



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 12 of 2008**

**PETER MWAI MACHARIA.....PLAINTIFF**

**VERSUS**

**BEN MUNGAI.....DEFENDANT**

**RULING**

The background information to the application as gathered from the record is that the plaintiff herein Mr. Peter Mwai Macharia moved to this Court vide a plaint dated 30<sup>th</sup> day of January 2008 suing the defendant Ben Mungai. The salient features of the claim in brief is that the defendant had entered into an agreement in writing with the Plaintiff to sell the suit property at a price of Kshs.4,000.000.00. The conditions attached to the sale was that Kshs.3.5 million was to be paid upon execution of the sale agreement, Kshs.0.5 million to be paid on or before the expiry of the 90 days from the date of the completion of the agreement, and the property was to be sold with vacant possession. Apparently the defendant failed to deliver up vacant possession within the completion period despite receipt of the purchase price. The action was prompted because the plaintiff had all along been ready and willing to complete the transactions. Hence request for orders for (a) specific performance of the said agreement or in the alternative a mandatory injunction to issue compelling the defendant to deliver up vacant possession of the said property to the plaintiff within the terms of the said agreement, damages for breach of the said agreement, interest, costs and any other relief that the court deems fit to grant.

Summons to enter appearance were taken out on the defendant who duly entered appearance dated 4<sup>th</sup> March 2008 and filed on 5<sup>th</sup> March 2008. Simultaneously with the entry of appearance was filed a statement of admission whose content is as follows:-

*“1) The defendant admits the description of the parties set out in paragraphs 1 and 2 of the plaint except that the defendants address for the purposes of this suit is care of Messers Kosgei & Masese Advocates of anniversary towers of 11<sup>th</sup> floor. Monrovia Street, P.O. Box 30317-00100 Nairobi.*

*2) The defendant admits that an agreement was indeed reached as set out in paragraph 3 of the plaint.*

*3) The defendant also admits the allegation contained in paragraph 4 of the plaint but states that it has been because of circumstances beyond his control.*

4) *The jurisdiction of this court is admitted reasons wherefore the defendant prays for the following relief;*

(a) *That the defendant be allowed to fulfill his obligation under the agreement.*

(b) *Any other relief the court deems fit to grant”*

On record is found a consent letter on headed paper of M/s Rombo & Company Advocates, dated March 12, 2008. The subject is **ELC No.12 of 2008 PETER MWAI MACHARIA VERSUS BEN MUNGI**, the content is:-

*Kindly record the following agreed to by parties herein*

**By consent**

(1) *Judgement be entered in favour of the plaintiff in terms of prayers 1 and 2 of the plaint.*

(2) *The defendant is to handover vacant possession of the property known as plot No. L5 Umoja Estate Nairobi to the plaintiff within 30 days of the date hereof.*

(3) *No order as to costs.*

*Signed*

*Rombo & Co.*

*Advocates for the Plaintiff*

*Signed*

*Kosgei & Masese*

*Advocate for the defendant”*

The consent was endorsed by the Deputy Registrar on 13.3.08 and a decree issued the same date.

Against the foregoing background information, the current applicant has come to this court by way of notice of motion dated 19<sup>th</sup> March 2008 and filed on 20<sup>th</sup> march 2008. It is brought under Orders 1 rule 10 (2) Order 39 rule 1, 2, 3 and 9, Order L rule 1 of the Civil Procedure Rules, Section 3 A and 63 (e) of the Civil Procedure Act, rules 3(2) of the High Court vacation Rules made pursuant to the Judicature Act Cap.8 and all other enabling provisions of law. The prayers sought are 8. For purposes of the record prayers 1 and 2 are spent. Those pending are:-

(4) That leave be granted to Margaret Wairimu to be enjoined in this suit as an interested party.

(5) That the consent judgment entered in favour of the plaintiff on the 13<sup>th</sup> day of March 2008 herein be set aside and or vacated.

(6) That the defendant and the plaintiff be restrained by themselves their servants, agents or by any person claiming under or through them from auctioning, disposing of or interfering in any manner whatsoever with the proposed interested parties/applicants and tenants therein, their quiet possession and/or any rights and interests arising from plot No. L 5 Umoja Estate (herein after referred to as the “suit

*property*” until the final determination of the suit herein.

