



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC. CIVIL APPLICATION NO. 248 OF 2012

ZEPHIR HOLDINGS LIMITED.....PLAINTIFF

Versus

MIMOSA PLANTATIONS LIMITED.....DEFENDANT

AND

JEREMIAH MATAGARO.....1ST INTERESTED PARTY

EZEKIEL MISANGO MUTISYA.....2ND INTERESTED PARTY

RULING

[1] The Record shows that this suit was concluded *ex parte* after the Defendant failed to enter appearance and judgment was entered in the Plaintiff's favour. The Defendant did not satisfy the decree of the court herein, and attachment and sale of the Defendant's property known as NAIROBI/BLOCK 112/127 (hereinafter known as "the suit property") was levied. The sale of the suit property was conducted through a public auction on 14th November, 2012, where the 2nd interested party was the highest bidder at the sale price of Kshs. 18, 500,000/= . The sale of the suit property to the 2nd Interested Party was confirmed by the court on 14th December, 2012.

[2] On 15th July, 2014, the 1st interested party filed an application dated 15th July, 2014 seeking among others, an order to set aside the sale by public auction of the suit property. The 2nd interested party gave notice of Preliminary Objection to the 1st Interested Party's application on 22nd August, 2014. The Preliminary Objection raised several issues including that the application brought by the 1st interested party is *Res Judicata* as it attempts to raise the same issues determined in Judicial Review No. 400 of 2013 Ezekiel Misango Mutisya & 6 Others and it is also an attempt to raise grounds of appeal through the back door. Other arguments were made; that the Court is *functus officio* upon the delivery of Judgment by Havelock J confirming the sale of the property in the public auction; that the Commercial Court did not have the jurisdiction to hear and determine the 1st interested party's application since all matters dealing with the disposition and ownership of land must be referred to the Environment and Land Court; that the orders to stay the public auction had been overtaken by events and the 1st Interested Party's recourse lies in a suit for indemnity against the National Land Commission. The 2nd Interested Party also objected to the application since the National Land Commission was not enjoined in the suit for an order of rectification of title to issue. It was also averred that the 2nd Interested Party was wrongly enjoined in this matter.

[3] The Preliminary Objection was canvassed by way of written submissions dated 3rd September, 2014 and 5th September, 2014 by the 2nd Interested Party and the 1st Interested Party, respectively. It was the argument of the 2nd Interested Party that the 1st interested party did not disclose the existence of **Nairobi High Court Judicial Review No. 400 of 2013** in which the facts pleaded by the 1st Interested Party's application had been raised and fully adjudicated upon and determined. In this regard, it was the contention of Counsel to the 2nd interested party that the issues raised are res judicata and the application cannot therefore stand. It was further pointed out that this Court was also functus officio in this matter as the same was fully concluded given the Orders of Havelock J. The disputes being raised constitute a different cause of action which cannot be canvassed in this suit. The 2nd Interested party also pointed out that he was wrongly enjoined in this suit and so also is the 1st interested party as he did not seek the leave of court to enjoin both interested parties in accordance to the Civil Procedure Rules. It was further submitted that the 1st interested party had not raised any ground for setting aside the public auction with regard to the suit property. In addition, the 2nd Interested Party contended that this court did not have the jurisdiction to hear and determine the instant application as it raises issues of ownership of land dispute which is a preserve of the Environment and Land Court. Finally, it was the argument of the 2nd interested party that the National Land Commission ought to be enjoined in this suit since it is the body which is mandated to deal with the rectification of the register of the suit property. In support of his submissions the 2nd Interested party relied on the cases of **Hussein Ali and 4 others v Commissioner of Land and 7 Others (2013) KLR**, **Julia Odhiambo Ogina v Andrew Horace O Omondi (2014) eKLR**, **Dhanji Jadra Ramji v Commissioner of Prisons & Another (2014) KLR** and **Kipsigis Farm Enterprises v Stephen Ngerechi & 2 others (2014) KLR**. The 2nd interested party therefore urged the court to uphold the Preliminary objection and find that the 1st interested parties application is bad in law, incompetent and fatally defective and dismiss it with costs.

