



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 436 OF 2010

ELISHEBA MUTHONI MBAE.....PLAINTIFF

VERSUS

NICHOLAS KARANI GICHOHI.....1ST DEFENDANT

CHRISTINE WANJIRU KARANI.....2ND DEFENDANT

ROBERT NJIRU MBOGO T/A

NJIRU MBOGO & CO. ADVOCATES.....3RD DEFENDANT

R U L I N G

1. The Court is to consider the Applicant's Chamber Summons dated 3 July, 2012 seeking to enjoin him, **Philip Kipkeu Kisang**, as a Co-Plaintiff to this suit. The said Application is brought under the provisions of **Order 1 Rules 10(2), 10(4) and 25** of the *Civil Procedure Rules* and **Sections 1A, 1B and 3A** of the *Civil Procedure Act* by the Applicant herein. The Application is premised on the grounds that the Applicant and the Plaintiff jointly entered into an agreement for the purchase of **L.R No. Nairobi/Block 72/1058** (hereinafter "the suit property") from the 1st and 2nd Defendants. The grounds in support of the Application detailed that the Applicant has made substantial payments towards the purchase of the suit property and that as a joint purchaser, the Applicant has an interest as against the 1st and 2nd Defendants. It detailed that the Applicant stands to suffer irreparable harm if not added to these proceedings.
2. The Application is supported by the Affidavit of **Philip Kipkeu Kisang** sworn on 3rd July, 2012. The deponent contended that on 9th July, 2005, he jointly entered into an agreement with the Plaintiff to purchase the suit property from the 1st and 2nd Defendants. He stated that he deposited Kshs. 3,900,000/- towards the purchase of the suit property and that, at no time, has he opted out of the Agreement. He maintained that he was forced to suspend the transfer of the suit property pending the resolution of differences between the Plaintiff and himself and that his interests would not be protected if he is not enjoined to these proceedings.
3. The Plaintiff, **Elisheba Muthoni Mbae**, opposed the Application by filing a Replying Affidavit sworn on 13th September, 2012 in which it was contended that the Applicant is only a nominee for a third party and that the Applicant has acted to frustrate the transfer of the property to the Plaintiff. The deponent stated that the Applicant did not pay any money towards the acquisition of the suit property and that the claim by the Applicant was bad in law by virtue of effluxion of time as well as the doctrine of Limitation of Actions.

4. The principle as regards the adding of a party to a suit, as a Plaintiff, is set out under the provisions of **Order 1 Rule 10 (2)** which provides that;

(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 improperly joined, whether as plaintiff or defendant, be struck out, and that the name 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. (Underlining mine).

In an application to be enjoined as a plaintiff in the matter, the Applicant has to satisfy the court that he is a necessary party without whom the court cannot effectually and completely adjudicate upon and determine all matters. **Order 1 Rule 10 (2)** should be read together with **Rule 1** of the same Order which states;

"All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise."

5. The Applicant has produced several documents in support of his application to be enjoined to the suit. He has produced before the Court a Sale Agreement dated 9th July, 2005 and marked as "PKK1" in which he is named as a 'Purchaser'. As per that Agreement, suit property was to be purchased for Kshs. 4,700,000/- and was to be paid in the manner set out in the agreement in Clause 4.1. The Applicant also claimed that he had paid Kshs. 3,900,000/- towards the purchase of the suit property. He submitted payment slips marked "PKK2(a)" to "PKK(e)" in which he made deposits of various amounts on diverse dates i.e. Kshs. 800,000/- on 13th July, 2005, Kshs. 900,000/- on 14th July, 2005, Kshs. 750,000/- on 15th July, 2005, Kshs. 510,000/- on 4th August, 2005 and Kshs. 150,000/- on 26th August, 2005. The Applicant alleged that the Plaintiff only paid Kshs. 470,000/- as 10% deposit towards the purchase of the suit property.
6. From the foregoing, can it be deduced that the Applicant is a necessary party to the suit? The suit emanates from the Agreement for Sale of 9th July, 2005 that was entered into as between the Applicant and Plaintiff as "Purchaser" and the Defendants. Is the Applicant, therefore, an essential and necessary party to the suit and should he be added as a plaintiff in this suit in which the Plaintiff seeks to have the suit premises transferred into her name? In the case of **Werrot & Co. Ltd & Others v Andrew Douglas Gregory & Others Nairobi (Milimani) H.C.C.C No. 2363 of 1998 (UR)**, Ringera, J (as he was then) observed that;

"The guiding principle in deciding whether to add a party is whether the presence of that party is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. As stated in SARKAR'S LAW OF CIVIL PROCEDURE, Vol. I at pages 531 and 532 there are two tests in the application of this principle:-

- 1. There must be a right to some relief against the party sought to be added in respect of the matter involved in the proceedings in question.***
 - 2. It should not be possible to pass an effective decree in the absence of such a party."***
7. In determining **who** is a necessary party to a suit, Devlin, J in **Amon v Raphael Tuck & Sons Ltd (1956) 1 All E. R. 273** in which it was held at p. 286-287 that:

"What makes a person a necessary party? It is not of course, merely that he has relevant

evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party." (Again underlining mine).

