



REPUBLIC OF KENYA  
-  
IN THE High Court Of Kenya At Nairobi  
-  
Commercial Division – Milimani  
-  
Civil Case No. 123 Of 2004

LUKAS KABOBIA NJUGUNA.....:PLAINTIFF

VERSUS

CONSOLATA BANK OF KENYA LTD ..... DEFENDANT

RULING

This Application is by a party interested in these proceedings. The Applicant wishes to be enjoined in this suit. He also seeks an order to discharge the order of temporary injunction issued herein on 3rd March 2004 and confirmed on 17th May 2004. The Application has been brought under Orders 1 Rule 10 (2) XXXIX Rule 4, L Rule 1 of the Civil Procedure Rules; Rule 3 (2) of the High Court Practice and Procedure Rules, Section 3A of the Civil Procedure Act and other enabling provisions of the Law. The application is said to be made on the following grounds: that:-

- (a) The Applicant is an interested party to the proceedings herein having purchased the suit premises being L.R. No.4953/715 Thika (IR 40457) at a public auction on 21.11.2003.**
- (b) The Applicant's presence before the Court is necessary to enable the Court effectually and completely adjudicate on all questions involved in the suit as any orders issued shall affect the Applicants rights as purchaser of the suit premises. (c) The order of temporary injunction was issued without the Applicant being granted an opportunity to be heard and it adversely affects the Applicants rights as purchaser of the suit premises.**
- (d) The order of temporary injunction was issued without full disclosure of all the circumstances prevailing including the sale of the suit premises to the Applicant prior to the filing of this suit.**
- (e) The Plaintiff and his advocate are guilty of material non-disclosure of pertinent facts prevailing in this matter prior to the filing of this suit and are not deserving of the order of temporary injunction issued in exercise of the Court's equitable jurisdiction.**

The Application is supported by an affidavit sworn by the Applicant wherein he depones that he purchased the suit property at an auction sale held on 27th November, 2003 at Kshs 525,000/= which sum he settled and instead of being registered as proprietor he was served with Court papers in Thika CMCCC No. 1525 of 2003. The Plaintiff in that case sought an order of injunction. The suit was struck out. As the Applicant awaited registration of a transfer in his favour he learnt that the present suit had been filed seeking a restraining order against transfer by the Defendant which order had been granted without disclosing that the Applicant had purchased the suit property. In the premises the Applicant not only seeks to be enjoined to these proceedings but also seeks discharge of the order of temporary injunction.

The Application is opposed and there is a Replying and a supplementary affidavit sworn by the Plaintiff. There are also grounds of opposition. The Plaintiff has deponed in his affidavits aforesaid that the Applicant's interest cannot be canvassed in this suit. He denies that he is guilty of material non-disclosure and further that the Applicant is a bona fide purchaser. The plaintiff further avers that he was not a party to the Thika court proceedings and further that the Applicant is not entitled to the orders sought in this Application.

The Application was canvassed before me on 11th March 2005 by Mr. Kariuki Learned Counsel for the Applicant Mr. Rinkanya, Learned Counsel for the Plaintiff and Mr. Mureithi Learned Counsel for the Defendant.

Counsel for the Applicant restated the averments in the supporting affidavit and added that the Court has a wide discretion to grant the orders sought. In opposing the Application Counsel for the Plaintiff recited the facts averred in the Plaintiff's affidavits aforesaid. He emphasized that the prayers seeking setting aside of the order of injunction cannot be made even before the prayer to be enjoined to the proceedings is determined. Mr. Mureithi Learned Counsel for the Defendant did not make any presentation.

I have now considered the Application, the authorities cited and the submissions of Counsel. Having done so I take the following view of the matter. Order 1 Rule 10 (2) reads:-

***“10(2). 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 effectually and completely to adjudicate upon and settle all questions involved in the suit be added.”***

A plain reading of this sub rule shows that the only party who can be joined whether as Plaintiff or Defendant is one who ought to have been joined it is also clear that a party can be joined if his presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit

The Applicant is alleged to be a purchaser of the suit premises. He alleges that he purchased the suit premises even before this suit was instituted. Any orders that may ultimately be made in this suit will obviously affect the Applicant. I have no doubt in my mind that the Applicant ought to have been joined to these proceedings at the time of institution of the suit. As a purchaser, his interest is directly in conflict with the Plaintiff's interest. I accordingly allow the Application dated 23rd August, 2004 in terms of prayer 2 thereof. The Applicant to be enjoined as a Defendant. As regards the prayer to discharge the order of temporary injunction issued on 3rd March 2004 and confirmed on 17th May 2004, I am not persuaded that the same can be granted before the Applicant is enjoined and files his pleadings. In my view to grant this prayer at this stage will be a travesty of justice. The effect will be a determination of the Applicant's claim on affidavit evidence at interlocutory stage which our procedural law does not permit.

In the result I order that the Applicant files and serves his pleadings within fourteen 14 days from today. The Plaintiff and the Defendant are at liberty to file and serve their responding pleadings within 14 days of service of the Applicant's papers. Thereafter the Applicant will be at liberty to canvass prayer 3 of the Application dated 23rd August, 2004.

Costs shall be in the cause.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2005.**

**Read in the presence of:-**

**F. AZANGALALA**

**JUDGE**