



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
COMMERCIAL & TAX DIVISION  
CIVIL CASE NO. 544 OF 2010**

**ANTHONY JOHN WAINAINA.....**  
**.....PLAINTIFF/APPLICANT**

**VERSUS**

**JEDIDAH WANJIRU GICHURI.....**  
**.....1<sup>ST</sup>DEFENDANT/RESPONDENT**  
**INSURANCE COMPANY OF EAST AFRICA.....**  
**.....2<sup>ND</sup> DEFENDANT/RESPONDENT**  
**NANCY WAITHIRA KIRURI.....**  
**.....3<sup>RD</sup> DEFENDANT/RESPONDENT**  
**THE LAND REGISTRAR**

**NAIROBI.....4<sup>TH</sup>**  
**DEFENDANT/RESPONDENT**

**RULING**

The applicant in the Chamber Summons dated 9<sup>th</sup> August 2010, has moved the court under Order XXXIX rules 1, 3, and 9 of the Civil Procedure Rules and all other enabling provisions of the law. He prays that pending the hearing and final determination of this suit the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants be restrained by an order of temporary injunction from transferring the property known as L. R. No. 209/12221/51 to the 3<sup>rd</sup> Defendant.

Subsequent upon the filing, by the Respondents, of Replying affidavits and Grounds of Opposition to the application, the 2<sup>nd</sup> Defendant/Respondent filed a Chamber Summons dated 7<sup>th</sup> September, 2010, brought under Order V1 Rule 13(1) (b) and (d) of the Civil Procedure Rules, praying that the plaintiff’s suit be struck out with costs, on the ground that the Plaintiff has not laid a basis for his claim against the 2<sup>nd</sup> Defendant/Respondent and that the said claim as set out in the plaint is an abuse of the process of the court since no contract exists between the Plaintiff and the 2<sup>nd</sup> Defendant/Respondent. The 2<sup>nd</sup> Respondent contends that the suit is frivolous and vexatious.

To support the application, the 2<sup>nd</sup> Defendant/Respondent relies on the Replying Affidavit of Naomi Munyi sworn on 1<sup>st</sup> September, 2010 in reply to the Plaintiff/Applicant’s Chamber Summons dated 9<sup>th</sup> August, 2010. It has also cited six court decisions in addition to the Civil Procedure Act (Cap 21) and the Law of Contract Act (Cap 23)

In similar fashion the 1<sup>st</sup> Defendant/Respondent has filed a Notice of Preliminary Objection in the said Chamber Summons which in essence, attacks the plaint and the suit as laying no solid foundation to the Chamber Summons of 9<sup>th</sup> August, 2010. The point of law raised in the 1<sup>st</sup> Respondent’s Preliminary Objection is that the plaint was filed in clear violation of the provisions of Order V11 Rule 3 (e) of the

Civil Procedure Rules in that the verifying affidavit filed in support of the averments in the plaint is false, in that the Plaintiff has totally concealed the fact that there is a pending suit in respect of the same subject matter, namely **High Court ELC Civil Suit No. 540 of 2008 [O.S]** between the Plaintiff/Applicant, the Registrar of Titles and the 1<sup>st</sup> Defendant/Respondent. For that reason, the 1<sup>st</sup> defendant contends that the verifying affidavit filed alongside the plaint is incurably defective, misleading and deceptive and therefore, incapable of rendering any legal support to the plaint filed against the Defendants.

In view of the fact that the outcome of the 2<sup>nd</sup> Defendant's application for striking out, as well as the 1<sup>st</sup> Defendant's Preliminary Objection would affect the entire suit, with a likelihood of bringing it to an end, this court directed that the same be heard together, prior to the Plaintiff's Chamber Summons. It is in respect of the two motions that this Ruling is delivered.

The Plaintiff/Respondent has asked the court to find that the 2<sup>nd</sup> Defendant's striking out application is not supported by evidence, there being no affidavit filed therewith, the applicant seeking instead to rely on the replying affidavit of its Company Secretary, Naomi Munyi sworn and filed on 1<sup>st</sup> September, 2010 in response to the Plaintiff/Respondent's Chamber Summons of 9<sup>th</sup> August, 2010.

I have considered it appropriate that I deal with the above objection first before delving into other issues, since it attacks the propriety of the application before me. Rule 16 of Order V1 requires only that any application made thereunder be by way of Summons. Order L Rule 7 which regulates the procedure of applications made by summons states, *inter alia*, as follows;

**“Every summons shall state in general terms the grounds of the application and ---- where any summons is based on evidence by an affidavit, a copy of the affidavit shall be served”.**

The respondent does not contend that the said affidavit of Naomi Munyi was not served. If anything, the same was duly served and a Supplementary affidavit sworn and filed in reply thereto on 7<sup>th</sup> September, 2010. For that reason, the technical objection to the Chamber Summons dated 7<sup>th</sup> September, 2010 cannot be sustained.

