



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 491 OF 2010**

**CONSOLATA M.**

**KIMUYA.....1<sup>ST</sup> PLAINTIFF**

**BOARD OF GOVERNORS BURUBURU GIRLS SECONDARY  
SCHOOL.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**METROPOLITAN HEALTH SERVICES  
LTD.....DEFENDANT**

**RULING**

The Applicants in the Chamber Summons dated 20<sup>th</sup> September 2010 are the Plaintiffs in this suit. They seek orders for the joining of Gerald Gakuru Muchugia and Dominic Kibigo Karanja as Defendants in the suit and any for other or alternative orders as the court may deem appropriate in the circumstances of the case.

The application is grounded on the fact that the two above-named persons have been named in the Defendant's Replying Affidavit filed on 22<sup>nd</sup> July 2010, as purchasers of the suit property whose transfer, sale, charging, alienation, dispossession and interference the Plaintiff seek to restrain by an order of the court as is sought in their Chamber Summons dated 16<sup>th</sup> July 2010, yet to be heard. The Applicants contend that the Defendant is using the said proposed additional defendants to escape its contractual obligations to the Plaintiffs and that the orders sought in the injunction application are bound

to affect the two named persons.

The application is supported by the affidavit of the 2<sup>nd</sup> Plaintiff's chairman Austin Salmon Kitololo sworn and filed on 20<sup>th</sup> September 2010. The two proposed additional Defendants have filed statements of Grounds of Opposition in reply to the application in which they state that, not being parties to the agreement between the Plaintiffs and the Defendant (which for some reason they refer to as an arbitration rather than a sale agreement), they cannot be properly suited.

The proposed co-defendants claim to be purchasers of the suit property for value, without notice of the legal relationship between the Plaintiffs and the Defendants. Their position is that, having paid the full purchase price for the suit property they hold indefeasible title to the same. On his part Dominic contends that any orders as would be made herein would violate his fundamental rights while the Gerald holds the view that such orders would not assist or facilitate in the settlement of the dispute between the Plaintiffs and the Defendants.

Written submissions were filed in the application with both the proposed additional Defendants dwelling on their being strangers to the arbitration agreement under which the dispute arising from the sale agreement between the Plaintiffs and Defendants would be resolved. On their part the Applicants rely on **Order 1 Rules 3 and 10(2)** and have submitted that the two proposed additional Defendants are proper parties whose presence before the court will be necessary for the effectual and complete adjudication of the existing dispute between the Plaintiffs and the Defendant and to settle with finality, all questions arising in the suit. They have submitted further that their expectation being that the proposed additional Defendants may be called upon to give up the suit property, in the event that the same is found to have illegally passed to them, then they ought to be made parties to the suit, more so because they have been mentioned by the Defendant in its defence to the suit filed against it. To support their arguments the Applicants have cited the following authorities.

1. **JOSHUA MULI KIILU –VS- H.F.C.K LTD & ANOTHER [2001] eKLR**
2. **ROHIT A SHAH & ANOTHER –VS- MOHANLAL SHAH & TWO OTHERS H.C.C.C. NO. 164 OF 1999 O.S**

All the above considered, I am of the view that the application to enjoin the two proposed additional Defendants has merit. They claim to have bought the property which is the subject matter in the dispute between the Plaintiffs and the Defendant, yet they have not filed any affidavits with annexures to prove their interest. As is implied by the Applicants in their submissions, the cause of action, is, in my view, based on the agreement for sale and it matters not that the prayer in the Plaint seeks a restraining order pending arbitration.

It is quite clear to me that what the Plaintiffs seek to restrain is the threatened breach of the contract of sale entered between them and the Defendant on 5<sup>th</sup> August 2009, which the Plaintiffs see as being directly affected by the deal between the Defendant and the proposed additional Defendants. The transfer of the suit property to the latter has been challenged in the Applicants Supporting Affidavit where it denies any knowledge of City Council Approval or occupational permit as would enable the proposed additional Defendants legally take possession. In the absence of any rebuttal of this deposition, and there being no evidence of good and/or indefeasible title acquired by the proposed Defendants as alleged by them, I find that the Applicants have made a case for two being enjoined in the suit.

Accordingly the application is hereby allowed. Costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 1<sup>ST</sup> day of SEPTEMBER 2011.**

**M. G. MUGO**

**JUDGE**

In the presence of:

No Appearance      For the Applicant

Mr. Nderitu holding brief for Mr. Mark      For the Respondent

Mr. Nderitu holding brief for Mr. Wainaina      For 2<sup>nd</sup> Proposed Defendant