- (7) That all registration or change of registration in the ownership, leasing, subleasing, allotment, for occupation or possession or in any kind of right, title or interest in the suit property with any land registry, government department and all other registration authorities be and is prohibited until further orders of this Honourable Court.
- (8) That pending the hearing of this application interim orders be granted in terms of prayers 5 and 6 herein above.
- (9) That the costs of the application be provided for.

The grounds in support are set out in the body of the application, supporting affidavit, annexures oral submissions in court and case law. The major ones are that:-

- (1) The intended interested party is the lawful wedded wife of the defendant herein. They married under statute on the 29<sup>th</sup> day of July 1989. They appear to have resided and cohabited together since 1979. They have three issues between them borne between 1980 to 1987.
- (2) In the course of so cohabiting and marriage they acquired the suit property which acts as the matrimonial home.
- (3) In the year 2004 the defendant deserted the matrimonial home but has since been appearing occasionally at the premises to seriously assault the intended interested party and her children.
- (4) That him defendant does not provide for them forcing the intended interested party to survive on own earnings and rental income from tenants living extensions to the said matrimonial property.
- (5) Matters mentioned in number 3 and 4 above forced the intended interested party to file judicial separation cause No.9 of 2007, in the Chief Magistrate’s Court at Milimani which is still pending. In the same cause she sought an injunction for protective orders to protect the suit property.
- (6) She was surprised when she was served with a decree to the effect that the defendant sold the property without her involvement. He was sued herein for non performance of his part of the bargain, he filed an admission, a consent was entered on the basis of that admission between counsels for both the defendant and the plaintiff allowing the plaintiffs claim as against the defendant.
- (7) The said consent yielded a decree whose performance was to be before 13.04.08. Therefore there is an apprehension that her rights and that of the children will be jeopardized if the said decree is executed.
- (8) She reiterates, she contributed directly and indirectly towards the purchase of the said property and therefore has beneficial interest in the property.
- (9) That the defendant has all along been aware of this beneficial interest and the purported entry into a consent without her involvement is nothing but a conspiracy to defeat her interests in the suit property.
- (10) It is her stand that the only best way to protect her interests herein is to be brought on board.

Both the plaintiff and defendant filed replying affidavits. The sum total of their opposition to the application is that:-

- (a). The plaintiff asserts that he purchased the property from the defendant in September 2007 unaware of the interested party's purported beneficial interest. Neither was he aware of any order barring the sale of the said suit property to anybody. He has just learned that the applicants' application dated 2<sup>nd</sup> March 2007 was dismissed. He maintains the sale agreement has nothing to do with the interested party.
- (b). The defendant on the other hand maintains that he is the registered proprietor of the suit property which he personally bought and improved.
- (c). Agrees the proposed interested party is his estranged wife.
- (d). Admits existence of judicial separation proceedings No. 9/2007 in Chief Magistrates Court Milimani which are still pending.
- (e). Admits there were restraint orders protecting the suit property pending hearing interpartes but the application on which the interim orders was anchored was dismissed for non attendance hence there is no court order prohibiting dealing in the said property hence the proposed interested party is nothing but a busy body in these proceeding who does not warrant any entry into these proceedings.
- (f). He maintains the property he sold was solely his and did not need the consent of the interested party to sell the same.

On case law counsel for the applicant relied on the decision of Koome J in the case of **PATRICIA MUTHONI MUTURI VERSUS STEPHEN MUTURI NAIROBI HCCC NO. 23 OF 2004 (OS)** decided on 18<sup>th</sup> March 20005. This is a decision emanating from a court of concurrent jurisdiction not binding on this court. However it is to be noted that at page 2 of the ruling the learned judge echoed and or cited principles or standards of proof established by the court of appeal in the case of **TABITHA NDERITU VERSUS NDERITU CA 203 OF 1997** at page 4, which standards are binding on this court. At line 8 from the top at page 2 it is quoted "*Acts that a wife has to show is that she is married to the husband at the time of launching her application; that the property in question was acquired during the subsistence of the marriage, and thirdly that she contributed directly or indirectly to the acquisition of the Assets*".