In view of the very strict principles which the court must adhere to in deciding whether or not to strike out pleadings and/or summarily dismiss a suit, I am of the considered view that the background to the present application be stated. The Plaintiff/Respondent's suit was filed under a plaint dated 9<sup>th</sup> August, 2010. In the said plaint, now sought to be struck out as against the 2<sup>nd</sup> Respondent, the Plaintiff/Respondent seeks relief against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, jointly and severally, as follows;

- a. A declaration that the purported sale of L. R. No. 12221/51 to the 3<sup>rd</sup> Defendant was fraudulent, null and void.**
- b. An Order for an injunction to restrain the Defendants from selling, transferring or disposing the suit property.**
- c. Refund of a total of Kshs. 3,416,688/= by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Plaintiff together with interest thereon from 2<sup>nd</sup> February, 2004 until payment in full.**
- d. Costs of this suit.**
- e. Interest on (a) and (b) at Court rates from the date of payment of the said amounts (*sic*)**

The circumstances giving rise to the Plaintiff's claim against the Defendants are as follows;

1. The plaintiff is the estranged wife of the 1<sup>st</sup> Defendant who is an employee of the 2<sup>nd</sup> Defendant.

2. Sometime in 2003 the 1<sup>st</sup> Defendant contracted to buy the suit property from a company called Clozet Investments Limited at an agreed price cost of Kshs. 5,250,000/=.
3. In February, 2004 the 1<sup>st</sup> Defendant obtained financial assistance from her employer, the 2<sup>nd</sup> Defendant to the tune of Kshs. 2,848,432/=towards the purchase price.
4. To secure the loan the 1<sup>st</sup> Defendant as a sole purchaser and newly registered owner, executed a charge in favour of the 2<sup>nd</sup> Defendant over the suit property, which was registered at the Land Titles Registry, Nairobi, on 20<sup>th</sup> April, 2004. She would pay the same by monthly deductions from her salary at the rate of Kshs. 15,291/=.
5. To assist the 1<sup>st</sup> Defendant pay the sum not covered by the 2<sup>nd</sup> Defendant's loan, the 1<sup>st</sup> Defendant obtained monetary assistance from the Plaintiff/respondent and paid the following sums towards the purchase.
 

(i)	Kshs.	2,775,068.00
(ii)	Kshs.	630,000.00
(iii)	Kshs.	<u>11,600.00</u>
Total	Kshs.	<u>3,416,668.00</u>
6. By a letter dated 23<sup>rd</sup> April, 2008, the 1<sup>st</sup> Defendant requested the 2<sup>nd</sup> Defendant to suspend the salary deduction for a period of four months, citing a major challenge in her personal life and expressing the hope that she would sort out the problem and resume the mortgage repayments.
7. As at 5<sup>th</sup> January, 2009, the 1<sup>st</sup> Defendant had not resumed her mortgage repayments, thereby causing the 2<sup>nd</sup> Defendant to issue her with a three month notice to repay the balance then outstanding at Kshs. 2,701,601/= in exercise of its statutory power of sale conferred to it under the charge.
8. On 23<sup>rd</sup> October, 2009, upon instructions received from the 2<sup>nd</sup> Defendants, M/S Keysian Auctioneers served the 1<sup>st</sup> Defendant the Statutory 45 days notice to pay the above outstandings, in default of which. the suit property would be auctioned.
9. A further 45 days notice was issued to the 1<sup>st</sup> Defendant on 15<sup>th</sup> March, 2010 setting the auction date as 21<sup>st</sup> May, 2010.
10. Documents annexed to the 2<sup>nd</sup> Defendant/applicants Replying Affidavit show that the property was advertised on 4<sup>th</sup> May, 2010 and sold on 21<sup>st</sup> May, 2010 at a bid price of Kshs. 7,600,000/=.
11. There exists no doubt therefore that after realizing its loan, the 2<sup>nd</sup> Defendant was left with a surplus from the proceeds. It is in respect of this residue that the plaintiff prays for a refund.

In his Grounds of Opposition filed on 17<sup>th</sup> September, 2010 the Plaintiff/Respondent challenges the 2<sup>nd</sup> Defendant's application as being misconceived, misplaced and bad in law. He contends that his plaint as filed raises triable issues as against the 2<sup>nd</sup> Defendant which warrant the suit going to a full hearing. It is clear from the plaint that the 2<sup>nd</sup> Defendant has been sued merely because of having sold the suit property in exercise of its statutory power of sale. The Plaintiff/Respondent contends that the sale was fraudulently conducted pursuant to a conspiracy between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to dispossess the Plaintiff/Respondent of the suit property without due notice to him, despite the fact that he had contributed to its purchase and was still in possession of and residing in the same, factors which he claims accord him an interest worthy of protection by an injunctive order. The particulars of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants alleged fraud have been pleaded as follows;