The 1st Interested Party did not take it lying down

[4] According to the 1st interested party, the Preliminary Objection is incompetent as the issues raised therein do not amount to preliminary points of law. Firstly, that there was no material non-disclosure on its part with regard to the existence of **Nairobi High Court Judicial Review No. 400 of 2013**. It was also pointed out that the issue of res judicata did not arise as the aforesaid case was not concerned with the determination of ownership of the disputed property but with the legality of the action of the Inspector General of Police in registering a restriction against the title of the suit property. Again, the 1st interested party contended that this court was not functus officio; it is still legally seized of the matter. Further, it was submitted that there was no misjoinder of parties in the present suit. Under Order 1 rule 9 of the Civil Procedure Rules, a matter should not be dismissed for misjoinder of parties. The 1st interested party also asserted that the issue of whether or not it had attained the threshold for setting aside the sale of the suit property and whether the National land Commission should be enjoined in the suit were not pure points of law capable of disposing of the suit, and that the court should therefore dismiss the Objections. The 1st interested party stated that the instant proceedings emanated from a matter that was commercial in nature and the subject matter of the application lay in the execution proceedings that are yet to be concluded. As such, it was contended that the Environment and Land Court did not have jurisdiction over the same. The 1st Interested Party beseeches the court to dismiss the Preliminary objection by the 2nd Respondent with costs for it is without merits.

THE DETERMINATION

[5] I have considered all the eminent arguments by all the parties. I have also considered the affidavits, the pleadings and the applicable law. Issues herein have been presented in a somewhat convoluted manner. There is the main application on the one hand and Preliminary Objections on the other hand. But the proper practice is to determine the Preliminary Objection first especially

where the objection is likely to dispose of the entire suit. On what is a Preliminary Objection, see a work of court in the case of **Engineer E.M Kithimba v Ag & Another [2014] eKLR** that:

A preliminary objection was clearly delineated in the case of MUKISA BISCUITS MANUFACTURING CO. LTD v WEST END DISTRIBUTOR LTD [1969] E.A 696 where Law JA stated the following:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

And J.B Ojwang J (as he then was) made it clearer in the case of Oraro Vs Mbajja where he stated:-

“I think the principle is abundantly clear. A “preliminary objection” correctly understood is now well identified as, and declared to be the point which must not be blurred with factual details liable to be contested and in any event, to be through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle a true preliminary objection which the court should allow to proceed. I am in agreement ... that ‘where a court needs to investigate facts, a matter cannot be raised as a preliminary point.’”

[6] Applying the test, do the points of objection by the 2nd interested party attain the above legal threshold of a Preliminary Objection? The 2nd Interested party has raised issues of res judicata, jurisdiction and the court being *functus officio* on the matter. These are pure points of law and are true preliminary objection. However, the issue of whether or not the 2nd interested party has offered sufficient grounds for setting aside the auction sale is not a pure point of law as it involves the exercise of discretion of the court upon weighing evidentiary materials and factual matters. It is a matter entangled with factual issues, therefore, not a Preliminary Objection in the sense of the law. I note however that the 2nd Interested Party has raised a very pertinent issue on misjoinder of parties, and the one especially on the joinder of the two interested parties will have fatal repercussions on the application if it is successful. I will determine that issue *in limine*.

[7] I have perused the record, and it is clear that neither the 1st nor 2nd interested parties participated in the suit. Indeed they were not parties in the cause of action of the suit. The 2nd Interested Party is a purchaser of the suit property in a public auction as the highest bidder. The public auction and the sale of the suit property were sanctioned and approved by the Court. The claim by the 1st Interested Party is that the Plaintiff wrongfully attached the suit property believing the same to be that of the Defendant. It was argued that, at the point of sale, the attached property legally belonged to the 1st interested party. Those points are well put. But, the 2nd interested party is saying that the court did not sanction the joinder of both interested parties in this suit, which means, therefore, that the 1st interested party cannot legally and technically bring the application before the court without first seeking the leave of court to be enjoined in the case. A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties. However, the objection here is that no leave was obtained for the joinder of the two interested parties. In other words, the two parties are in the proceedings without the authority of the court. According to Order 1 rule 10(2) of the Civil Procedure Rules:-