At page 3 of the said ruling line (2) from the top counsel referred to the case of Kivuitu versus Kivuitu whereby the same court of appeal had recognized that in a marriage relationship the wife's indirect contribution to the welfare of the family should be given consideration. At page 3 line 2 from the bottom the learned judge observed "*I have carefully evaluated the submission and read the pleadings filed herein. At this stage I have to satisfy myself that*

- (i). *The parties are married to each other although there are divorce proceedings the marriage is not dissolved prior to this case.*
- (ii). *There is no denial that the subject properties were acquired during the subsistence of the marriage. The issue of the contribution either directly or indirectly should be left for determination after oral evidence by the trial court. I am satisfied on a balance of convenience that if the properties which are under the control of the respondent are dealt with in a manner that is prejudicial to the applicant, she will certainly suffer irreparable loss.... I am satisfied that before any action is taken where by the legal position of the properties is changed, the applicants claim for determination of her claim should be heard first and the status quo in respect of the properties should be maintained*".

On the courts assessment of the facts herein it is clear that the core prayer in the application under consideration is prayer 3 which is seeking an order that the applicant be allowed to be joined to these proceedings. The other prayers 4, 5, 6 and 7, are what is called substantive prayers. This courts judicial wisdom as well as notice on granting of such substantive prayers is that they can only be granted to a party who has locus standi in the matter under review. Herein there is no dispute that the applicant has

not yet acquired locus standi in this matter. It is therefore correctly submitted by the plaintiff and defendants counsel that the said prayers are premature, void abinito and they should be struck out. The striking out will not affect the applicants right to pursue them should she be allowed to gain locus standi herein. This is on the basis that striking out invalid papers or pleadings or prayers is not a bar to presentation of proper ones based on the cardinal principle that a last thing that a court of law should do is to deny audience to a litigant wishing to approach the seat of justice for a hearing. Secondly that at all times courts, should lean favourably towards substantive justice as opposed to technical justice unless circumstances dictated otherwise. Accordingly prayer 4, 5, 6 and 7 are struck out for being premature. Prayer 3 and 8 remain to be determined on merit.

On the merits it is this courts finding that the following are not in this dispute:-

- (1) Marriage of the defendant and applicant.
- (2) That there are pending separation proceedings which are not yet determined hence the marriage still subsists.
- (3) There is no dispute that the applicant attempted to obtain protection orders to protect her interests in the said property by prohibiting any dealings regarding the same pending determination of the separation proceedings. It is not disputed that indeed interim orders were granted pending hearing inter partes of the interim application. From the annexures to the replying affidavit it is clear that no substantive orders were made on that application to determine whether the applicant had any protectable interest in the suit property or not as the application was dismissed for non attendance. Therefore the court cannot afford to lose sight of this and the fact that the sale actually occurred after the interim orders were discharged after the dismissal of the application for non attendance. Since the said application was disposed off on a point of technicality, chances of the applicant revisiting the protective issue herein cannot be ruled out as she will not be caught by the Resjudicata principles as the matter was not finally disposed off on merit.

As per the principles set by the court of appeal quoted in the case of **MUTURI VERSUS MUTURI** (supra) though it dealt with an injunctive relief, the same principles apply here as all that the applicant seeks herein and what the applicant was seeking in that case were protective orders to protect the rights of the applicant in the alleged matrimonial property. The same principles and or standards can be applied herein to determine whether there is reason for the applicant to be allowed to access locus standi in this matter.

The major reason put forward by her is that it is matrimonial property, and she resides therein and lastly proceeds of income from the same is used to pay fees for the children. The defendant admits the applicant is his estranged wife, does not dispute the existence of separation proceedings in the lower court, does not dispute, there had been interim orders which had been granted before the application was dismissed. It is however to be noted that apart from saying that he is the registered proprietor, there is no categorical denial that the property was acquired during the subsistence of the marriage. This being the case an assertion by the intended applicant of both direct and indirect contribution to the acquisition of the same become an issue capable of being inquired into.

