



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC CIVIL SUIT NO. 233 OF 2014

LUISE PETRA IRMGARD SPIEBE.....PLAINTIFF

-VERSUS-

MOHAMED ALI MWINYI.....DEFEMDANT

MUSTAFA MOHAMED MAGIYE.....INTERESTED PARTY

RULING

1. Mustafa Mohamed Nagiye has moved this Court via his application dated 7th December 2015. The application is brought under Ordr 1 rule 3 Order 51 rule 1 of the Civil Procedure Rules and section 1 A and 3 A of the Civil Procedure Act. It seeks the following prayers;

- 1. That the Application be heard ex-parte in the first instance.**
- 2. That this Court be pleased to allow Mustafa Mohamed Nagiye join as an Interested Party and/or Defendant.**
- 3. That leave be granted that he files his defence and Counter claim within a time to be set by the Court.**
- 4. That the Court be pleased to stay any exparte orders issued herein which affects Mr. Mustafa Nagiye's property particularly house without land on Plot No.211/11/Kisauni Magongo-Mishomorini.**
- 5. That the costs of this application be provided for.**

2. The application is supported by the grounds on the face of it inter alia that the applicant bought plot No 211/11/Kisauni Magongo from the Defendant for a sum of Kenya Shillings Two Million Seven Hundred Thousand. Secondly that the interested party has nothing to do with the disputes between the plaintiffs and the defendant. The application is also supported by an affidavit in which he annexed a sale agreement executed on 7th May 2014.

3. The application is opposed by the plaintiff vide her replying affidavit sworn on 22nd February 2016. She denied the veracity of the sale agreement annexed by the applicant and added that if the transaction did occur then the defendant lacked capacity to transact. Further the plaintiff deposed that this suit is themed on various properties. The plaintiff deposed that Mustafa was a good friend of the defendant

therefore he ought to have known the plaintiff's interest in the law.

4. The advocates then rendered oral submissions which reiterated the contents of the pleadings before Court. Mr Koja advocate for the applicant urged the Court to grant the applicant an opportunity to present his case. Mrs Ali submitted that this application is made to circumvent the execution of the orders given on 15.9.15 and also the pending contempt application against the defendant. It is the plaintiff's submission that there is concivance` between the defendant and the applicant.

5. I have read the application and the affidavit filed in opposition thereto. Order 1 rule describes persons who may be joined as plaintiffs or defendants. In this instant, the applicant has deposed in his ground (d) on the face of the application that he has nothing to do with the dispute between the plaintiff and the defendant. One is tempted to ask why then does he want to be joined to these proceedings.

6. One of the orders he has sought is to be given leave to file a defence and a counter-claim. The plaintiff does not have any claim as against the applicant if one reads the plaint filed on 10th September 2014. In the plaintiff's suit, the gist of the claim is for a breach of trust by the defendant. Therefore the applicant's claim if any would be directed to the defendant and not the plaintiff. Under the provisions of order 1 rule 3 I do not see why he should be joined as a defendant and therefore acquire rights to file a defence and/or counter-claim.

7. The applicant has put his reliance on the sale agreement between him and the defendant as his basis to join this suit. On the basis of this agreement, I do grant him leave to be joined as an interested party. Once joined, I do also give him leave to file a witness statement and annex documents. However if he wishes to make a substantive claim, let him bring a fresh suit against the defendant. Prayer 2 of the application is allowed to the extent of the applicant being joined as an interested party to the suit.

8. As regards prayer 4, the orders referred to were not granted exparte. The parties to that application were given opportunity to present their case. The defendant did not bring to this Court's attention that he had sold the plot in question to the applicant. Further the defendant did not apply to appeal or reiew those orders. There is no reason given that the orders should be stayed pending the hearing of what action/event. I decline to grant this prayer because no basis has been laid for granting the same.

9. On costs, I order that each party to bear their respective costs of the application.

Ruling dated and delivered at Mombasa this 6th day of July 2016

A. OMOLLO

JUDGE