



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 98 of 2010

SIMON KIHOSHIA NDERITU.....PLAINTIFF/APPLICANT

VERSUS

ABDI SHEIKH AHMED1ST DEFENDANT/RESPONDENT

ECO DEVELOPMENT BANK LTD.....2ND DEFENDANT/RESPONDENT

AKIBA (DEVELOPMENT) LTD.....3RD DEFENDANT/RESPONDENT

RULING

The plaintiff on behalf of other residents of Akiba Bellevue Estate brought this suit against the defendants in respect of suit premises known as LR. NO.13324/92 which is the subject of this dispute.

In the prayers set out in the amended plaint the plaintiff sought an order of injunction against the 1st and 3rd defendants, a declaration that the property belongs to the residents of the said estate, possession of the said property and costs.

There is an interim order in place restraining the 1st and 3rd defendants from dealing with the subject

matter pending the determination of this suit or orders that may be granted by the court.

The 2nd defendant was subsequently removed from these proceedings. The 1st defendant subsequently filed a Notice of Preliminary Objection to the plaintiff's suit on the following grounds;

- 1) **In so far it is undisputed fact that the plaintiff is suing as a Chairman of Akiba Bellevue Estate and on behalf of the residents of the said estate, the suit, being a representative suit is fatally defective and null and void *ab initio* as it offends the mandatory provisions of Order 1 Rule 8 of Civil Procedure Act and Rules, Cap 21 Laws of Kenya.**
- 2) **By extension to ground 1 above the suit is non-existent in law as it offends the mandatory provisions of Order I Rule 12 (2) of the Civil Procedure Act and Rules.**
- 3) **The plaintiff lacks *locus standi* to prosecute the case.**
- 4) **The suit is null and void *ab initio* as it offends Section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya.**
- 5) **(Has been withdrawn with view of the exit of the 2nd defendant from these proceedings).**
- 6) **In view of the foregoing the plaintiff's suit and application are incurably defective, frivolous and abuse of the court process and must be struck out with costs to the 1st defendant.**

The learned counsel for the 1st defendant and that of the plaintiff have filed submissions in respect of the said Notice of Preliminary Objection. They have also cited several authorities which I have noted.

A Notice of Preliminary Objection should address the issues that go to the root of the entire suit leading to its dismissal. This is because it relates to issues of law that can be discerned from the pleadings

alone. A lot of emphasis has been laid on the alledged authority given to the plaintiff Simon Kihohia Nderitu by the other residents of the said estate or lack of it. The learned counsel for the 1st defendant has emphasized severally the need to comply with the provisions of Order I Rule 8 and 12 of the Civil Procedure Rules aforesaid. Citing a decision of the Court of Appeal *Cahill and others –vs – Nandhra and others (2006)1 EA* at page 14, he submitted that for a representative suit the superior court's permission under Order I Rule 8 is mandatory. The conditions necessary to bring a suit within Order I rule 8 are;

- i. Numerous persons**
- ii. Same interests**
- iii. Authority or permission of the court**
- iv. Notice of suit**

He also cited *HCCC No.144 of 2008 Michael Linketo Ololabuna and others – vs – Skyship Company Ltd* where Musiga J. said as follows;

“But a person filing a representative suit must seek direction from the court as to the mode of giving notice of institution of the suit to all such persons having the same interest in the suit.”

Order I Rule 12 provides as follows;

“12 (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead, or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

I note that Rule 8 is couched in a language that is discretionary on both the person suing or the

court giving authority to such a person. Equally, Rule 12 also infers discretion on the part of the persons giving authority to the person suing. However, even if authority were to be given by any other party, the form of that authority has not been prescribed, provided that it shall be in writing and signed by such party.

It has been admitted by the 1st defendant that there is a list of names and telephone numbers annexed to one of the affidavits sworn by Simon Kihohia Nderitu. If I am, right and I believe I am, that no form of authority has been prescribed, then it may logically be concluded that the said names *prima facie* points to the authority as envisaged under the rules.

I am also inclined to find that, the words used in the rules above cited are not mandatory but directory. There is also Order I Rule 9 which reads as follows;

“No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.” This rule cannot be read in isolation from the rest of the order in view of the controversy that has been raised by the pleadings herein.

The other grounds raised in the preliminary objection cannot be resolved without calling evidence. Whether or not there was a contract also touches on the pleadings of the 1st defendant. His acquisition of the property whether by way of purchase or beneficial interest is an issue that can only be resolved by way of evidence. Whether or not the plaintiff lacks *locus standi* can also not be resolved by way of affidavit or submission. Also, whether or not this suit is statutorily barred and offends Sections 4 and 7 of the Limitation of Actions Act is a triable issue.

Finally, the striking out of a suit is a drastic measure where a court must move cautiously, considering the interest of all parties in the suit. If the pleading can be cured by way amendment, the court should move to sustain the same rather than striking it out. In any case, Section 1A of the Civil Procedure Act as introduced by Act No.6 of 2009 gives a court a very wide discretion to facilitate the just,

expeditious and proportionate resolution of civil disputes.

I am of the view that the preliminary objection is misplaced and if anything has contributed to the delay in this matter. The same is dismissed with costs to the plaintiff.

Orders accordingly.

Dated, signed and delivered at Nairobi this 24th day of September, 2010.

A. MBOGHOLI MSAGHA

JUDGE