



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 326 of 2008

**RUTH NJERI
KUNIARA.....PLAINTIFF**

VERSUS

**INDUSTRIAL COMMERCIAL DEVELOPMENT CORPORATION.....1ST
DEFENDANT**

**WATTS ENTERPRISES2ND
DEFENDANT**

R U L I N G

Application dated 3/6/2009 brought under **Order XXXIX Rule 4, Order XLIV Rule 1 (1), Order 1 Rule 10, Order 1 Rule 13, Order VI Rule 13 (a) (b) (c) Civil Procedure Code, Section 3A Civil Procedure Act, Cap. 21.** Orders sought are:-

- 1. That Antony N. Ngunjiri be joined in these proceedings as interested party;**
- 2. Orders made on 23/9/2008 and order and proceedings commenced pursuant thereto be stayed forthwith pending hearing of prayers 4-7 hereinafter and/or determination;**
- 3. That orders made on 23/9/2009 be set aside and or vacated;**
- 4. That any entry lodged subsequent to the lodging of transfer on 3rd November 2008 if registered against the title No.14225/171 be vacated or deleted;**
- 5. That the application dated 6/6/2007 be dismissed with costs on the grounds herein below;**
- 6. That the plaintiff's plaint/suit be dismissed in limine with costs to all defendants for failure to show any or any reasonable cause of action against the interested party.**

The applicant is interested and affected by orders made in this suit on

23/9/2008. There is an error, open and clear and apparent on the face of the record. The plaintiff knew that the applicant had purchased and had met the interested party to negotiate the purchase before filing this suit. The court was aware of the applicant's interest in the suit. There is miscarriage of justice. The

applicant's rights were curtailed without him being heard.

That suit ought to be dismissed against all defendants. The application is supported by affidavit of the applicant who swears that he purchased plot No. L.R.14225/171 at a public auction. He swears that he was not served with any proceedings of pleadings or any order. He is a bona fide purchaser for value he says. It is unjust that his right to vacant possession of his property has been hindered without his being heard.

There are allegations of fraud and illegality in the auction in which he participated. On the face of the record there is an error apparent. On the face of the record it is indicated that when ruling dated 23/9/2008 was made there were only 2 parties. It is only as from 3rd June 2009 that the present applicant, Antony N. Ngunjiri applied to be joined as a party claiming to be the purchaser of the suit property at an auction.

Upon perusal of the record it is clear that the interested party ought to be joined as a third defendant. He has shown that he has an interest in the suit property.

(a) I therefore grant prayer 3 in the chamber summons. The consequence is that the plaint will be amended to include him as defendant and he will file his defence. This order is made under Order 1 Rule 10 Civil Procedure Code;

(b) Order XXXIX 4 Civil Procedure Code provides that order of injunction may be discharged or varied or set aside by court on an application made thereto by any party dissatisfied with such order.

In this case when the order was made the applicant, Antony Ngunjiri

was not a party to the suit. However, the rule appears not to apply to any person (member of public) but to any party who is a party in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.

The applicant has a reason to apply for the discharge of the injunction on the ground that he claims interest in the suit property by purchase and that the order was made without giving him a chance to be heard. In the circumstances, I am satisfied that he is entitled to order as prayed under **Order 5** in the summons.

Regarding prayer 6 there is no evidence supporting matters alleged at prayer 6 and the same is dismissed.

I have perused the record I do not see application dated 6/6/2007. Prayer 7 is therefore misconceived and therefore dismissed. Regarding prayer 8, the same is premature. There was no suit against the applicant until the plaint is amended and he be enjoined in the suit.

The upshot is therefore, that the applicant is enjoined in the suit as defendant. The plaintiff shall amend the plaint within 7 days hereof and serve the new party who will file defence within 14 days of services. The orders made on 23/9/2008 are against first and second defendants and therefore prayer number 5 is granted and set aside.

The application shall be set down for hearing with all parties present within 7 days of this order. Costs of this suit shall be in the cause.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 30th day of October , 2009.

JOYCE N. KHAMINWA

JUDGE