



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 268 OF 2009
EMBASEL DEVELOPMENT PROGRAMME.....PLAINTIFF
VERSUS
RENTON COMPANY LIMITED.....DEFENDANT

RULING NO. 1

The background information herein is that there is a plaint on the record dated 8th day of June 2009 and filed the same date. The parties to the suit are EMBASEL DEVELOPMENT PROGRAMME VERSUS RANTON COMPANY LTD. The plaint had simultaneously been filed with a chamber summons under certificate of urgency dated the same date and filed the same date as the plaint.

The applicant appeared in court on 9th June 2009 when interim orders were granted in the first instance. The defendant respondent entered appearance and then filed a notice of preliminary objection dated and filed the same date of 22nd day of June 2009. No replying affidavit was filed to the interim application but on 23.06.09 parties appeared in court and recorded a consent along the following terms:-

- (1) *The Chamber summons application dated and filed in court on 8/06/09 and the entire suit herein be and is hereby marked as settled on the following terms:-*
- (a) *The agreement between the plaintiff and the defendant dated 18/02/2009 be and is hereby affirmed on the following conditions:-*
- (i) *That the plaintiff do pay to the defendant a sum of Kshs 15,000,000/- Ksh fifteen million on or before 29/06/2009 time being of the essence.*
- (ii) *The completion of the sale shall be 180 days from todays date.*
- (iii) *The balance of the purchase price shall be paid within the completion period above herein.*
- (2) *Parties herein be at liberty to apply.*
- (3) *Each party to bear its own costs on 3rd July 2009.*

A party describing itself as an interested party brought notice of motion under order L rule 1 of the CPR,

section 3 and 3A and 63E of the CPA and all enabling provisions of the law. The application is dated and filed the same date. It seeks 6 prayers namely.

- (1) That this honourable court be pleased to certify this matter urgent and be heard ex parte in the first instance.*
- (2) That this honourable court, be pleased to grant leave to the interested party/applicant to be enjoined into this suit.*
- (3) That this honourable court, be pleased to issue an order restraining the defendant by itself, its servants, agents, and or party/legal representatives from selling, alienating transferring, subdividing and or dealing in any other manner with the property known as land reference number 12979/C situate at Ruai within Nairobi pending the hearing and determination of this application.*
- (4) That this Honourable court, be pleased to set aside the consent order recorded in court, on 23rd June 2009 by the Plaintiff and the defendant.*
- (5) That this Honourable court, be pleased to issue an order, restraining the defendant by itself, its servants, agents and or party/legal representative from selling/alienating transferring, subdividing and or dealing in other manner with the property known as land reference number 1297/4 situate at Ruai within Nairobi pending the hearing and determination of this suit.*
- (6) That costs of this application be in the cause.*

The counsel for the plaintiff filed grounds of opposition to the said application and a notice of preliminary objection. The grounds of opposition are dated 8th day of July 2009 and filed on the 9th day of July 2009. Where as the preliminary objection is dated 10th day of July 2009 and filed the same date. It raises 3 grounds of objection and these are:-

- (1) There is no suit in existence herein upon which the said application can be founded.
- (2) The interested party is a stranger to the suit which was marked as settled on 23rd June 2009 and as such it has no locus standi to present the application.
- (3) The suit having been marked as settled pursuant to a consent order recorded on 23rd June 2009, the court is finctus officio.

Counsel for the defendant also filed a notice of preliminary objection also dated 9th July 2009 and filed the same date. It raises 7 grounds of objections namely:-

- (1) That no temporary prohibitory orders can issue outside the provision of order 39 of the Civil Procedure code.
- (2) That there is no suit pending for hearing and determination on which temporary prohibitory orders can issue.
- (3) That the applicants have no final claim in this suit on which they can seek temporary orders.
- (4) That there is no legal status in proceedings known as interested party to which the court, can appoint applicants.
- (5) That the applicant ought to make its application under order 1 rule 10 & 11 of the CPR to be joined as a party.
- (6) That the court, is finctus officio as the entire suit has been compromised and the applicants

remedy is in :-

- (i) A new suit against the parties herein.
- (ii) An application for review
- (7) The applicant is claims a nullity by virtue of section 3(2) of the law of contract Act.

Parties were heard on both preliminary objections and this ruling is in respect of the said preliminary objections. In his oral arguments, counsel for the plaintiff objector simply reiterated the content of the grounds raised in the preliminary objection as follows:-

- The application is a proper candidate for striking out because there is no suit on the basis of which the application can be presented.
- The suit as between the plaintiff and the defendant has been settled.
- It is correct that there is an order allowing parties to apply but to them, the only parties given liberty to apply are the parties who were on board as at the time those orders were made.

