REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL CASE 21 OF 2006

NASIBI AORE.....PLAINTIFF

VERSUS

BONNY MUSEBE)

JANE BONNY MUSEBE).....DEFENDANTS

Exparte JANE ANYONA OMUTSANI

R U L I N G

The applicant **JANE ANYONA OMUTSANI**, is seeking to be enjoined to this suit, as the 3rd defendant. She has therefore moved the court by way of a chamber summons pursuant to the provisions of Order 1 rules 11 and 12 of the Civil Procedure rules, as read together with sections 3 and 3A of the Civil Procedure Act.

The applicant is the wife to the plaintiff. In that capacity she leased out to the defendants some 27.5 acres out of the suit property **L.R. No. KITALE MUNICIPALITY/BLOCK 17/BIDII/149.** She acknowledges receipt of Ksh. 220,000/= from the defendants, as the rent for the said lease.

It is the applicant's contention that she had leased out the said portion of land because she was a co-owner thereof. Having done so, the defendants are said to have had a legitimate basis for entering onto that portion of land, and using it.

That notwithstanding, the defendants had now been sued by the plaintiff, because he was the registered proprietor of the suit property.

But the applicant feels that it is necessary for her to be enjoined to this suit, as it is by virtue of the lease which she granted to the defendants that the said defendants took possession of the land in question, thus provoking this suit. She believes that if she is enjoined to the suit, that would enable the court to determine if the claim against the defendants was genuine.

It is also submitted by the applicant that if she was not enjoined to the suit, and if thereafter the suit succeeded against the defendants, the applicant would be liable to refund to the defendants, the rent which they had paid to her. Over and above such a refund, the applicant fears that she may well be compelled to pay compensation to the defendants.

In answer to the application, the plaintiff says that the application was nothing more than an attempt to

delay the proceedings in this case. The main reason for that contention is that the applicant has been aware of the case for a considerable period of time, having filed a replying affidavit on 18th March, 2006. That being the case, the plaintiff faults the applicant for not seeking to be enjoined then, if her current desire were honest.

As far as the plaintiff was concerned, this application was an afterthought, which came about after the defendants had failed to file a defence, resulting in an interlocutory judgment being entered in favour of the plaintiff.

I have verified from the court records that interlocutory judgment was entered by the Deputy Registrar on 28th March, 2006, after the defendants had entered appearance, but without following it with a defence.

In the circumstances, the plaintiff expressed the view that the applicant was purporting to speak on behalf of the defendants, whilst she lacked locus to bring forth a defence on behalf of the said defendants.

To be fair to the applicant, she has at no time claimed to be speaking on behalf of the defendants. If anything, she says that the suit herein was filed against the defendants with the sole intention of getting at her, in view of the matrimonial problems that are bedeviling the marriage between her and the plaintiff.

The fact that the couple were having marital problems was confirmed by the plaintiff, who pointed out that the applicant had filed Divorce Cause No. 8 of 2006. The plaintiff's advocate also told the court that in the said Divorce Cause, the applicant herein had sought orders that would enable her to occupy the suit property.

To my mind, the said concessions by the plaintiff were actually supportive of the applicant's contention that she has a legitimate claim over the suit property. In other words, she would not be seeking to fight the battles for and on behalf of the defendants, but she appears to believe, (rightly or wrongly) that she has a genuine claim over the property in issue.

Furthermore, when the plaintiff says that the applicant had actually sought the permission of elders before leasing out the property to the property, that is conduct that is suggestive of a person who was above-board.

That notwithstanding, the plaintiff pointed out that the lease agreement being relied upon by the applicant was not enforceable, as no consent was given by the relevant Land Control Board. He also says that as the registered proprietor over the suit property, his rights cannot be successfully challenged, because of the provisions of sections 27 and 28 of the Registered Land Act.

Whereas those arguments are obviously very potent, I do hold the considered view that until and unless the applicant was given a platform from which she could attempt to respond thereto, it was premature to expect her to answer to them.

