



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 39 of 2008

1. MOHAMED SALIM ALI MOHAMED JUMA
2. JUMA ALI MOHAMED JUMA.....PLAINTIFFS
VERSUS
1. THE COMMISSIONER OF LANDS
2. KWIK FIT TYRES & AUTOCARE LTD.....DEFENDANTS

RULING

This is an application by Villa Moran Limited (hereinafter “*the applicant*”) which seeks to, among other things, to be joined in these proceedings as a defendant. It also seeks orders to discharge orders made in this suit in favour of the plaintiff and instead, restraining orders be made in its favour restraining the plaintiffs and the 2nd defendant from demolishing its property or otherwise interfering with the quiet enjoyment of LR No. Mombasa/Block/XVI/1394 by the applicant.

The application has been brought under sections 3A and 63 of the Civil Procedure Act, Order 1 Rule 10 (2) and Order XXXIX Rules 1, 2, 3, 4 and 7 of the Civil Procedure Rules.

The application is said to be made on some 18 grounds, the main ones being that the applicant is the purchaser and transferee of the said L.R. No. Mombasa/Block XVI/1394 (hereinafter “*the suit property*”) upon which it has been in occupation since the year 2000 with the full knowledge of the plaintiffs and the 2nd defendant; that the plaintiffs and the 2nd defendant have conspired to file this suit to frustrate the applicant’s property rights over the suit property; that the applicant is a necessary party since the subject matter of the suit is its property; that the orders made herein in favour of the plaintiff were obtained on the basis of non-disclosure and that unless the orders sought herein are granted the plaintiffs and the 2nd defendant will succeed in their conspiracy to frustrate the applicant’s property rights.

The application is supported by an affidavit sworn by one Francis Kabue Mutuathuku the applicant’s property manager which affidavit elaborates the above grounds.

The application is opposed and there is a replying affidavit sworn by the 2nd plaintiff who avers that he is also an attorney of the 1st plaintiff. It is deponed in the said affidavit, *inter alia*, that the applicant’s interest in the suit property is neither registered nor registrable; that the suit premises have never been occupied by the 2nd defendant or the applicant save for a security guard posted to the premises in early 2008; that the 2nd defendant also lays claim to the suit property which claim displaces the applicant’s claim. In the premises there is no basis for the applicant joining these proceedings. There is, also according to the plaintiffs, no basis for interfering with the orders made in their favour as the same were not made against the applicant.

The application was placed before me for hearing on 1st October 2009 when counsel agreed to file written

submissions. In the event, only counsel for the applicant and the plaintiff filed written submissions. I have considered the application, the affidavits filed, the submissions of counsel and the authorities cited. Having done so, I take the following view of the matter. Order 1 Rule 10 (2) of the Civil Procedure Rules which is one of the rules invoked by the applicant reads as follows:-

“10 (2) 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 this sub-rule, a party may be joined as plaintiff or defendant if such party ought to have been joined at the institution of the suit or if his presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. The court therefore exercises a discretion. In the exercise of that discretion the court will consider various circumstances and factors among them the following:-

- (a) Has there been undue delay?
- (b) Does the proposed substitution or addition change the nature or character, or the cause of action?
- (c) Does the proposed substitution or addition, adversely affect an adversary's acquired right or rights under the Law?
- (d) Will the adversary suffer irreparable injury?
- (e) What is just in the circumstances?
- (f) Etc.

The list is not exhaustive. It should also be appreciated that the existence of any or more of the above factors or circumstances will not automatically result in allowing a substitution or an addition of a party to existing proceedings. The applicant alleges to have purchased the suit premises before this suit was instituted and that the orders made herein adversely affect it. The applicant further alleges to be in possession of the suit property. In that event the orders made touching the suit property obviously affect it. As to whether the applicant's assertions will be proved or not cannot be conclusively determined at this stage. On the basis of those assertions however, I have no doubt in my mind that the applicant ought to have been joined in these proceedings at the time of institution thereof. As a purchaser, his interest is directly in conflict with that of the 2nd defendant and the plaintiffs.

This suit was instituted on 3rd March 2008 and the applicant lodged this application on 3rd December 2008. The applicant is not in the circumstances guilty of undue delay in bringing this application. The applicant's presence in these proceedings will not change the character or nature of the plaintiff's cause of action. I also do not detect any acquired right since the institution of the suit which will be adversely affected by the proposed addition of the applicant. I further do not see the prejudice the plaintiff and the 2nd defendant will suffer if the applicant is joined. In the premises, I allow the application dated 3rd December 2008 in terms of prayer 2.

With regard to the prayers to discharge orders of injunction issued in favour of the plaintiff, I note that the orders made were directed at the 2nd defendant and the same are being challenged in its application lodged on 26th June 2008. An order discharging those orders will in effect determine the said pending application.

The applicant further seeks an order lifting the restraining order registered against the suit property to facilitate registration of a transfer in its favour. In my view to grant this prayer at this stage will be a travesty of justice. The effect will be a determination of the applicant's claim even before the other parties respond to the same. Our procedural

law does not permit the same.

The applicant further seeks its own set of orders of injunction restraining the plaintiffs and the 2nd defendant from demolishing or otherwise interfering with the applicant's quiet enjoyment, occupation, possession, use of, dealing with and developing the suit property pending the hearing and determination of this suit. Procedurally, the applicant has just been allowed to join these proceedings. I am not persuaded that the applicant is entitled to the said orders at this stage even before its pleadings are forwardly filed. In any event the applicant's interest in the suit property is yet to be registered. In the premises, I am not persuaded that a prima facie case has been demonstrated to warrant the grant of a temporary injunction at this stage.

However, to maintain some semblance of order in respect of the suit property, I make an order that no party including the applicant should carry out any construction or development on the suit property at this stage.

I grant each party liberty to apply.

Costs in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF FEBRUARY 2010.

F. AZANGALALA

JUDGE

Read in the presence of Mr. Okongo for the Plaintiffs and Munyao for the Interested Party.

F. AZANGALALA

JUDGE

23RD FEBRUARY 2010