



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 158 of 2007**

**1. FRANCIS NYAMAI MWANZIA**

**2. TABITHA MUTHIO MWANZIA.....PLAINTIFFS**

**VERSUS**

**ROSE WANGARI NDEGWA.....DEFENDANT**

**RULING**

The defendant, Rose Wangari Ndegwa, by her Notice of Motion dated 23<sup>rd</sup> July 2008 seeks an order striking out the plaint. In the alternative she seeks an order staying this suit pending the hearing and determination of Mombasa HCCC No. 8 of 2007. The application is expressed to be brought under sections 3A and 6 of the Civil Procedure Act, Order VI Rule 13 (1) (c) and (d) and Order VII Rule 1 (3) of the Civil Procedure Rules.

The application is predicated upon the grounds that this suit was filed on 3<sup>rd</sup> July 2007 while HCCC No. 8 of 2007 was filed on 12<sup>th</sup> March 2007; that both suits relate to the same subject matter; that the issues in both suits are similar; that the parties are the same and that this suit is verified by a defective affidavit. The application is supported by an affidavit sworn by the defendant which affidavit elaborates the said grounds. Annexed to the affidavit are copies of pleadings in HCCC No. 8 of 2007.

The application is opposed and there is a replying affidavit sworn by the 1<sup>st</sup> plaintiff, Francis Nyamai Mwanzia who has sworn the affidavit on his own behalf and on behalf of the 2<sup>nd</sup> plaintiffs, Tabitha Muthio Mwanzia. The plaintiffs contend that the parties and the issues in the two suits are different and so are the reliefs sought. They further contend that they have no counter-claim in HCCC No. 8 of 2007 to ventilate their rights and if the orders sought herein are granted they stand to suffer irreparably. With respect to the verifying affidavit, the plaintiffs state that the same is not defective.

When the application came up for hearing on 2<sup>nd</sup> October 2009, counsel agreed to file written submissions which were duly filed together with authorities relied upon by 30<sup>th</sup> November 2009. I have considered the application and read the affidavits sworn both in support of and in opposition to the application. I have also given due consideration to the written submissions of counsel and the authorities

cited. The cases relied upon are all of the High Court and with all due respect to counsel, the cases considered different issues from the issues herein and are therefore clearly distinguishable from this case.

The defendant seeks the striking out of this suit on the ground that it is verified by a defective affidavit. The fatal defect alleged is the failure to state the place of abode of the deponent and the failure to initial an alteration. In my view the defects are not fatal. They are of form and can be ignored. Striking out a pleading, especially a plaint, is a draconian measure. I do not think the plaintiff's suit should suffer that fate merely because the deponent of the verifying affidavit has not stated his place of abode and that the place the affidavit was commissioned is altered and not initialed. The verifying affidavit may be irregular but it is not incompetent. The prayer to strike out the suit is therefore declined.

With regard to the prayer that this suit be stayed pending the hearing and determination of Mombasa HCCC No. 8 of 2007, the following facts are not in dispute. In that suit the defendant herein Rose Wangari Ndegwa, is the plaintiff. She has sued M/S Housing Finance Company of Kenya Limited (1<sup>st</sup> defendant), Francis Nyamai Mwanzia (2<sup>nd</sup> defendant), Tabitha Muthio Mwanzia (3<sup>rd</sup> defendant) and the Registrar of Titles Mombasa (4<sup>th</sup> defendant). The plaintiffs herein are therefore the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in that suit.

The reliefs sought are 16 and include a perpetual injunction restraining the defendants from among other things, evicting the plaintiff from the suit property. The suit property is Title No. C.R.18132 sub-division No. 3160/1/MN.

In this suit, the plaintiffs have sued the same Rose Wangari Ndegwa seeking among other reliefs her eviction from the same suit property. The plaintiffs' claim herein is in direct conflict with the defendant's claim in the said suit. Yet the issues in both suits as so intertwined that a decision in one will directly affect the other. That is notwithstanding the fact that Housing Finance Company of Kenya Limited and the Registrar of Titles are joined in HCCC No. 8 of 2007 but are not parties in this suit. Section 6 of the Civil Procedure Act reads as follows:-

**“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the right claimed.”**

As already observed, the plaintiffs' claim for vacant possession and the eviction of the defendant is an issue directly and substantially in issue in HCCC No. 8 of 2007. If the defendant's claims in that suit are granted, the fate of this suit will be sealed. If the two suits are tried simultaneously, there is a real possibility of conflicting decisions being made which can lead to absurd results. It is in fact such a consequence which was intended to be prevented by section 6 of the Civil Procedure Act. Its object is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue.

The plaintiffs herein contend that their suit was not filed later in time. They say so because they were joined in HCCC No. 8 of 2007 when this suit had already been filed. The plaintiffs cannot be right in view of the fact that amendments take effect from the date of the original pleading. The Law therefore presumes that the plaintiffs were parties in HCCC No. 8 of 2007 from the date of instituting thereof i.e. on 9<sup>th</sup> March 2007.

In the end, I will allow the application dated 23<sup>rd</sup> July 2008 in terms of prayer (b) thereof. Costs of the application shall be in the cause.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF FEBRUARY 2010.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Olwande holding brief for Maundu for the Applicant.

**F. AZANGALALA**

**JUDGE**

**22<sup>ND</sup> FEBRUARY 2010**