8. Further, in **Mulla: Code of Civil Procedure (Abridged) Fourteenth Edition, 2005** at p. 655-656, the learned authors stated;

"Where two or more person are entitled to the same relief in respect of a transaction, they must all join as Plaintiffs in one suit as they represent a single and indivisible right which cannot be adjudicated upon in the absence of any such persons. Thus if A, B and C are joint owners of a property, they must all be joined in a suit to recover the property."

In **Halsbury's Laws of England, Volume 37, Fourth Edition** at para. 216, the learned authors further expounded on the principles on adding a party to a suit. They write:

"A person cannot be a Plaintiff unless he has a vested interest in the subject matter of the action. In an action founded on contract, the proper Plaintiff is the person in with whom or on whose behalf the contract was made or in whom the rights under the contract are vested."

9. As above, the cause of action in this suit emanates from the Agreement for Sale 9th July, 2005 entered into by the Plaintiff and Applicant on the one hand and the Defendants on the other. The Plaintiff seeks prayers as against the Defendants to forward duly signed Transfer forms for the suit property to the Plaintiff. In the alternative, it seeks that the Registrar of Titles (presumably) be mandated to sign the Transfer forms on behalf of the first and second Defendants. Thirdly, the Plaintiff seeks an order as against the third Defendant to release the Original Title Document of the suit property together with all other completion documents to the Plaintiff. As per the said Agreement for Sale, the Plaintiff and the Applicant were to be the joint owners of the property that was sold to them by the Defendants. However, as regards paragraph 8 of the Plaintiff's submission, the Plaintiff maintains that after the signing of the said Agreement for Sale, the Applicant opted out of the same and the Plaintiff maintained that she paid for the suit property alone. According to the principle that pertains as to the adding of a Plaintiff to a suit, in my opinion, the Applicant is a necessary party to this suit. By her own submission filed on 9th October, 2012, the Plaintiff admits that both she and the Applicant were joint buyers of the suit property. At paragraph 1 of those submissions:

"1. The Applicant and Respondent were joint buyers of the suit property L.R NO. NAIROBI/BLOCK 72/1058."

The gist of paragraphs 2-8 in the submissions is that the Plaintiff and the Applicant were co-purchasers of the property and as such were each bound jointly in all matters arising from the Sale Agreement.

10. In my opinion, no effectual or complete settlement of the suit can be made in the absence of the Applicant and as such he is entitled to be added as a Plaintiff. The reading of **Order 1 Rule 10 (2)** together with **Rule 1** in essence establishes the Applicant as a necessary party to the suit as he has satisfied the two conditions as set out under the Order: (a) *the right to relief in respect of or*

arising out of the same act or transaction or series of acts or transactions is alleged to exist, and (b) where, if such persons brought separate suits, any common question of law or fact would arise.

11. However, under **rule 2:**

"..... the court may either on the application of any party or of its own motion, put the plaintiffs to their election or order separate trials or make such other order as may be expedient."

Quite obviously, the Plaintiff herein as drawn seeks orders as against the Defendants solely for the benefit of the Plaintiff. The same will obviously require amendment should I allow the Applicant herein to be joined as a Co-Plaintiff.

12. Again in her submissions filed on 9 October, 2012, the Plaintiff herein refers to the Draft Plaintiff attached to the Affidavit of the Applicant in support of his Application more particularly the Cross-claim therein. She maintained that such Cross-claim will be barred under the provisions of the *Limitation of Actions Act (Cap 22, Laws of Kenya)*. She also detailed that she had been fighting for her right to the suit property alone since 2007 when the Applicant denied the giving of instructions to institute a suit in *HCCC No. 160 2007*. She also detailed that the Applicant is a late comer in this suit and should be estopped by operation of law from joining in and making any claim against the Defendants. It seems to me that all these matters need to be decided upon as between the Applicant and the Plaintiff herein before a decision or determination can be made by this court as regards the present suit before it, as well as the position of the Defendants in regard thereto. In relation to those matters and issues as between the Plaintiff and the Applicant herein, I do not think that such are properly to be aired before court in the present suit. Accordingly, I direct that the Applicant, should he wish to be enjoined in this suit, needs first to file an appropriate suit as against the Plaintiff most probably in terms of the Draft Plaintiff annexed to the Affidavit in Support marked as "PKK 5" as suitably amended as regards parties and prayers.

13. Consequently and for that purpose, I order that the Proceedings in this present suit before court be stayed for a period of 90 days as from the date hereof. Further, I stand over the Applicant's Application herein, generally. Such period of time will allow the Applicant to proceed in accordance with my directions as above if he should be so minded. Orders accordingly. There will be no order as to costs.

DATED and delivered at Nairobi this 1st day of March 2013.

J. B. HAVELOCK

JUDGE