REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 639 OF 2003

SUSAN WAMBUI GITHEHU …….. PLAINTIFF

VERSUS

DAVID KIMANI NDUMBU & TWO OTHERS …… DEFENDANT

R U L I N G

The application before me has been brought by one Sophia Watiri Ndungu, seeking to be joined as an interested party in the suit.

The application is said to be founded upon section 3A of the Civil Procedure Act; and Order 1 rules 10 (2), 13 and 22 of the Civil Procedure Rules. Before I commence analyzing the application, I deem it prudent to set out in full the provisions of Order 1 rule 10 (2). It reads as follows:

> "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 be joined, whether as plaintif or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added".

The applicant herein states that she is the mother to the 3 Defendants. More significantly, she states that she has at all material times resided on the property L.R. No. NGONG/NGONG/432, out of which, she says, the suit property was hived off. Her contention is that she is the beneficial owner of the property. She asserts that the suit property was fraudulently and unlawfully transferred to the Plaintiff. She goes further to assert that the Defendants and the Plaintiff did not reside on the suit premises; and that if there were any allegations of trespass to the suit property, the same should be directed at her.

For these reasons, the applicant feels that it is necessary for her to become a party to these proceedings, so as to enable the court get to the bottom of the matters in issue in the case.

In support of the application is a supplementary affidavit sworn by the applicant on 10/12/03. Annexed to the said affidavit are copies of certificates of official searches in respect of each of the 4 titles which were issued after the original title was sub-divided. The said certificates of official searches show that restrictions have been registered against the 4 titles. The applicant says that the restrictions were registered at her behest.

All the foregoing appear to indicate that the applicant is so intertwined with the goings-on upon the suit property, that any decision pertaining thereto would have a direct impact upon her.

But the Plaintiff thinks otherwise. Through her lawyer, the Plaintiff says that there is no reason that

would warrant the Applicant being enjoined as a party to this suit.

The Plaintiff illustrated to the court the fact that the applicant has been involved in previous litigation, touching on the suit property. This fact was readily acknowledged by the applicant, in her affidavit sworn on 24/9/03.

It is the contention of the Plaintiff that the applicant had, in HCCC No. 4936 of 1993 Sophia Watiri Ndungu Vs Peter Ndungu Njenga raised the same prayers as those she is seeking to put forward in this case. It was pointed out to the court that the earlier case had gone upto the Court of Appeal in Civil Appeal No. 20 of 2000, Peter Ndungu Njenga Vs Sophia Watiri Ndungu. The Plaintiff noted that the Court of Appeal, in that case, had already made a decision on the question of the applicant's alleged legal or beneficial interests in the suit property. Therefore, as far as the Plaintiff is concerned the whole issue being raised by the applicant is already Res Judicata, and therefore that the applicant ought not to be allowed to litigate upon them anew. It was submitted by the Plaintiff that the present application is no more than an attempt to circumvent the decision of the Court of Appeal, so that the applicant can join the suit and seek the same remedies already adjudicated upon.

The Plaintiff also pointed out the fact that the applicant had failed to comply with the order of Aluoch J., dated 27/11/03. By the said order, this court had directed the applicant to file and serve a further affidavit, to which was to be annexed a copy of the title deed and/or green card and a certificate of search in respect of Ngong/Ngong/432. Following the applicant's said failure to comply, the Plaintiff produced the requisite documents, which are annexed to the Replying Affidavit of Gachiengo Gitau. The said documents are said to be proof that Ngong/Ngong/432 is not in existence. In effect, the parties to this suit are said to be litigating in respect of a completely different property, which has a valid title. The Plaintiff submits that if the applicant wishes to challenge the title of the suit property, she would have to initiate proceedings to annul the title.

In her reply, the applicant submitted that the court of Appeal did not settle the question as to her legal or beneficial interests in the suit property. She said that the Court of Appeal had allowed the appeal on a technicality. Upon a perusal of the Judgment of the Court of Appeal, I observed that the substantive decision was to the effect that the learned judge had no jurisdiction to alienate suit lands between spouses during their life-time of unbroken converture. I believe that it is instructive to note that the court of Appeal also made the following observation in its judgment;

> "The cause of action as pleaded in the plaint is one which is available to a wife under section 17 of the Married Women's Property Act of 1182 of England, in appropriate circumstances. But the claim in the prayers by the respondent is based on the concept of an implied or resulting trust".

Later still, the court went on to state that;

> "The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The court's will not imply a trust save in order to give effect to the intention of the parties".

From my reading of the Court of Appeal's decision, I am inclined to agree with the applicant that the decision was founded upon a technicality. But all said and done, that does not alter the fact that the said decision is solidly in force. Any issue that has already been adjudicated upon cannot be entertained again by this court, through a side wind. Is that what the applicant is seeking to achieve?

I believe that if the applicant is seeking remedies similar to those already adjudicated upon, she must be told in no uncertain terms that the court will not give her another opportunity to be heard. But it is not apparent to me what exactly she is seeking in this case. She says that her claims are founded on fraud which occurred after the judgment of the Court of Appeal in Civil Appeal No. 2 of 2002 Peter Ndungu Njenga Vs Sophia Watiri Ndungu. She also says that if she is successful in her claims, the new title issued in respect of the suit property would be invalidated. That would have a direct bearing on the plaintiff's title to the suit property.

The applicant says that she lives on the suit property, and that any orders that might be adverse to the Defendants will actually be executed against her.

In order to decide on the application before me, I have found guidance from a decision of the Supreme Court of Uganda, in Departed Asians Property Custodian Board V Jaffer Brothers Limited [1999] E.A 55. In that case the Supreme Court of Uganda had occassion to interpret the applicability of Order 1 rule 10 (2), which is worded exactly like its Kenyan counterpart. Kanyeihamba JSC, cited the provisions of Order 1 rule 10 (2) and then went on (at page 63) to decide as follows;

> "This rule is similar to the English Rule of Supreme Court Order 16, rule 11 under which the case of Amon V Raphael Tuck & Sons Limited [1956], A11 E R at 273, was considered and decided, and in which it was said that a party may be joined in a suit, not because there is a cause of action against it, but because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter".

In my considered view, if judgment was eventually granted in favour of the Plaintiff and she sought to execute it, the person who would be directly affected would be the applicant, if it is indeed true that she has always been in occupation of the suit property. In fact the applicant is already on record (in the application before me) as saying that any complaints about possession of the suit property, fences and boundaries associated therewith, should be directed at her, on account of the fact she is in occupation.

I hold that it is necessary for the applicant to be joined into this suit as an interested party, as her presence is necessary to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause. I do therefore order that the applicant be joined as an interested party in this suit.

Costs of this application shall be in the cause.

Dated at Nairobi this 9th day of March 2004.

FRED A. OCHIENG

Ag. JUDGE