



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 276 & 277 of 2004

OMAR SAID MWATAYARI PLAINTIFF/RESPONDENT

VERSUS

VIPINKUMAR NATHALAL SHAH 1ST DEFENDANT/APPLICANT

SOUTH COAST BEACH PROPERTIES

LIMITED 2ND DEFENDANT/APPLICANT

AND

COASTLAND PROPERTIES LTD ... NECESSARY PARTY/RESPONDENT

RULING

(1) Following a default judgment in favour of the Plaintiff against the Defendants, the Plaintiff transferred the suit property plot No. Kwale/Galu Kinondo/55 to a third party M/s Coastland Properties Ltd (hereinafter CPL) which proceeded to subdivide the suit property into Kwale/Galu Kinondo/1637, 1637, 1638 and 1639 and commenced construction on plot No. 1639. The Defendants by an application dated 14th June 2006 sought orders to join CPL as a necessary party to the suit and for the restriction of further dealings with the suit property until the determination of the suit. The Defendants also pursued the setting aside of the default judgment which was eventually granted by the Court of Appeal by its Order of 16th October 2009.

(2) By a further application dated 14th September 2010, the Defendants sought penal orders against CPL for allegedly disobeying preservative orders granted by the High Court on the 16th June 2006 upon the application for joinder of the CPL as a necessary party and by the Court of Appeal on the 27th June 2007 pending the hearing of the Defendants' appeal against the default judgment of the High Court, but of which the CPL is alleged to have been aware.

(3) The two applications are opposed by the CPL whose counsel together with counsel for the Defendants made written and oral submissions on their respective contentions with respect to two applications, simultaneously. Counsel for the Plaintiff did not make any submissions on the applications which he considers a matter between the Defendants and the CPL.

(4) For the Defendants/Applicants it was contended that Order 1 rule 10 (2) of the Civil Procedure Rules

authorized the joinder of a necessary party to enable the court to effectively and completely adjudicate the issue of ownership of the suit land and that CPL was such a necessary party, reference being made to Sarkar on Code of Civil Procedure 9th Ed. (2000) providing a commentary on Order 1 rule 10 (2) of the Indian Code of Civil Procedure which is in pari materia with the Kenyan rule.

With regard the contempt application of 14th September 2010, counsel for the Defendants contended that the **“CPL has always known and been made aware of the preservatory orders referred to above. Despite knowledge it has conducted itself in a manner to suggest that it is ignorant of the Court Orders and because it is not formally joined as a party it can choose to disregard the Order.”** Counsel relied on the English Court of Appeal decision in **Attorney General v. Newspaper Publishing plc (1987) 3 ALL E.R. 276** where it was held that: -

Where the court had made orders to preserve the subject matter of an action pending trial, a third party who knew of these orders but who nevertheless destroyed or seriously damaged that subject matter would be guilty of criminal contempt, if in doing so he intended to impede or prejudice the administration or justice.”

(5) Counsel for CPL contended that following the setting aside of the default judgment by the Court of Appeal **“the matter was to start denovo which meant that anything that had been done ought to start afresh”** and **“no party can place any reliance on interlocutory orders that had been subsisting.”** Counsel submitted that the Defendants’ Defence dated 27th October 2009 had no claim against CPL and it did **“not show any claim or intention to join the necessary party in this suit”**, and that the Defendants were **“bound by their own pleadings and cannot introduce prayers which are not anywhere in the entire pleadings at the stage of submissions.”**

As regards the prayer for restricting dealings with the suit property, the CPL submitted that it was a purchaser for value of the Sub-division Nos. Kwale/Galu Kinondo/733 and 734 (original plot No. Kwale/Galu Kinondo/55) and it had invested colossal sum of money in the construction and improvement on their plots aforesaid, and the Defendants had not deposited security for damages or an undertaking as to damages in the event the orders sought are granted. The CPL also objected that the two applications **“cannot be determined simultaneously as the application to enjoin it must be determined first to confirm the status of the so called necessary party before any orders are made against them.”**

(6) Accordingly, the issues for determination before the court are: -

(a) Whether CPL shall be joined as a necessary party to the suit;

(b) Whether further dealings with the suit land to wit Kwale/Galu Kinondo/55 will be restricted until the determination of the suit; and

(c) Whether an order for demolition of structures constructed on suit property pending determination of the suit will be made.

(7) Shall CPL be joined as a necessary party to the suit?

The authority of the court to order the joinder of parties is clear. Order 1 rule 10 (2) of the Civil Procedure Rules provides: -

“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 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.”

The Court’s power is exercisable at any stage of the proceedings on its own motion or a motion by either party with respect to a person who should have been joined as a Plaintiff or Defendant or is a necessary

party, the latter for purposes of effective and complete adjudication of all questions involved in the suit, and for all these parties on such terms as the court deems just.

