



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 2934 OF 1996

NDUNGU MUNGAI.....PLAINTIFF

Versus

DANIEL MWATHI KIRIGO.....FIRST DEFENDANT

STEPHEN NDUNGU MWATHI.....SECOND DEFENDANT

RULING

This is an application by Ndungu Mungai, the plaintiff herein, for several orders. He seeks to enjoin George Kimani Nganga and Jackson Kigo Kariuki (hereinafter referred to as Nganga & Kariuki respectively) as the 3rd and 4th defendants, respectively herein and secondly that he be granted leave to amend his plaint to join the said two.

He also seeks for a temporary injunction to restrain the four defendants from interfering with the premises known as KIAMBAA/THIMBIGUA/94 (the suit premises) pending the determination of his suit against them.

The application is brought under Orders 1 rule 10 (2), IVA rule 3 and 5, XXXIX rules 1 and 2 of the Civil Procedure Rules.

At the outset, I feel that it is imperative that I point out that the orders being sought in this application and especially the prayer for a temporary injunction cannot be entertained by this court at this particular stage. My opinion is based on the fact that Nganga & Kariuki against whom the orders are also being sought, are yet to become parties to this suit, as that relevant application to have them joined as defendants is yet to be determined. It must be borne in mind that court orders should never be granted in vain. Such an instance would arise if an order were to be granted against a person who is not a party to a suit and against whom a suit has not even been filed.

Even if I were to grant the orders to the 2nd prayer, the plaintiff would still have firstly have to file his suit against Nganga and Kariuki for Order XXXIX under which this application is made, is clear in its application. Orders can only be granted thereunder where there already exists a suit against the named respondents. No suit exists in this instance, against Nganga and Kariuki.

Be that as it may, I shall now endeavour to determine the application in as far as it relates to the two first prayers.

The application is based on the grounds that the 1st defendant transferred the suit premises to the 2nd respondent who in turn transferred the same to Nganga. Nganga is said to have thereafter transferred it to Kariuki, and hence the reason that these two be joined as defendants herein.

Nganga and Kariuki oppose the application. They admit having acquired the suit premises but aver that they did so as purchasers for value and without prior notice of the applicant's interest. Kariuki depones that he bought a vacant undeveloped property, and upon which he has now embarked with the development of residential premises, which are intended for rental purposes. He also bases his grounds of objection to the application on the fact that no allegation of fraud has been advanced against him in the proposed amended plaint.

Order 1 rule 10 (2) under which this application is made states:

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and in such terms as may appear to be first, order that the house of any party improperly joined, whether as plaintiff or defendant be struck out and that the house 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"

In my humble opinion, in an application of this nature, the court has to satisfy itself that the joinder of the parties is necessary. The major criteria should be whether the proposed amended plaint raises any reasonable cause of action against the parties whom it is intended to be enjoined. If no reasonable cause of action were established, then the issue of the court having to effectually and completely adjudicate and settle all questions involved in the suit as against the parties intended to be joined would not arise.

I have taken into account the pleadings herein, the proposed amended plaint and the submissions of both counsels, and I note that no fraud has been alleged against the proposed defendants and no reasonable cause of action has been established against the two. It is therefore my humble opinion that, in view of the above there would no any useful purpose that would be achieved in joining the said two as defendants in this suit.

The plaintiff's claim if any would lie against the existing or named defendants.

The application is thus dismissed with costs.

Dated and delivered this 17th day of May 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of:

Mr. Nyachoti for the applicant

No appearance for the respondent/Int parties