



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

Civil Case 91 of 2004

WILLIAM MUTHEE MUTHAMIPLAINTIFF

VERSUS

BANK OF BARODA.....DEFENDANT

RULING

This case was heard before me and at the stage when the plaintiff closed his case and the defence was about to commence with its case the applicant made an application the subject of this ruling.

The application is brought under Order 1 rules 1 and 8 and (3) and 10; Order 6A Rules 8, and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The orders sought before me were: -

- (1) That this Honourable court be pleased to add and/or include DAVID MUTHAMI MUTHEE as a party (2nd plaintiff) in this suit;
- (2) That the Honourable court be pleased to grant leave to the applicant to amend the plaint as per the annexed amended draft.

When the case commenced for hearing the present applicant gave evidence on behalf of the plaintiff by virtue of a power of attorney donated to him by the plaintiff. The plaintiff is indeed the applicant's son.

The applicant attended public auction where the suit property was offered for sale and he stated, "I purchased" the property from the defendant. What the applicant meant, I believe, is that he bid for the property. However the agreement of sale was between the plaintiff and defendant, dated 29th October 2001. The property was eventually transferred to the plaintiff but subsequently retransferred to its previous owner hence the present case.

The plaintiff's counsel is acting for the applicant even though he failed to file a notice of appointment. However since the matter was not argued before me I wish to proceed to rule on the merits of the application.

The applicant's counsel in argument stated that there is a constructive trust between the plaintiff and the applicant. Neither the counsel nor the affidavit in support elaborate on this trust so one is left to speculate on its relevance to this suit. That as it may be the plaintiff it was argued entered into a sale agreement with the defendant for the purchase of the suit property which transaction was financed by the

applicant and which property was purchased for the applicant's sole benefit.

The applicant, therefore argued, that he has suffered loss and damage because of the failed sale and further stated that he was a necessary party to these proceedings. The applicant argued that the amendment will not prejudice the defendant.

The application was opposed and the defendant filed grounds of opposition, which were raised in argument by counsel.

Counsel argued that the applicant has no cause of action against the defendant either in contract or in tort, he described the applicant as a "busy body"; and he said if the court grant the orders as sought the court will be acting in vain.

He further argued the agreement which gives rise to the action is dated 29th October 2001 and he invited the court to see that there is no allegation of the defendant's breach of that contract as toward the applicant. He argued that if the applicant's cause of action is for breach of trust then that cause of action does not belong to this suit. Counsel finally said that no amendment is necessary and none is merited.

In approaching this ruling I am aware that the court's power to allow amendment is wide. The discretion to be exercised by the court although wide is a judicial one and should be exercised rationally and on well settled principles.

In the present case the principles to be applied are the principles of Law of contract. The plaintiff's cause of action is based on the contract i.e. the agreement of sale dated 29th October 2001. That agreement which is part of the documents exhibited on behalf of the plaintiff in this case was between the plaintiff and the defendant. That being the case the applicant has failed to show what cause of action he has against the defendant. Indeed if the applicant's counsel had put on the 'legal hat' he would have realized that his client's claim will be caught by the rule of privity of contract. To quote from the book 'contract cases & material' H.G. Beale, W.D. Bishop & M.P Furmston, page 1127

"One may not be a party to a bargain either because he does not assent to it even though he provides something that could be labeled consideration....."

This quote aptly applies to this case. The applicant states that he financed the transaction but as it can clearly be seen he did not execute the agreement, which is the basic of the present claim. For that failure he cannot be a party to these proceedings and the application on to that basis fails.

The order of this court is that the application dated 7th December 2004 is dismissed with costs to be paid by the plaintiff to the defendant.

Dated and delivered on 3rd day of March 2005.

MARY KASANGO

JUDGE