“(2). 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.....whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

Any party, who comes in a proceeding after pleadings have been closed, will only join on application except where the court makes the joinder *suo moto* or the party comes as an objector to attachment of the suit property. A proceeding is not jumped into in a haphazard manner. Equally, except a proceeding in the nature of objection to attachment or any other instance provided in law, a party does not become a party until there is an order of joinder whether on application or *suo moto* by the court. I should state here that even *amicus curiae* will join on the order of the court. See the practice in constitutional petitions for example. Therefore, in ordinary circumstances, admission to a judicial proceeding especially where you are not the primary party is an important aspect in adjudication of cases which follows after the principle that ‘presence of proper parties before the court is *sine qua non* exercise of jurisdiction by the court’, and that principle will be defeated if parties were to enter existing proceeding without permission of the court or anyhow. Just to emphasize how important the leave of the court in joinder of parties is, as it is at that stage where the proper parties are discerned, see **Apex International Limited & Anglo-Leasing and Finance International Limited v Kenya Anti-Corruption Commission [2012] eKLR** which quoted the decision of the Supreme Court of Nigeria in the case of **Goodwill and Trust Investment Ltd And Another v Will And Bush Ltd** that;

“It is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed, the parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and, “where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned”.

[8] Upon a thorough perusal of the court record, it is apparent that the 1st interested party did not seek the leave of court to be enjoined in this suit. The application before the court does not in itself have a prayer for his joinder or that of the 2nd Interested Party as parties in the suit. Further, the court did not order *suo motto* for the joinder of either the 1st and or 2nd interested party. It is my considered view therefore that the 1st interested party is not properly before the court. He ought to have sought the leave of court to be enjoined in the suit first before moving on a spree for other far reaching orders. Even if the 1st Interested Party approached the court as an objector to attachment under Order 22 rule 51 of the Civil Procedure Rules, such objection proceedings are only possible before payment out of the proceeds of sale of such property. That position is not obtaining in this case. And, in a sense, therefore, the court will claim to be *functus officio* on the matter. Either way, the application has no foot on which to stand and should fail. It should be noted that the 2nd Interested Party was also not properly enjoined, and on the basis of my decision on *functus officio*, his joinder would still be impossible in law. Accordingly, the Preliminary Objection by the two interested parties are not properly before the court, given the fact that the two persons are what I would call “strangers” in these proceedings. The objections, therefore, suffer a similar fate as the application. If I go a little further into the merits, I would still dismiss the application because the issues it is raising fall within the law on property ownership, and the property being land, this court is not the right forum to litigate issues of ownership- the Environment and Land Court is.

Whichever way one looks at it, and I stated this earlier, the kind of proceedings the 1st Interested Party is raising at the best would be objection to attachment under Order 22 rule 51 of the Civil Procedure Rules but such objection is only possible before payment out of the proceeds of sale of such property. In a sense, therefore, the court will claim it is *functus officio*. Every perspective one will want to view the application by the 1st Interested Party makes a case for a separate proceedings

to be filed against all the necessary parties if the issues being raised by the 1st Interested Party are to receive real judicial adjudication. Then, issues of whether the National Land Commission is necessary party in such suit will be profitable. In my view, in such proceeding on ownership of the suit property, nothing prevents impleading that the auction sale was null and void. Then, the record of this suit and the entire proceedings becomes useful source of material of evidentiary value to the proceeding on ownership wrangle over the suit property. I have said enough. The upshot is that the application dated 15th July, 2014 is dismissed and all other matters saddling astride it, including the preliminary objections. I make no order as to costs.

Dated, signed and delivered in court at Nairobi this 3rd day of November, 2014

F. GIKONYO

JUDGE