



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO.477 OF 2010

CAROLINE N. NDUNGU.....1ST PLAINTIFF
NUZHAT A. MWINZANGU.....2ND PLAINTIFF
BERNICE N. MWENDWA.....3RD PLAINTIFF
MARGARET A. OCHIENG.....4TH PLAINTIFF
CHARLES MACHOKA.....5TH PLAINTIFF
DAVID GOKO NDERITU.....6TH PLAINTIFF
HELLEN CHEPCHUMBA.....7TH PLAINTIFF
ZEDDY NASERIAN.....8TH PLAINTIFF

VERSUS

**THE REGISTERED TRUSTEES OF TELPOSTA PENSION
SCHEME.....DEFENDANT/RESPONDENT**

AND

**BERNARD KARIUKI WATAARI }
REBECCA LETANGULE }
REMGUIS OKEYO }
FAITH NJOROGE }
JAQUELINE KEZIA }
BEATRICE KALENDA }.....**THIRD PARTY**
CATHERINE KIRARA }
KENNEDY BWOSI }
JENNIFER OKOTH }
LAWRENCE MUGAMBI }
PAUL M. GITAU }**

Coram: Mwera J

Achiando for 1st – 8th applicants

Bundotich for defendants

Mr Koech for third party/applicants

Njoroge, court clerk

RULING

The notice of motion about to be determined was dated 23/2/11. It was brought by the eleven (11) third parties under the now repealed Order XXXVIII rule 1, 2, Order XXXX (?) rule 1, 7 and sections 3A, 3, 80 of the Civil Procedure Act for orders:

- i) that the suit be consolidated with HCCC 264/07 Bernard Kariuki Wataari & 9 others Vs the Registered Trustees of Telposta Pension Scheme;
- ii) that there be a stay of proceedings in this HCCC 477/10 pending the conclusion of the said HCCC 264/07
- iii) that the orders herein of 20/1/11 be set aside pending the final determination of HCCC 264/07

The grounds put forth for the above prayers were that the plaintiffs are not the registered proprietors of premises known as NAIROBI/BLOCK 23/301/4, 5, 7, 9, 11, 12, 13, 15, 16, 17 and 19, Kangundo Road Kileleshwa Nairobi. That the 3rd parties had filed HCCC 264/07 against the defendant pension scheme to bar it from evicting them from the premises (listed above). In the suit the 3rd parties got injunctive orders against the defendant until HCCC 264/07 is finally heard. Those orders had never been discharged. That the issues in this suit and in no. 264/07 are basically the same and so the two suits need to be consolidated for one determination – a thing that will save judicial time and costs.

In the supporting affidavit sworn by Benard Kariuki Wataari, the 1st third party, he stated that he had perused the plaint herein, the chamber summons dated 15.10.10 together with the supporting affidavit thereof. He repeated that the plaintiffs herein were not registered over the eleven (11) properties set out in the prayers and so had no legal interest to litigate here. The 3rd parties were on the other hand members of the former and current employees of Telkom Kenya and Postal Corporation and members of the defendant. They thus had first priority to purchase the said properties. They got letters to that effect. So the orders of 20/1/11 requiring them inter alia to vacate the said housing units for 45 days in order to allow for repairs thereto cannot be complied with because they already had the injunction order in HCCC 264/07 restraining anybody from interfering with their occupation of the houses. The order of 20.1.11 had been obtained to circumvent the injunction orders.

A notice of preliminary objection with four (4) main points was filed by the defendant. It was therein contended that the 3rd parties' application had been filed in contravention of Order 1 rule 17 of the Civil Procedure Rules which required that they seek leave of the court to enter appearance in a matter, since the time fixed in the 3rd party notice had expired. Such a notice dated 8/11/10 was served and an affidavit of service filed in court on 16.11.10. The service was noted by the court. Then the time given in the 3rd notice expired. A further ground was that the 3rd parties had not filed a defence to the 3rd party notice and so have no pleading to stand on before court.

In the defendant's replying affidavit sworn by Peter Rotich, the administrator/trust secretary of the defendant, it was stated that he had authority to state that the 1st third party (Bernard Kariuki) who had sworn the replying affidavit to the present motion had not attached a letter of authority from other 3rd parties to depone on their behalf. The defendant was the registered proprietor of the suit premises and that at no time did the plaintiffs claim any right/interest in those properties. Only that the plaintiffs sought court orders to compel the defendant to abate the nuisance which was occurring on the same block where the two sets of litigants had their properties. The defendant had admitted that. The 3rd parties had as they admit, disobeyed the court orders to vacate the premises temporarily for construction to go on, so as to abate the nuisance. It had not been demonstrated how the order of injunction the 3rd parties got excluded them from the orders of temporary vacation to abate the nuisance on the subject properties. The two causes – this one and HCCC 264/07 had set out different claims – in this one the plaintiffs want the

defendant to abate a nuisance which it admitted while in the other, the 3rd parties who are plaintiffs there seek orders that they be given first priority to purchase the houses owned by the defendant. Further, that the 3rd parties had filed another suit HCCC 739/07, against the defendant which they wanted to consolidate with another suit – both facts not disclosed to this court. The defendant was not, by the orders to have temporary vacation, trying to go round the injunction orders. And there was no basis upon which this suit and HCCC 264/07 should be consolidated.

The plaintiffs also filed a preliminary objection based on Order 1 rule 17 Civil Procedure Rules adding that the 3rd parties had not filed a defence on which to base their present application.