This can not however be inquired into before the person raising it can be brought on board herein. This person is the applicant. This is fortified by the fact that neither plaintiff nor defendant is willing to bring her on board. The matter is urgent because both the plaintiff and the defendant have benefited from the proceedings. The defendant has in his pocket a substantial amount of the purchase price if not all, where as the plaintiff has a decree seeking to vest him with ownership.

Indeed the plaintiff may plead "*innocent purchaser without notice.*" But this is a matter for the substantive trial either of the main cause if reopened for the applicant or the interlocutory interim injunction relief. However in the eyes of the law all the three litigants stand equal before the eyes of the law. The intended interested party is however disadvantaged as she cannot attack any procedural

measures taken due to lack of locus standi. This court is therefore satisfied that the intended interested party has shown sufficient reason to warrant her being accorded locus standing herein to protect her interests.

Having established justification for the applicant being admitted into these proceedings, the court now proceeds to determine whether the procedure followed is the correct procedure for allowing the applicant access into these proceedings. Order 1 rule 10 (2) Civil Procedure Rules and Section 3 A cited are the ones relevant to prayer 3. Order 1 rule 10 (2) provides *“the court may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicator upon and settle all questions involved in the suit be added”*.

Section 3 A Civil Procedure Act on the other hand provides *“nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice to prevent abuse of the process of the court”*.

This court had occasion to deal with a similar situation in a ruling delivered in the case of **TRITON PETROLEUM LTD VERSUS CHARTER HOUSE BANK LTD NAIROBI HCCC NO. 183 OF 2005**. At page 4 of the said ruling line 1 from the top this court observed thus *“neither the plaintiff nor the defendant has moved the court to bring in the Kenya Railways Corporation under the relevant rules either as an additional defendant or as a 3<sup>rd</sup> party. The Kenya Railways Corporation finding itself in a vulnerable position and apprehending suffering prejudice has moved to this court seeking leave of the court to be joined to these proceedings as an interested party”*.

At page 6 of the ruling line 8 from the top the court continue *“it is clear that the application is brought under Section 3 A of the Civil Procedure Act. The reason given is that there is no other avenue through which the offended party can bring himself within these proceedings. The avenue under Order 1 rule 10 of the Civil Procedure Rules is available to parties already having locus standi in the proceedings. To support this stand the applicants cited this courts own decision in the case of **KINGORI VERSUS CHEGE AND THREE OTHERS [2002] 2KLR 243**. At page 250 paragraph 15 – 30 it is observed that as regards the prayer that he be joined as a party on his own the court has had to revisit order 1 rule 10 (2) of the Civil Procedure Rules which deals with addition of a defendant to a proceeding. A reading from that provision allows the court to add a defendant on its motion or upon application by either party either orally or formally by summons in chambers under order 1 rule 22. Herein the court has not moved on its own. Has been moved by the intending party on its own formally. The operative words in Order 1 rule 10 (2) in the Civil Procedure Rules are either upon or without the application of either party. The use of the word either party denotes that the formal move has to be made by a party already participating in the proceedings. There is no addition of use of the words or any other party or 3<sup>rd</sup> party under the rule. It would seem that an intending party cannot come in on his own and choose which position he wants”*.

At line 8 from the bottom on page 7 of the said ruling the court confirmed *“this court has reconsidered that argument and finds that although it is not revoking the same it still stands by the first parties of the argument that under Order 1 rule 10 (2) the only parties with locus standi to bring in a new party to the proceedings are those already in the proceeding. What this court is being called upon to consider is that the last portion of that observation which says that “it would seem that an intending party cannot come on his own and choose which position he wants. It is these that the counsel has asked this court to revisit. Their argument is that Section 3 A of the Civil Procedure Act under which they have come provides a remedy.”*

