

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 525 of 2003

MURAD EBRAHIM MURAD.....1ST PLAINTIFF

HAMIDA MURAD.....2ND PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....1ST DEFENDANT

ANNE WANGUI MWICHARO.....2ND DEFENDANT

RULING

Before me are two applications which seek diametrically opposed orders from the court. The first application was made by the plaintiffs on 27th March 2008 under the provisions of **Order L Rules 1 & 17** of the **Civil Procedure Rules** and **Sections 3 & 3A** of the **Civil Procedure Act** seeking orders of the court to set aside what is alleged to be an ex parte order issued by Azangalala J on 22nd October 2007 which enjoined Anne Wangui Mwacharo as a defendant in the suit. The application is supported by the annexed affidavit of Ebrahim Murad, the 1st plaintiff. The application is opposed. The other application is the one filed by the 2nd defendant. It is dated 19th October 2007. In the said application, which is purportedly made under the provisions of **Order II Rule 8** of the **Civil Procedure Rule** and **Order XXXIX Rules 1 & 2** of the **Civil Procedure Act**, the 2nd defendant prayed to be enjoined in the suit as the 2nd defendant. Further to that, the 2nd defendant sought orders of the court to restrain the plaintiffs by themselves or through their agents from interfering with, laying any claim, selling, transferring or in any other way dealing with the parcel of land known as LR. No.209/7725 pending the hearing and determination of the suit. The application is supported by the annexed affidavit of Anne Mwacharo, the 2nd defendant. The application is opposed by the plaintiffs who have filed several replying affidavits in opposition to the said application.

It was evident from the oral submissions made by counsel on behalf of the plaintiffs and counsel on behalf of the defendants that the plaintiffs took issue with the court's decision of 22nd October 2007 which enjoined Anne Mwacharo as the 2nd defendant in this suit. According to the plaintiffs' application, the learned judge erred when he allowed the 2nd defendant to be enjoined in the suit on the basis of her application which had cited a rule of the Civil Procedure which was not applicable in the circumstance. In the application seeking to be enjoined in the suit, the 2nd defendant had referred herself as the 2nd defendant and had further cited **Order II Rule 8** of the **Civil Procedure Rules** which states that applications under **Rules 1(3), 3 & 5** of the **Order** shall be made by summons in the court. The plaintiffs were of the view that the court did not have the requisite jurisdiction to enjoin the said Anne Mwacharo as a party in the suit in light of breach of the said rules of procedure.

In response to the application, the 2nd defendant argued that the learned judge had taken into consideration the fact that the plaintiffs had earlier made an application dated 17th October 2007 seeking to enjoin the 2nd defendant as a party to these proceedings. It was the 2nd defendant's case that the court had properly exercised its discretion to allow the 2nd defendant to be enjoined in the suit in view of the fact that the court established that the 2nd defendant was a necessary party to the proceeding. It is not in dispute that the 2nd defendant is alleging that she is registered owner of the property that is the subject of the suit. It is apparent that the plaintiffs are objecting to the said order by the court which enjoined the 2nd defendant as a party to these proceedings purely on technical grounds.

The plaintiffs appear to fault the court for enjoining the 2nd defendant to the proceedings on the basis of an application which cited the wrong rule of Civil Procedure. On evaluation of the facts of this case, it is evident that the plaintiffs' application is misguided. Under **Order L Rule 12** of the **Civil Procedure Rules**, no application shall be refused by the court merely by reason of failure to comply with the rule that requires the citing of every rule or statutory provision by which an application is ordinarily predicated. Further, even though the judge did not specifically cite the provision of **Order I Rule 10(2)** of the **Civil Procedure Rules** in his said order, there is no doubt that the court had the rule in mind which entitled it to exercise jurisdiction to enjoin any party to the proceedings when it formed the opinion that the 2nd defendant was necessary to enable the court effectually and completely adjudicate upon and settle on

questions in dispute involved in the suit. The plaintiffs' application dated 27th March 2008 therefore lacks merit and is hereby dismissed with costs to the defendants.

The 2nd defendant's application dated 19th October 2007 essentially seeks interlocutory orders of injunction pending the hearing and determination of the suit. The 2nd defendant, upon being enjoined in the suit, filed her defence to the plaintiffs' claim and counterclaimed against the plaintiffs on 8th January 2008. It is therefore clear that the 2nd defendant's application was made *in vacuo*. The application lacked a substratum in the nature of a pending suit. The 2nd defendant had no pending suit before this court upon which to base her application for the said interlocutory orders of injunction. The 2nd defendant can only seek such restraining orders after filing her counterclaim against the plaintiffs. Her application seeking to restrain the plaintiffs from dealing with the suit property was therefore a non-starter. The application had no legs on which to stand on. It had no foundation and if it did, its foundation was quicksand. I proceed to strike out the said application with costs to the plaintiffs.

The 2nd defendant shall however be at liberty to file another application if she so wishes so that the same may be determined on its merits.

DATED AT NAIROBI THIS 28TH DAY OF OCTOBER 2009

L KIMARU

JUDGE