They also filed a replying affidavit sworn by Margaret Auma Achieng the 4th plaintiff more or less on the same lines as that filed by the defendant. The defendant filed a supplementary affidavit to correct the issue of who served the hearing notice on the 3rd parties – one Patrick O. Miruka.

Asked to submit the 3rd parties maintained that the orders of injunction in HCC 264/07 had never been discharged set aside, reviewed or appealed against. They were not heard when the orders of temporary vacation were issued in this suit and consolidating it with HCCC 264/07 will serve judicial time and costs.

Responding to the 2 notices of preliminary objection and specifically the provisions of Order 1 rule 17 of the Civil Procedure Rules, the 3rd parties' position was that it was not mandatory that they seek leave of the court to enter appearance after the time stated in the 3rd party notice had expired. Failure to do so was not fatal. And it was debatable if their present application was vexatious, frivolous or lacked merit. So the orders sought ought to be granted.

On their part the plaintiffs associated themselves with the submission filed on behalf of the defendant to the effect that the 3rd parties had not challenged the fact that they were served with a 3rd party notice and they did not duly enter appearance or seek leave to do so after the specified time (see order R. 17 Civil Procedure Rules). So filing this applicant, even without a defence was not tenable. It was added that the application lacked merit in that it had not demonstrated what would justify consolidating this suit with HCCC 264/07. Similarly it had not been demonstrated how the orders herein (for temporary vacation of premises) militated against the injunction orders in HCCC 264/07, yet at the same time the applicants seeking to consolidate the two. The orders need not be granted.

Beginning with Order 1 rule 17 of Civil Procedure Rules, the basis of the 2 notices of preliminary objection herein:

“17. If a person not a party to the suit who is served as mentioned in rule 15 (hereinafter called the “third party”) desires to dispute the plaintiff’s claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the 3rd party must enter an appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third – party notice:

Provided that a person so served and failing to enter appearance within the time fixed in the notice, may apply to the court for leave to enter appearance, and for good cause such leave maybe given upon such terms, if, any, as the court shall think fit.”

It is not disputed that the defendant served a 3rd party notice and an affidavit of service was filed. The 3rd parties herein did not enter appearance within the time fixed in the notice, and did not even bother to seek leave, after the fixed time expired. On 5/11/10 it had been ordered that 3rd party notices do issue with a direction that they appear before court on 17.11.10. They did not do so and only entered appearance on 24.2.11 along with the filing of the present application. To date it appears they are yet to file a defence or if they have done so none was easily traceable on the record at the time of drafting this ruling. In any event the 3rd parties appeared to argue that having failed to enter appearance in time, it was not mandatory that they seek leave of the court to do so. That does not appear correct. If a person is minded to participate in proceedings where he has been served with a 3rd party notice his appearance in the time fixed or with leave of the court is necessary. Otherwise how else with the litigants in the matter and indeed the court know who are participating in the proceedings? In this case the 3rd parties did not even show up when the court heard the parties before issuing the orders of 20/1/11. So with that default they are bound by the orders that issued.

Having been served with the due notice in order to participate in the proceedings, and having failed/neglected to appear in order to participate, the 3rd parties cannot be seen to claim that they were not heard in the proceedings that led to the orders of 20/1/11. They were given opportunity and they neglected to utilize it. So their belated appearance and without the court's leave, to bring this application is without basis. It is null and void and so no valid proceedings can be based on it. So even at this point the 3rd parties' application should be thrown out.

However, proceeding to consider the application on its merits, the prayer to consolidate this suit with HCCC 264/07 could not have been allowed. The reason is that they have nothing in common to necessitate hearing the two suits together. The gist of each is that while in HCCC 264/07 the plaintiffs therein, the 3rd parties, sought orders to restrain the defendants from interfering with their occupation of the houses owned by the defendant so that they get a first priority to purchase them, the prayer herein centered around the defendant abating a nuisance affecting the houses occupied by the plaintiffs here and the plaintiffs in HCCC 264/07. The defendant admitted to liability to abate that. It was added by the defendant herein but not refuted by the 3rd parties, that in fact they had another suit HCCC 968/05 consolidated with HCCC 969/05, against the defendant – a fact that was not disclosed to court.

The other prayer to stay the orders and proceedings in this case until HCCC 264/07 is finally heard was not grounded on anything. In any event, and it appears contradictory, the same applicants want the 2 suits consolidated.

Coming to the prayer to set aside the orders of 20/1/11 this court is not inclined to do so. In that ruling this court delivered itself, inter alia:

“Moving to the reasonable application of Khamoni Js order of 2/8/10 [the injunction order] in the light of these two cases, this court is of the view that orders in regard to prayers 2, 3, 4 of the chamber summons dated 5/10/10 do also apply to the 3rd parties. They were served to appear in these proceedings. They did not. Fair enough. However, to enable the common property owners here the defendant, to repair maintain or otherwise keep the properties occupied by the 2 sets of plaintiffs in a habitable state, the 3rd parties will vacate their premises temporarily for the repair works to take place. That they should do in the next 45 days. That vacation is temporary and as soon as the repair work is done, they will resume occupation until HCCC 264/07 is finally determined. In the context of the circumstances prevailing here this direction does not derogate or vary Khamoni J's order of 2/8/07. Indeed it appears to benefit all.”

Then as now, this court is minded to hold that the orders of injunction the 3rd parties got are still in place and will remain in place after repairs and moving back into the premises, until HCCC 264/07 is finally

determined. The orders are in force from the date hereof.
All in all this application is dismissed with costs to the plaintiffs and the defendant.

Delivered on 10/5/11.

J. W. MWERA

JUDGE