From page 8, 2<sup>nd</sup> paragraph to page 9 the court reviewed case law on the applicability of Section 3 A of the Civil Procedure Act. In the case of **RYAN INVESTMENTS LTD, & ANOTHER VERSUS THE UNITED STATES OF AMERICA [1970] EA 675** it was held inter alia that it is only where there is a specific remedy provided by the law that the inherent jurisdiction of the court cannot be invoked. In

the case of **WANJAU VERSUS MURAYA [1983] KLR (CA) 276** it was held inter alia that Section 3 A of the Civil Procedure Act (Cap 21) although saving the inherent powers of the court to make such orders as may be necessary for ends of justice or to prevent abuse of the power of court should not be cited where there is an appropriate, section or order and rule to cover the relief sought. In the case of **KIBUTHA VERSUS KIBUTHA [1984] KLR 243 (CA)** it was held inter alia that the inherent powers of the court under the Civil Procedure Act (Cap 21) Section 3 A cannot be invoked so as to override other rules unless, it cannot be shown that special circumstances exist or that injustice will be occasioned by the by the application of such other rules which was not the case here. Lastly in the case of **AFRICAN IMPORT AND IMPORT LTD VERSUS CONTINENTAL CREDIT FINANCE LTD. AND ANOTHER [2004] 1 KLR 121** it was held inter alia that Section 3 A of the Civil Procedure Act will (not) aid a person where there is a clear provision of law governing a matter in which a step or steps shall be taken in the action.

At page 9 last paragraph in the said quoted ruling, this court concluded that Section 3 A of the Civil Procedure Act applies where there is no provision of law governing the particular situation of law being inquired into. At page 10 line 4 from the top the court observed (in reference to the provision of order 1 rule 10 Civil Procedure Rules) that *“it is also clear as ruled in that case of **KINGORI VERSUS CHEGE AND 3 OTHERS** (supra) that provision exists where parties already in the proceedings are mandated to bring in others”*. The court went on further to rule that *“in the absence of a provision to allow a party bring in itself into the proceedings calls into play the invocation of Section 3 A of the Civil Procedure Act. The only question left for determination of this court is simply to decide whether the circumstances herein warrant such intervention”*

This court has applied the foregoing reasoning to the facts herein and makes findings:-

(1) That Order 1 rule 10 (2) cited by the applicant does not aid the application. The same applies to parties already participating in the proceedings. However Section 3 A of the Civil Procedure Act operates to aid the applicant gain access to these proceedings. The only question as paused in the cited case is a determination as to whether the circumstances displayed herein warrant such intervention by this court. In this courts view, the answer to this question is in the affirmative. The reasons are:-

(1) The court has ruled that marriage between the applicant and the defendant is not disputed.

(ii) That though there are pending separation proceedings, the same have not been finalised.

(2) That it is not disputed that the property is registered in the name of the defendant.

(ii) That the applicant asserts joint acquisition through direct and indirect contributions, and although the defendant depones to sole acquisition, there is no assertion that the same was not acquired during the subsistence of the marriage making a claim of both direct and indirect contribution by the applicant not remote.

(3) There is no dispute that interim protective orders had being granted in the separation cause but these were discharged due to non attendance, thus making the issue of agitation for protective orders to remain available to the applicant both in the separation proceedings through application to set aside the dismissal order and reinstatement of the dismissed application and then have it disposed off on merit or alternatively have the same agitated herein.

(4) There is proof that the property has been sold by the defendant to the plaintiff. A substantial amount of the purchase price has found its way into the hands of the defendant. From the deponement, the defendant has not stated that the applicant was aware of the sale or has had access to the said money. Neither is he defendant willing to share anything with the applicant.

(5) The plaintiff who has moved to acquire the property for value has a decree in his favour and had the applicant not moved to court execution process would have been set in motion.

(6) Neither plaintiff nor defendant is willing to introduce the plaintiff into these proceedings. In fact her attempt to get into the proceedings is being resisted. It means that she has to access the proceedings on her own.

(7) If in deed she contributed directly or indirectly to the acquisition of the said property as a spouse though she has another avenue of seeking compensation for the loss through originating summons procedures, there is no harm in her making efforts to try and forestall the progression of the transfer of the property from the defendant to the plaintiff in these proceedings since she has become aware of the same by bringing herself on board in view of her allegation that she and the children reside in the said premises and she uses income from part of the premises to pay school fees for the children of the marriage.