The plaintiff pointed out that the authorities cited by the applicant were all in respect of claims for declarations under the Married Women's Property Act, save for one. The one odd case was said to be **DAGAMA ROSE GROUP OF COMPANIES LTD. VS. DESANUO & 13 OTHERS (1990) KLR 25.**

As far as the plaintiff was concerned, the only reason why the court allowed the joinder of the applicant, as a defendant to that suit, was because of the shares that had been transferred to him.

Having perused that authority I noted that the learned Commissioner of Assize actually held that it was not appropriate, at that stage of the proceedings, to determine whether or not the alleged transfer of shares to the applicant was effective in law. It was for that very reason that he ordered that the applicant be enjoined to the suit, as his presence before the court was considered necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

Meanwhile, it is noted that in **NJOROGE VS. NGARI (1985) KLR 480** the court held that even if a property was registered in the name of one person, if another contributed towards the acquisition thereof, then both persons have proprietary interests in that property. The court also held that section 28 of the Registered Land Act did not relieve the proprietor from any duty or obligations to which he is subject as trustee.

In **KARANJA VS. KARANJA (1976) KLR 37**, the court held that the absence of an agreement or intention that a contributing spouse share beneficially in the property, did not exclude the imputation of such an intention. Such imputation could arise even in instances wherein the wife was contributing indirectly, through payments for household and other expenses which the husband would otherwise have had to pay.

And in **NJOKI VS. GACHINGIRI (1997) KLR 153**, the court reiterated that section 28 of the Registered Land Act does not defeat the interest of a beneficiary against the registered trustee. Such a beneficiary remained a beneficial owner of the property and would be entitled, as against the trustee, to have rectification of the register.

Of course, the plaintiff is right to point out that the cases cited by the applicant were in relation to the Married Women's Property Act. To my mind, far from rendering those authorities irrelevant, I hold that that makes them even more relevant because the applicant's claim is grounded upon her marriage to the plaintiff.

And as the applicant is said to have sought, (in the Divorce Cause), orders that would enable her to occupy the suit property, that makes it understable why she should take a keen interest in these proceedings.

Secondly, the claim herein is not only consistent with that in the Divorce Cause but is reflective of a desire other than that of simply delaying this case, as suggested by the plaintiff.

It is to be noted that in **RUTH NJERI MWANIKI VS. STEPHEN MWANIKI & ANOTHER, NBI CIVIL APPEAL NO. …….. OF 1991**, the Hon. Mbito J. declined to restrain the respondent from dealing with his property as he wished, even though the appellant had complained that that would lead to a situation where their children may have nothing left to them.

But it is noteworthy that in that authority, which was cited by the plaintiff herein, the learned judge went on to say that;-

"***The Appellant could only succeed if her claim was based on joint ownership of property purchased during their marriage."***

Such an acknowledgement by the judge implies that insofar as the applicant's claim herein is that of a spouse, who is claiming joint ownership to the suit property, the applicant may well have a sustainable claim. And if she were to prove such a claim, the applicant may well justify her action of leasing part of that property to the defendants. Of course, the court is not overlooking the hurdle poised by the lack of consent from the Land Control Board. But such is a hurdle that the applicant will have to contend with, on the road to proving such claim as she believes to be sustainable.

Accordingly, I find and hold that the applicant is a necessary party, whose presence in this suit would enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. In particular, her presence will enable the court determine whether or not the defendants were trespassers onto the suit property, as asserted in the plaint.

For those reasons, leave is granted to the applicant to be enjoined to this suit as the 3rd defendant. As a consequence of that joinder, leave is granted to the plaintiff to amend his plaint as he may deem necessary within the next fourteen days. Leave is also granted to the applicant, who will now be the 3rd defendant, to file her defence, if any, within fourteen days of service.

As regards costs, although the application was successful, I order that the same shall be in the cause. The sole reason for not awarding, costs to the applicant automatically, is that she has not explained the delay in seeking joinder, having become aware of the suit as early as March, 2006.

Dated and Delivered at Kitale, this 6th day of June, 2007.

FRED A. OCHIENG.

JUDGE.