

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 187 of 2007

FORTUNATUS WANJOHI NDEGWA.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

R U L I N G

By a chamber summons brought under Order VIA Rule 3(3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Fortunatus Wanjohi Ndegwa, who is the plaintiff in this suit, seeks leave of this court to amend his plaint filed on 11th July, 2007 in terms of the amended plaint annexed to his application. The plaintiff also seeks an order that the plaint be deemed duly filed and served in respect of the 1st defendant. In the plaint now sought to be amended, the 1st defendant, National Bank of Kenya Ltd, (the proposed 1st defendant) was the only defendant. The plaintiff now seeks to introduce a 2nd defendant Julius Koome M'Mbwira. The plaintiff is also introducing a claim alleging fraud against the defendants particulars of which have been given. In addition, the plaintiff is introducing a new prayer for a declaration that the auction sale in respect of Ngong/Ngong/12687/Ongata Rongai (hereinafter referred to as the suit property), is null and void.

The application is supported by an affidavit sworn by the plaintiff in which he depones that he has established that the suit property was purportedly sold by the defendant to the proposed 2nd defendant, Koome M'Mbwira, in purported exercise of the defendant's statutory power of sale over the suit property. It is the plaintiff's contention that it is necessary for him to amend his plaint so as to introduce the new developments in order to assist the court to fully determine the issues in controversy.

The application was opposed by the defendant through grounds of objection which were filed on 14th January, 2008. It was contended *inter alia*, that the amendment sought by the plaintiff seeks to introduce a new party to the suit without leave of the court as required under Order I Rule 10 of the Civil Procedure Rules. In that regard, counsel for the respondent relied on ***HCCC No.808 of 2004 Lester Square Investment Ltd vs Jacob Oyieko & 2 Others***. Secondly, it was contended that the amendment sought ought not to be allowed as it seeks to introduce allegations of fraud which had not been pleaded in the first instance. In this regard, ***Bethany & Co. Ltd Vs Black TLR (1892-1893) 580***, was relied upon. It was contended that the application was made in bad faith as the facts sought to be introduced were not new facts but have all along been within the knowledge of the plaintiff. It was contended that the only remedy available to the plaintiff was damages. The court was therefore urged to dismiss the application.

In response to the submissions made on behalf of the defendant, the plaintiff's counsel maintained that Order I Rule 10(2) of the Civil Procedure Rules only donates the power to the court to allow an amendment whose effect is to add a new party whilst the procedure is provided under Order VIA Rule 3(3) under which the plaintiff had moved the court for leave. Counsel for the plaintiff urged the court to reject the case of ***Bethany & Co Ltd vs Black*** (supra) as bad law. It was maintained that ulterior motive had not been demonstrated and that although the suit property may have been sold the transfer may not have been effected and therefore the plaintiff can arrest the situation by bringing the proposed purchaser into this suit.

It is evident that the plaintiff is seeking leave of this court to amend his plaint so as to introduce a 2nd

defendant. Although the plaintiff has brought this application under Order VIA Rule 3(3) of the Civil Procedure Rules, the application does not fall within that provision, as the plaintiff is not seeking to correct the name of the defendant or to correct a genuine mistake which would cause reasonable doubt as to the identity of the person intended to be sued, but, is simply trying to introduce another party as a 2nd defendant. Such an amendment would fall within the provisions of Order I Rule 10(2) of the Civil Procedure Rules, as an amendment necessary to add a party whose presence before the court may be necessary in order to enable the court adjudicate upon and settle all questions involved in the suit. In short, the plaintiff has moved the court through the wrong provision and he cannot seek relief from Section 3A of the Civil Procedure Act as there are clear provisions providing for the relief he is seeking.

The question is whether the plaintiff's application should be dismissed merely because he has moved the court under the wrong provision. Order L Rule 12 of the Civil Procedure Rules provides as follows:

“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

In my understanding the above provides a lifeline where no specific rule is quoted. In the same spirit, the court has powers to entertain the applicant's application even though it is brought under the wrong provision.

I have considered the proposed amendments with a view to determining whether the presence of the proposed 2nd defendant is necessary to enable this court finally determine the issues in controversy. I do note that the plaintiff's substantive complaint is the exercise of the original defendant's statutory power of sale over the suit property. Although the plaintiff has introduced issues of fraud, there is no specific allegation of fraud against the proposed 2nd defendant nor has any cause of action been revealed against the proposed 2nd defendant in the proposed amended plaint. Apparently the proposed 2nd defendant is only being brought into the suit because he bought the suit property at the public auction. However, it is clear that under Section 77 of the Registered Land Act Cap 300, the plaintiff's remedy if any, arising from the sale of the suit property is damages against the original defendant.

For these reasons, I decline to grant leave to the plaintiff to amend the plaint by adding the proposed 2nd defendant. The plaintiff is however at liberty to amend the plaint by introducing the allegations of fraud against the original defendant as contained in the proposed amended plaint. Such amended plaint shall be filed and served within 15 days from the date hereof.

Those shall be the orders of this court.

Dated and delivered this 24th day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the plaintiff absent

Kaburu H/B for the defendant