



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELCC SUIT NO. 813 OF 2015

BISHOP MARK K. KARIUKI

BISHOP B. MASINDE

BISHOP GEORGE GICHANA

(Suing as Registered Trustees of Deliverance Church).....PLAINTIFFS

=VERSUS=

NEW AGE DEVELOPERS CONSTRUCTION COMPANY LIMITED.....1ST DEFENDANT

SAMUEL CHECE KIBUNJA.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

CHASE BANK (K) LTD (IN RECEIVERSHIP).....4TH DEFENDANT

RULING

The 4th defendant was added to this suit pursuant to the leave that was granted to the plaintiffs to amend their plaint on 4th September, 2017. In the amended plaint, the plaintiffs averred that they had entered into an agreement of sale with Baliga Limited and Bellina Wacuka Gatonye on 11th September, 2008 under which they were to purchase from them eleven (11) parcels of land among them Title No. Juja/Komo/Block 1/30 (“the suit property”) at a consideration of Kshs. 13,775,000/= of which they had paid Kshs. 13,275,000/=. The plaintiffs averred that while they were waiting for the said parcels of land to be transferred to them, the 1st and 2nd defendants through their servants and agents invaded the suit property and started digging trenches for the purposes of erecting a perimeter wall around the same.

The plaintiffs averred that the suit property was subdivided into two (2) portions namely, Title No. Juja/Komo/Block 1/3079 and Juja/Komo/Block 1/3080 and registered in the name of the 1st defendant. The plaintiffs averred that on 28th May, 2015, the 1st defendant charged Title No. Juja/Komo/Block 1/3080 to the 4th defendant to secure a loan of Kshs. 43,605,000/=. The plaintiffs averred that the 1st defendant failed to repay the loan advanced to it by the 4th defendant as a result of which the 4th defendant served it with a statutory notice of its intention to sell Title No. Juja/Komo/Block 1/3080 by public auction to recover the outstanding loan.

The plaintiffs sought among other reliefs, a declaration that the sub-division of Title No. Juja/Komo/Block 1/30 into Title No. Juja/Komo/Block 1/3079 and 3080 was illegal null and void, a declaration that the registration of a charge in respect of Title No. Juja/Komo/Block 1/3080 in favour of the 4th defendant was illegal, null and void, an order for the removal/discharge of the said charge registered on 28th May, 2015 and a permanent injunction to restrain the 4th defendant from selling, taking possession or interfering in any way with the parcels of land known as Title No. Juja/Komo/Block 1/1379 and 1380.

The 4th defendant filed a defence on 22nd January, 2019. The 4th defendant averred that on or about 16th March, 2017, it granted a loan of Kshs. 43,605,000/= to the 1st defendant which was secured by a charge over Title No. Juja/Komo/Block 1/3080 registered in the name of the 1st defendant. The 4th defendant averred that the charge that was executed in its favour by the 1st defendant over Title No. Juja/Komo/Block 1/3080 was lawful and that it was entitled to exercise its statutory power of sale over the said property following the 1st defendant’s default in loan repayment. The 4th defendant averred that the plaintiffs’ suit as against it was frivolous and vexatious the same having been brought with the sole aim of scuttling the exercise of its statutory power of sale that had accrued.

What is now before me is the 4th defendant's application brought by way of Chamber Summons dated 16th January, 2020 in which the 4th defendant has sought leave to amend its statement of defence and to introduce a counter-claim. The application was brought on the grounds that the 4th defendant had advanced to the 1st defendant a loan of Kshs. 43,605,000/= that was secured by a charge over title No. Juja/Komo/Block 1/3080 and guaranteed by the 1st defendant's directors. The 1st defendant had defaulted in its loan repayment obligations. When the 4th defendant served the 1st defendant with a statutory notice and attempted to sell Title No. Juja/Komo/Block 1/3080 the plaintiff filed the present suit alleging the 1st defendant had fraudulently acquired and charged the property to the 1st defendant. The 4th defendant stood to suffer loss if the court finds that Title No. Juja/Komo/Block 1/3080 was acquired by the 1st defendant and charged to the 4th defendant fraudulently unless the 4th defendant was allowed to file a counter-claim against the 1st defendant for the outstanding loan amount of Kshs. 51,484,757.53 as at 5th July, 2017. The 4th defendant averred further that it had been acquired by SBM Bank (K) Ltd. and as such it was necessary for SBM Bank (K) Ltd. to be made a defendant in place of Chase Bank (K) Ltd. (In receivership). The 4th defendant averred that no prejudice would be suffered by the respondents if the application was allowed.

