



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

CIVIL SUIT NO 517 OF 2014

LUCY NUNGARI NGIGI & 132 OTHERSPLAINTIFFS

VERSUS

NATIONAL BANK OF KENYA.....1ST DEFENDANT

PCEA RUIRU PARISH DEVELOPMENT FOUNDATION2ND DEFENDANT

AND

PETER MUCHERU MWAURA & 148 OTHERS.....PROPOSED PLAINTIFFS

RULING

1. For the determination of the Court was the application dated 30th July 2015 brought by the Proposed Plaintiffs under the ambit of Order 1 Rule 1 & 8(3), Order 8 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act and Articles 48 and 159 of the Constitution. Under the application, the Applicants sought to be enjoined in the suit as Plaintiff, and further, for the Court to allow for the amendment of pleadings and be allowed to fully participate in the matter.
2. It was the Applicants contention that they were all paid up purchasers of the suit property, and they had the same cause of action and interests as the original Plaintiffs. It was further contended that they would be gravely prejudiced if they were not allowed to be enjoined as parties to the suit, and that by they being enjoined, the Court would be able to fully determine the issues in dispute between the parties.
3. These averments were reiterated in the supporting affidavit sworn on 30th July 2015, and in which the deponent further argued the Court to consider the application to facilitate the just, efficient and expedient disposition of the suit, and to avert the eminent danger of the Applicants' rights being alienated. The application was further supported by the Supplementary Affidavit sworn on 16th November 2015.
4. The application was opposed through the replying affidavit by the 50th Plaintiff dated 11th September 2015. It was averred that the 136th Proposed Plaintiff, one Simon Mukundi Ngigi, had not issued any instructions to be enjoined in the suit through the application, as he was already a party to the suit through the donee of his power of attorney, the deponent.
5. It was contended that the power of attorney dated 19th July 2010, which was duly filed,

- empowered the deponent to act on behalf of the mentioned Simon Mukundi Ngigi on all aspects and matters pertaining to the suit property, and could therefore, not have instructed the 1st Proposed Applicant, to supposedly institute the suit on his behalf as he was domiciled abroad.
6. Further, it was averred that the action by the 1st Proposed Applicant, purporting to act without the express authority and to represent another, was illegal and unprocedural, and as such, the application dated 30th July 2015 was defective and should be struck out forthwith.
 7. The application was further opposed through the grounds of opposition filed by the 1st Defendant dated 1st September 2015.
 8. I have considered the application, the affidavits both in support of and in objection to the application and dispositions made by the parties. What is considered for determination are two (2) issues; (1) whether the 1st Proposed Plaintiff has an interest in the suit property and therefore the suit; and (2) whether the 1st Proposed Plaintiff had the authority to file the instant application for enjoined pursuant to the provisions of Order 1 Rule 13(1)& (2) of the Civil Procedure Rules.
 9. With regards to the first issue, the 1st Proposed Plaintiff filed a supplementary affidavit sworn on 12th February 2015. At para. 7 therein, it was deposed as follows *inter alia*;

‘THAT I also wish to state that I had jointly with my wife Lydia Njeri Mucheru purchased Plots No 89 & 90 measuring one acre each, however, my advocate on record inadvertently left out paragraph 12 of my affidavit sworn on 30th July 2015 supporting the application dated 30th July 2015 which part indicates the said plots I had purchased with my wife and the plots purchased by the other 25 persons (applicants/proposed Plaintiffs). I therefore, have the capacity to institute the suit herein and to also act on behalf of the other applicants herein. Annexed herewith and marked “PMM-3” , “PMM-4” and “PMM-5” is a copy of the sale agreement for the purchase of the said plots, a copy of the certificate of the allotment of the same and the aforesaid part of my supporting affidavit left out (for reference) respectively.

10. The 1st Proposed Plaintiff has been able to establish that he, together with his wife, were purchasers of two plots each measuring one (1) acre. These were Plots 89 & 90. However, as per the sale agreement dated 3rd July 2012, at Clause 2(b) thereof, it shows that the purchase was for a quarter acre plot, and not the one (1) acre as purported by the 1st Proposed Plaintiff.
11. Further, the sale agreement does not indicate that the purchase was for plots 89 & 90 as averred. However, and further to their claim of purchase, the 1st Proposed Plaintiff presented into evidence a certificate from the 2nd Defendant, in which it showed that they had completed payment for 0.25 acre plot in the suit property.
12. The certificate issued was certificate No 0336 and was issued on 16th November 2012. The 2nd Defendant did not raise any contention as to the said sale agreement, or to the certificate issued on 16th November 2012, and neither did the 1st Defendant. The 1st Proposed Plaintiff had the capacity, therefore, to seek to institute the present suit as to be enjoined as a party to the suit, as he had a claim and interest against the Defendants, and thereby, a cause of action, having been a paid up purchaser for a plot measuring 0.25 acres, and been issued with a certificate of purchase on 16th November 2012.
13. Turning on to the issue of authority to act on behalf of the other proposed parties to the suit, the rules under Order 1 Rule 13(1) & (2) are considered. Under Rule (1), it is provided that;

‘Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.(Emphasis added).