In the present suit, CPL as the transferee of the suit property upon a default judgment for the Plaintiff against the Defendants is a necessary party for the complete adjudication of all questions relating to the suit property. If the CPL is not joined as a party and it dealt with the sub-divisions created out of the suit property so as to put it out of reach of the Defendants, then if the Defendants were successful in this suit, their victory would be rendered nugatory. I therefore find that CPL is a necessary party in order to enable the court to effectually adjudicate the issue of ownership of the suit property. I find support in this position in the commentary by Sarkar on the Code of Civil Procedure of India 9th Ed. (2000) at p. 764 where the learned author puts forth two tests for determining necessary party as follows:

“For determining the question who is a necessary party there are two tests: (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in absence of such a party.”

Were the Defendants to succeed in their cause they should have a right to recover the suit property from the CPL and a decree in absence of such party will be ineffective to realize the right to such recovery.

(8) Upon what terms should the CPL be joined as a necessary party in the suit?

Order 1 rule 10 (4) of the Civil Procedure Rules provides **“where a Defendant is added or substituted, the plaint shall, unless the court, otherwise directs, be amended in such a manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new Defendant and, if the court thinks fit, on the original Defendant.”**

By analogy, since the CPL is in the position of a Defendant as relates to the Defendants’ claim to the ownership of the suit property, the Defendant’s defence should be amended to reflect their claim against CPL and the amended copies should be served upon the necessary party who becomes a Defendant in the Defendants’ counter claim. Had the issue between the Defendants and the CPL been one only of contempt of court without a question of ownership of the suit property, it would have been unnecessary to join the CPL as a Defendant in a counter claim but merely as necessary party whose presence would be necessary for the effective adjudication of the contempt and consequent orders.

I am aware of my decision in **Selina Begonja & 3 Others v. Sifuna Msa HCCC 297 of 2010** where I declined to permit the trial of an issue of ownership of house on the suit property between one of 4 Plaintiffs and an interested party in the same suit as in that suit the interested party was not a necessary party for the determination of the entire suit which had already been compromised between the Plaintiffs and the Defendants by a consent order.

(9) Should further dealings with the suit land Kwale/Galu Kinondo/55 be restricted until the determination of the suit?

An order for restriction issues against a title under section 136 of the Registered Land Act and it is distinct from an order for injunction against a named party. It is therefore not necessary that CPL be made a party as a defendant or a necessary party to enable the Registrar to make an order for restriction. The prospect of alienation of the suit property by the CPL which has acquired the property by transfer from the Plaintiff and sub-divided it into four parcels of land is a compelling factor. As the Court of Appeal noted in the Defendants’ application for injunction pending appeal in C.A.C.A. No. NAI 97 of 2007 (66/2007 UR) **“there is genuine apprehension that further dealings with the suit land will continue and if injunction is not granted and the appeal is successful the suit land, as presently held, will not be recovered.”** The appeal was successful leading to the setting aside of the default judgment upon which the Plaintiff had transferred the suit property to the CPL. For this reason, I find that an order for restriction on the suit property and sub-divisions created therefrom is merited.

(10) Should an order for demolition of the CPL structures on the suit property be made?

The CPL defence to the contempt application is that it undertook construction on plot No. 1639 after acquiring the suit property Kwale/Galu Kinondo/55 and sub-dividing it into plots 1636, 1637, 1638 and 1639, before the preservation orders of the court were made. As held in the **Attorney General v. Newspaper Publishing case**, supra, at p. 277 **“the mens rea required to establish an intention to impede or prejudice the administration of justice is a specific intent and not mere recklessness as to whether the administration of justice would be impeded or prejudice.”** I do not find that the specific intent to interfere with the due administration of justice has been proved in this case. Moreover, the order for demolition of the construction on the suit property being in the nature of a mandatory order should not be made at the interlocutory stage of the trial but rather upon the full trial and final determination of the rights of the parties to the subject matter of the suit.

(11) Accordingly, for reasons set out above, I make the following orders: -

(1) M/s Coastland Properties Ltd shall be joined to the suit as a necessary party.

(2) The Defendants shall amend their defence to reflect their claim against the necessary party and serve the same upon the necessary party within 7 days hereof.

(3) The necessary party M/s Coastland Properties Ltd shall have 14 days to file its statement of defence against the claim by the Defendants.

(4) There shall be an order for restriction against all dealings with the suit property and all sub-divisions created therefrom being Kwale/Galu Kinondo/1636, 1637, 1639 and 1639.

(5) The Defendants' application dated 14th September 2010 for demolition of structures on the suit property is dismissed.

(6) As the parties to two applications have each partly succeeded against each other in the respective applications, there shall be no order as to costs.

Dated and delivered this 5th day of July 2012.

EDWARD M. MURIITHI
JUDGE

In the presence of: -

Mr. Waithera for the Plaintiff/Respondent

Miss Obuira for the Defendants/Applicants

Ms Linda - Court Clerk