will cause prejudice or injustice to the other parties.

In this case, neither the Appellant nor the defendants in the main suit stood to be prejudiced by the joinder. Indeed, the non-joinder of the Appellant would have been tantamount to defeating the entire claim and more particularly prayer 'c' which I have reproduced at the beginning of this ruling. The defendant transferred the suit property to his wife with the full knowledge that the same was the subject of the court proceedings. He cannot be allowed to circumvent justice by benefiting from such an act. If the court were to disallow the joinder of the Appellant to the main suit and then prayer 'c' was allowed, wouldn't the Appellant then run to court waving a breach of rules of natural justice because she would not be heard yet she is the registered owner? The defendant cannot be allowed to have his cake and eat it. My finding is that the joinder of the Appellant would enable the trial court to bring on board all the interested parties so that all the relevant issues would be ventilated in the presence of all and each would have an opportunity to be heard. This would not cause any prejudice or injustice to any party. On the Contrary, it would ensure that the revered common principle of *audi alteram partem* is adhered to and given its rightful place in the proceedings.

For the foregoing reasons, I find and hold that this Appeal lacks merit. The same is hereby dismissed with costs to the Respondents.

W. KARANJA

JUDGE

Signed by the abovementioned.

Delivered and dated at Embu this 2nd day of January 2011

H. M. OKWENGU

JUDGE

In presence of:- Muchiri for Applicant, Kanthungu for Respondents.