Further, Rule (2) of the said Order 1 reads;

The authority shall be in writing signed by the party giving it and shall be filed in the case

14. In the affidavit in support of the application dated 30th July 2015 at paragraph 2 thereof, the deponent contended that;

‘THAT further to the foregoing, I have been granted express authority by the other proposed Plaintiff/Applicants herein to act and/or appear on their behalf and I thus swear this affidavit in that regard’.

The 6th-133rd Plaintiffs contended that there was no such authority presented at the time the application was made on 30th July 2015, and as such the application was defective. This averments were concurred to by the 1st Defendant, who went further to state that 1st Proposed Plaintiff knowingly swore a false statement, deposing that he had the express authority of the other proposed Plaintiffs.

They went further to refer to paras. 5-9 of the replying affidavit, and contended that the inclusion of some parties without express authority was illegal and unprocedural and against the provisions of Section 11 of the Oaths & Statutory Declarations Act. At the last paragraph of the supporting affidavit, the deponent averred that;

‘THAT all the facts deponed hereinabove are true to the best of my knowledge and information and belief save where stated otherwise’.

These aforementioned statements, in relation to Section 11 of the Oaths & Statutory Declarations Act, would seem to the Court that the 1st Proposed Plaintiff may have falsified his statement to indicate that he had the express authority to file the application on behalf of the other Proposed Plaintiffs, knowing well that he did not. Issue was raised with Proposed Plaintiff No 136 one Simon Mukundi Ngigi who was domiciled abroad, according to his donee of power of attorney, Catherine Gathoni Ngigi.

It was contended that the proposed Plaintiff could not have authorized the 1st Proposed Plaintiff to institute the instant application yet he had already been made a party to the suit.

15. In **Research International East Africa Ltd v Julius Arisi & 213 Others (2007) eKLR** the Court of Appeal held *inter alia*;

“In our view, none of the 214 Plaintiffs has any right to take any steps in the suit on behalf of any other Plaintiff without the express authority in writing...having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 Plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1(2) of Order VII of the Civil Procedure Rules and that their suit is liable to be struck out by the superior Court under rule 1(3) of Order VII CP Rules.”

This position was reiterated in **M’bechi Nkandau & 5 Others v Attorney General & 3 Others (2011) eKLR** where it was held as follows;

“I find in this case that the Plaintiffs have not complied with Order 1 Rule 13(2) of the Civil Procedure Rules and to allow the applicants to continue to purport to represent the Plaintiff would amount to miscarriage of justice as no proper procedure has been followed and no written authority has been filled indicating which parties wanted to be represented by who in the suit.”

16. In both these cases, the Court was categorical that there had to be express authority in order for one to represent another in a suit as enunciated under Order 1 Rule 13(1). However, in the instant

- suit, there was an authority filed with the supplementary affidavit dated 12th February 2016. Further, the 1st Proposed admitted at para. 6 thereof, that he did not have the authority of Simon Mukundi Ngigi, and that a further twenty-two (22) people had not signed against their names, and therefore sought for these names to be struck out of the proposes list.
17. Under Sections 1A and 1B of the Civil Procedure Act, the Court has a mandate to ensure that justice, equality and fairness is afforded to all that come before it. In achieving this objective, the Court has to consider what would be in the best interest of the parties, and to ensure that justice is done; not at the expense of the other parties, but in the achieving of this overriding objective. Further, and as provided under Article 159 (2)(d) of the Constitution, as read with Articles and 50(1) thereof,
 18. it is for this Court to afford any party who has presented his or her case before the Court a fair hearing, and to ensure that justice is accorded fairly. In this instance, there was a list that was presented before the Court ostensibly in compliance and in conformity with Order 1 Rule 13(2) of the Civil Procedure Rules. The parties listed have issued their express consent to the 1st Proposed Plaintiff to file and institute the suit on their behalf.
 19. In reading the holding in **Research International East Africa Ltd v Julius Arisi & 213 Others** (supra), the Court has the power to make orders that it deems fit in the achievement of the tenets of Sections 1A and 1B of the Civil Procedure Act. In light thereof, and with regards to the authority filed together with the supplementary affidavit dated 12th February 2016, the Court allows the application dated 30th July 2015, to the extent that, only the parties that have given authority under Order 1 Rule 13(2) in the authority filed together with the supplementary affidavit dated 12th February 2016, are made parties and enjoined to the suit as Plaintiffs. Further, the Plaintiff shall be amended accordingly as may be necessary to facilitate the expedient and effective determination of the issues in dispute.
 20. The Defendants shall be served with any amended pleadings in accordance with the timelines as set out under the Civil Procedure Rules.

Written, dated and signed at Nairobi this 5th day of May 2016.

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C. KARIUKI

JUDGE

Dated, signed and delivered in court at Nairobi this 6th day of May, 2016.

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O. SEWE

JUDGE