- “(a) They removed the caveat placed by the Plaintiff against the title to the said property without the knowledge or concurrence of the Plaintiff even though they knew or ought to have known that the Plaintiff had invested heavily in the said property.**
- (b) They sold or purported to sell the said property without the consent of the knowledge of the Plaintiff.**
- (c) The 2<sup>nd</sup> Defendant accepted the payments of Kshs. 2,775,068/= and later Kshs. 630,000/= towards the purchase of the said property and sold it without accounting for the sale proceeds or refund the money paid by the Plaintiff upon purchase.**
- (d) The 2<sup>nd</sup> Defendant failed to deduct the monthly repayments from the 1<sup>st</sup> Defendant’s salary and pretended that there were arrears in order to defraud the Plaintiff.**
- (e) They applied for the removal of the caveat secretly without informing the Plaintiff.**
- (f) They sold the suit property in total disregard of the rights of the Plaintiff which they knew or ought to have known”.**

As rightly put by the 2<sup>nd</sup> Defendant/Applicant the issues herein derive from the contractual and other relationships between the parties. There is the sale agreement between the 1<sup>st</sup> Defendant and Clozet Investments Limited and the charge between the 1<sup>st</sup> Defendants (wherein counsel for the 2<sup>nd</sup> Respondent appear to have acted for all the parties) and the sale of the suit property (at an auction) from the 2<sup>nd</sup> Defendant/Applicant to the 3<sup>rd</sup> Defendant. There is also the contract of employment between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 2<sup>nd</sup> Defendant/Applicant’s position is that the Plaintiff/Respondent, not being a party to any of these contracts cannot sue upon them. In this regard the 2<sup>nd</sup> Defendant/Applicant relies on the following authorities.

1. **AGRICULTURAL FINANCE CORPORATION –VS- LENGITIA LIMITED** [1985] KLR 765, where the Court of Appeal held, *inter alia* that;

**“As a general rule, a contract affects only the parties to it and it cannot be enforced by or against a person not a party even if the contract is made for his benefit and purports to give the right to sue or to make him liable upon it”.**

2. **KENINDIA ASSURANCE CO. LIMITED –VS- OTIENDE** [1991] KLR 38, where it was held, *inter alia*, that a third party cannot sue on a contract if he is not a party to it.

3. **NAIROBI MAMBA VILLAGE –VS- NATIONAL BANK OF KENYA** 2002 E.A. 197, which has a direct bearing to this application as will be seen from the following holding.

**“A party seeking to prevent alienation, wastage or damage to property in dispute under Order XXXIX of the Civil Procedure Rules had to establish that it had legal rights in such property. In this instance the Plaintiff could not properly seek to restrain the chargee from selling the property as the intended sale was carried out pursuant to the exercise of the contractual and statutory power of the chargee contained in a charge to which the Plaintiff was not a party. The only person who could legitimately challenge the exercise of the power of sale was the charger. Though the Plaintiff had an interest in the property as it was both the security for its indebtedness and the location of its business, neither of those interests amounted to a proprietary interest in the property---”.**

The Plaintiff in the present case claims to have contributed substantially to the purchase of the suit property and also that it is his home. Not being a party to any of the contracts relating to the property, more particularly, having not been registered as co-owner or co-chargor with the 1<sup>st</sup> Defendant he has no legal or equitable right over the property as would entitle him to the relief’s sought against the 2<sup>nd</sup>

Defendant whose charge is not disputed.

Whatever agreement the Plaintiff/Respondent may have had with the 1<sup>st</sup> Defendant to make him pay the sums paid by him towards the acquisition of the suit property in the 1<sup>st</sup> Defendant's name has no effect whatsoever on the contracts existing between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants since he was not privy thereto. It appears that the Plaintiff was persuaded of this in the course of the hearing, leading to his counsel submitting thus:

**“The authorities cited are intended to persuade the court that a proprietary interest in a property must be demonstrated to back up a claim such as is before court. The Plaintiff is not claiming the property and is not interested. He only wants the money paid by him returned...”**

It is for the above reason only that the Plaintiff contends that the suit should proceed to trial. I find that such a step would be quite unnecessary since there is no dispute that part of the purchase price emanated from the Plaintiff/Respondent and that upon the exercise of the 2<sup>nd</sup> Defendant/Applicant's power of sale, by which the suit property was sold to the 3<sup>rd</sup> Defendant, a surplus was realized. The Plaintiff having clearly submitted that he has no interest in the suit property any more but only a refund of the sums paid by him, then the only issue for determination appears to be; to whom that surplus is to be paid, an issue which I consider would not involve the 3<sup>rd</sup> and 4<sup>th</sup> Defendants as all.