As found by Koome J. in the case of **PATRICIA MUTHONI MUTURI VERSUS STEPHEN MUTURI (supra)** that if the court does not intervene the applicants rights will be prejudiced, herein too in the wake of the scenario displayed hereof, if the applicant is not brought on board to present her facts to be considered along side those of the plaintiff and the defendant, the applicant is likely to suffer prejudice.

Further also as observed by this court in the **TRITON PETROLEUM LTD VERSUS CHARTER HOUSE BANK LTD RULING (supra)** at page 10 line 8 from the bottom, neither party has moved to bring in the intended party despite the defendants admission that she is his estranged wife and also despite her assertion that she has beneficial interest in the property sought to be transferred to the plaintiff. Both are resisting the applicants' entry in these proceedings. As observed by this court, in the said cited ruling at line 5 from the bottom on page 10, the conduct of these two parties looks mischievous and if left unchecked might result in a miscarriage of justice being rendered to the intended party. The only way that, that mischief can be curbed is by opening the door for the applicant to come in. This is inevitable because if the matter herein is finalised and then the intended party attempts to raise it in any other forum she will be caught up with the rule of *indolence, laches, rejudicata, etc.* It is therefore proper to take the action taken to fore stall the aforesaid consequences. Failure to add the intended interested party might lead to an increase in litigation costs and forums over the same subject matter which situation is likely to lead to issuance of conflicting decisions by different tribunals over the same subject matter.

The net result of the foregoing assessment is that prayer 3 of the applicants' application dated 19<sup>th</sup> March 2008 and filed on 20<sup>th</sup> March 2008 has merit. Interests of justice demand that the interested party be brought on board to protect her interests as well as rights over the said subject matter of these proceedings.

The applicant is being brought into the proceedings under Section 3 A Civil Procedure Act procedure. She is therefore neither applicant nor a defendant. This presents a challenge as to the nature and the title and name of the nature of the pleadings to be presented for consideration along side those already on record. That notwithstanding, this court can still invoke the inherent powers under the same Section 3 A Civil Procedure Act and title to the nature of pleadings that the incoming interested party is to present to court for consideration. Prayer 3 thereof is therefore allowed on the following terms:-

- (1) Prayer 3 of the application dated 19.3.08 and filed on 20.3.08 is allowed.
  - (2) Since there is a plaint on record which the interested party intends to oppose or challenge together with all consequential orders emanating from and in the absence of a better procedure provided by the rules for such an entry, this court in its own judicial wisdom considers that the said interested party do enter the proceedings by way of an appearance as an interested party within 7 days from the date of the reading of the ruling.
- (ii) The said appearance to be served on both the plaintiff and the defendant within 7 days from the date of filing the same.

(3) Within 14 days from entry of appearance the said interested party is to file and serve her statement of claim on both the plaintiff and the defendant.

(4) The plaintiff will have 14 days from the date of service upon him of the interested parties statement of claim to amend the plaint to reflect the presence of the interested party in these proceedings.

(ii) to file a reply to the interested party's claim.

(5) The defendant who has entered appearance will also have leave to file a response to the interested parties claim within 14 days from the date of service upon him of the said claim.

(6) The interested party will have seven days from service upon her of the plaintiffs and defendants responses to respond to the same.

(7) The interested party has leave of the court to file an application seeking the struck out reliefs in prayer 4, 5, 6 and 7 if she deems fit to do so.

(8) In view of the presence of the consent orders entered herein by the plaintiff and the defendant, and also in view of the presence of the decree in favour of the plaintiff which is due to ripe on 13<sup>th</sup> April 2008 ushering in imminent execution process, the court is of the opinion that the interest of justice demands that status quo be maintained for a period of time to avoid miscarriage of justice being meted out to the disadvantaged party and to avoid her being taken unfair advantage of by parties already on board to her detriment. The court on its own motion grants that status quo granted on 3.04.08 do remain in force for a period of 45 days from the date of the ruling to enable parties regularize their position as stated above.

(9) Thereafter parties to proceed according to law.

(10) Costs will be in the cause.

**DATED, READ AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL 2008.**

**R. N. NAMBUYE**

**JUDGE**