The application was opposed by the 1st and 2nd defendants only through a Notice of Preliminary Objection dated 8th August 2020. The 1st and 2nd defendants contended that the application was fatally defective and incompetent as it offended order 7 rules 3 and 8 of Civil Procedure Rules. The 1st and 2nd defendants contended that the orders sought could not be granted because what the 4th defendant intended to introduce as a counter-claim was not a counter-claim since it was a claim between the 4th defendant, the 1st defendant and other parties and did not involve the plaintiff. The 1st and 2nd defendants contended that a counter-claim must involve a plaintiff.

At the hearing of the application, the 4th defendant's advocate argued that it was not mandatory that a plaintiff be included in a counter-claim. The 4th defendant's advocate argued that a counter-claim can be brought against other parties who are not parties to the suit. The 4th defendant's advocate relied on a number of authorities in support of her submissions and urged the court to allow the application.

In his submissions in reply, the 1st and 2nd defendant's advocate argued that the 1st and 2nd defendant's objection to the application was based on order 7 rule 3 of the Civil Procedure Rules that is worded in mandatory terms. He submitted that a counter-claim must include a plaintiff otherwise it ceases to be a counter-claim. The 1st and 2nd defendant's advocate submitted that the counter-claim sought to be introduced by the 4th defendant did not have the plaintiff as a party. He submitted that the claim sought to be brought by the 4th defendant as a counter-claim can be brought as a separate suit or through third party proceedings or a notice against a co-defendant. The 1st and 2nd defendant's advocate submitted that there were a number of authorities supporting this position which he promised to supply to the court.

I have considered the 4th defendant's application together with the supporting affidavit. I have also considered the notice of preliminary objection filed by the 1st and 2nd defendants in opposition to the application. Finally, I have considered the submissions by the advocates for both parties. A perusal of the 4th defendant's draft amended statement of defence and counter-claim leaves no doubt that the intended counter-claim is between the 4th defendant as plaintiff, the 1st defendant in the main suit as the 1st defendant and Annette Edna Muthoni Mbatia and Peter Mahu Muthee who are not yet parties to this suit as 2nd and 3rd defendants. There is no claim in the counter-claim against the plaintiff. It is a civil debt claim by the 4th defendant as a lender against the 1st defendant as a borrower and the 2nd and 3rd defendants in the intended counter-claim as guarantors. No relief has been sought by the 4th defendant in relation to Title No. Juja/Komo/Block 1/3080 which is the subject of the plaintiff's claim in the main suit against the 1st to 4th defendants.

In my view, the 4th defendant's claim against the 1st defendant and the two new parties named in the draft counter-claim is independent of the plaintiffs' claim herein and is not dependent on the outcome of the plaintiff's suit. The causes of action are different the same as the subject matter and the reliefs sought. After considering the provisions of order 7 Rules 3, 8 and 12 of the Civil Procedure Rules, I am in agreement with the 1st and 2nd defendants that generally, a counter-claim must include a plaintiff and that in the circumstances of this suit, 4th defendant's counter-claim as framed should be brought by way of a separate suit. In my view, the counter-claim sought to be introduced by the 4th defendant will unnecessarily convolute these proceedings where the primary cause of action is fraud and illegal acquisition of land.

I am aware of the public policy that frowns against multiplicity of suits. As I have stated above, the 4th defendant's claim is an independent claim against the 1st defendant and other parties. It is not related to the cause of action in the main suit and does not concern the other parties to the suit. The suit cannot be conveniently heard together with this suit and even if brought as a separate suit, it would not be necessary to consolidate the same with this suit. For the foregoing reasons, the filing of the 4th defendant's claim against the 1st defendant and the two new parties as a separate suit does not amount to multiplicity of suits. I did not find the authorities cited by the 4th defendant useful as they were both distinguishable.

For the foregoing reasons, I will allow the 4th defendant's application but partially. I therefore make the following orders in respect of the 4th defendant's Chamber Summons application dated 16th January, 2020.

1. The 4th defendant is granted leave to amend its statement of defence by substituting Chase Bank (K) Ltd. (In receivership) with SBM Bank (K) Ltd. as the 4th defendant and in any other manner deemed necessary.
2. Leave to introduce a counter-claim in the nature set out in the draft 4th defendant's amended statement of defence and counter-claim is refused.
3. The 4th defendant is at liberty to bring the claim by way of a separate suit.

4. The plaintiffs shall amend their plaint further to substitute Chase Bank (K) Ltd. with SBM Bank (K) Ltd. as the 4th defendant within 14 days of service of the amended statement of defence by the 4th defendant.

5. The costs of the application shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 8TH DAY OF APRIL 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiffs

Mr. Waigwa for the 1st Defendant

Mr. Litoro for the 2nd Defendant

Ms. Wainaina for the 4th Defendant

Ms. C. Nyokabi-Court Assistant