As between the Plaintiff and the 2<sup>nd</sup> Defendant/Applicant, the question the Plaintiff ought to ask himself is, had there been a shortfall after the auction, would the 2<sup>nd</sup> Defendant pursue the Plaintiff for the same? Certainly not, in view of the fact that there exists no contractual relationship between the 2<sup>nd</sup> Defendant and the Plaintiff and for which reason, the plaintiff could never be held liable under the charge. Clearly therefore, the authorities cited by the 2<sup>nd</sup> Defendant/Applicant to support its application for striking out operate against the Plaintiff's claim. There exists no triable issue as between the two and the Plaintiff has not demonstrated any prima facie case with a probability of success as against the 2<sup>nd</sup> Defendant. Even if that were the case the 2<sup>nd</sup> Defendant would certainly be able to compensate the Plaintiff in damages. The 2<sup>nd</sup> Defendants right to exercise the power of sale is not one that the Plaintiff can legally challenge, given the above findings.

As regards the 1<sup>st</sup> Defendant's objection to the suit, the Plaintiff has stated that the same is untenable on the basis that it does not meet the requirement that a Preliminary Objection be purely on matters of law. Counsel for the Plaintiff submitted that the same is based is partly on law and partly on facts and that it is incapable of determining the entire suit. Also that to say there is a pending suit related to the present one should be supported by affidavit to show that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are not parties in that suit which relates to the removal of a caveat over the suit property (Common in both suits).

In the 1<sup>st</sup> Defendants' Replying Affidavit of 1<sup>st</sup> September, 2010, she admits that the Plaintiff did give her a sum of Kshs. 2,775,068/= which went towards the purchase of the suit property, which is now the subject of the suit between the 1<sup>st</sup> Defendant (as next friend and mother of the Plaintiff's Children) and the Plaintiff as evidenced by the plaint annexed as “JWG 1” to the Replying Affidavit of 1<sup>st</sup> September, 2010. (See paragraphs 9 and 10 and prayer (d) of the plaint).

The Plaintiff having submitted that he is no longer interested in the suit property but only a refund of the sums paid towards its purchase, it follows therefore that prayers (a) and (b) of the plaint have, as it were, fallen on the way side. This court having found that the 2<sup>nd</sup> Defendant is not obligated under law to pay the surplus of the auction proceeds to the Plaintiff, and which surplus is not in the hands of the 1<sup>st</sup> Defendant, in any event, I see no issues left for trial in this suit as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, since the relationship between the two was regulated by contracts to which the Plaintiff was not privy. The allegation of fraud in the exercise of the power of sale being premised only on the ground that the Plaintiff was not notified cannot hold ground since he was not entitled to be put on any notice since, as already stated in this ruling, no liability attached to him under the charge. For this reason prayer (c) of

the Plaintiff cannot be entertained either. Clearly the contention that the Plaintiff is guilty of material non disclosure has been proved by the 1<sup>st</sup> Defendants' Replying Affidavit of 1<sup>st</sup> September, 2010 and the annexures thereto and also the admission by Mr. M. Chege , learned counsel for the Plaintiff that indeed EL Civil Suit No. 540 of 2008 ([O.S.] is pending at the High Court Central Registry.

Further, for the reason that the Plaintiff has abandoned any proprietary interest in the suit property, there would be nothing to try as between the Plaintiff, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. That being the case, I see no possibility of the suit succeeding as against any of the parties hereto, in which case to allow the same to proceed to trial would be acting in vain.

In the premises I allow the 2<sup>nd</sup> Defendant's Chamber Summons of 7<sup>th</sup> September, 2010 and the 1<sup>st</sup> Defendant's Preliminary Objection. Accordingly, the plaint is hereby struck out and the suit dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

The above notwithstanding, and in order that the issue of the surplus may be resolved in the best interests of the Plaintiff, the 1<sup>st</sup> Defendant and the children of the marriage who also have a legal interest in the subject matter herein, I order and direct that an interest bearing account be opened forthwith with reputable bank or Financial institution in the joint names of the advocates for the Plaintiff and the 1<sup>st</sup> Defendant into which account the 2<sup>nd</sup> Defendant shall pay the surplus of proceed in respect of the sale of L. R. No. 209/12221/51, House No. 094 Five Star Estate. The estranged couple may, if they so wish, apply to have the same included as a subject matter in the pending litigation between them.

Mention for compliance on 30<sup>th</sup> November, 2010.

**DATED, SIGNED and DELIVERED at NAIROBI this 18<sup>TH</sup> day of NOVEMBER, 2010.**

**M. G. MUGO**  
**JUDGE**

In the presence of:

Ms. Bubi for For the Applicant/2<sup>nd</sup> defendant

Ms. Bubi for holding brief for Mr Machira for Objector/1<sup>st</sup> defendant

Ms. Gichuri holding brief for Mwangi chege For the Respondent/Plaintiff