Maintain a party cannot be joined to a non existed suit.

- Counsel for the defendant on the other hand concurred with the submissions of the counsel for the plaintiff and then stressed the following:-
- Maintains that since the suit has been compromised there is no room for the incoming party to be joined to the suit.
- There is no status in law known as interested parties. The only status known in law and that which has been provided for are, those order 1 rule 10 of the CPR namely plaintiff and defendant and a 3rd party.
- The only remedy for the applicant lies in bringing a new suit against the parties herein.

In response counsel for the intended interested party submitted as follows:-

- The subject, matter of these proceedings is a property that the defendant intended to sell to the intended interested party and the suit herein was intended to cancel the sale to the intended interested party.
- They consent order is illegal, as the plaintiff lacks capacity to enter into a contract with a 3rd party when there is already a contract between them and the intended interested party.
- They can only challenge that illegally if they are offered an opportunity to do so in this matter.
- Maintain that since there is liberty to apply in order number 2, this gives the intended interested party room to be joined to the proceedings herein.
- The proper way of allowing them to determine whether the suit is in existence or not is by allowing them into the proceedings so that they can canvase that issue.

In reply, counsel for the plaintiff added that the orders which compromised the suit being consent orders, they can only be set aside by parties to them.

- There was no issue of lack of capacity that was agitated between the plaintiff and the defendant.

- Where as counsel for the defendant still maintain, that the only remedy is for the intended party to file a separate suit against the parties herein.

On the courts assessment of the facts herein, it is clear that prayers 3, 4 and 5 of the application objected to are substantive in nature. In this courts' considered opinion, these could only be presented for agitation by a party already in the proceedings. These are therefore premature. Had the application not been objected to, these would have been struck out as being premature leaving prayer 2 as the only prayer that could have been left to be canvased.

(2) Prayer 3 and 5 being injunctive orders would also have been found premature in that order 39 CPR which is the substantive provision regulating the granting and or refusal to grant an injunctive relief makes it clear that such a relief is only available where there is a suit in existence. It therefore follows that these could only be availed to the intended party after the matter is reopened for them their pleading filed, by them, and on the basis of their pleadings anchor an application for an injunction. It cannot exist in a vacuum.

For this reason too, the said prayers would have been found to be premature and the same would have been struck out on that ground.

The faulting of prayer 3 and 5 leaves prayer 2 and 4 in contest. Due consideration has been made by this court on these two prayers in line with the rival arguments made herein for and against them and the court moves to make the following findings.

(i) Indeed as submitted by the objectors herein the suit herein has been marked settled. As such in this courts opinion the proceedings are closed.

(ii) Indeed the orders of consent entered herein on 23/06/09 contains item 2 of the said orders which gave liberty to the parties to apply. This court has revisited that order and makes observation that in the manner couched the same in restrictive in re operation. The restrictive nature of its operation is found in the words:-

“ Parties herein” By “ Parties herein,” In this courts opinion, is meant to confine that “liberty to apply” to the parties already on board in the said suit. These parties are none other than the plaintiff and the defendant.”

As regards the merits of whether an interested party can be joined to the proceedings or not, is a matter for interrogation on merits. This would have been properly argued had the proceeding been alive. This being the case there is no need for this court, to be labor that point. The same thing applies to the arguments for the setting aside of the consent order by a party not party to it. Having ruled that the proceedings are closed and the only parties given liberty to apply are those who are already on board, in the proceedings as at the time the consent orders were made, there is no need to interrogate the merits of whether a non party to a consent can move the court, for a relief in respect of the same, notwithstanding this court's finding that the reliefs were premature for the reasons given.

For the reasons given in the assessment both preliminary objection I have been upheld for the following reasons:-

(1) Prayers 3, 4 and 5 are premature in that being substantive in nature, they can only be presented by a party who is already on board.

(2) The liberty to apply in item 2 of the consent order of 23/06/09 is limited to the “parties herein” meaning the parties already participating in the proceedings namely the plaintiff and the defendant and not a 3rd party.

(3) The court, is in agreement with the assertion of the preliminary objectors that a suit marked settled by consent is a dead one and can only be revised by the parties to that consent.

(4) The objectors will have costs of the preliminary objection.

Dated, Read and delivered at Nairobi this 24th day of July 2009.

R.N.NAMBUYE

JUDGE