



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. CASE NO. 281 OF 2017

JOHNSON MWANZIA WAMBUA.....PLAINTIFF

VERSUS

BONIFACE MUNYAO (*Being sued as the Administrator of the Estate of JOHN MUSAU MUPYA (deceased).....1ST DEFENDANT*)
SUSAN NDINDA MUTETI (*Being sued as the Administrators of the Estate of MICHAEL MUTETI (deceased).....2ND DEFENDANT*)
NATIONAL HOUSING CORPORATION.....3RD DEFENDANT

RULING

1. In the Chamber Summons dated 10th May, 2018, the 3rd Defendant/Applicant is praying for the following orders:

a. That the 3rd Defendant's/Applicant's name be struck out in this suit.

b. That the cost of this Application together with the suit be provided for.

2. The Application is premised on the grounds that the Plaintiff, vide his Complaint dated 28th June, 2017, has not averred any violation of his rights or wrong doing to him by the 3rd Defendant; that the 3rd Defendant is not interested in any manner in the suit property and that the suit does not disclose a cause of action as against the 3rd Defendant.

3. In his Affidavit, the 3rd Defendant's Chief Legal Officer deponed that the 3rd Defendant constructed residential houses in Tala Housing Scheme as land parcel number Matungulu/Kyaume/1512; that vide the Agreement dated 15th November, 2002, the 1st Defendant bought House No. 22 (*the suit property*) and that he was thereafter registered as the proprietor of the said house.

4. It is the 3rd Defendant's case that it was neither a party nor privy to the particulars of the alleged Agreement dated 1st August, 1999 between the Plaintiff and the 1st Defendant; that the 3rd Defendant is a stranger to all the dealings between the Plaintiff and the Co-Defendants and that the Plaintiff does not

disclose a reasonable cause of action as against the 3rd Defendant.

5. The 3rd Defendants' Chief Legal Officer finally testified that as per their records, the suit property is registered in favour of the Plaintiff; that the 3rd Defendant is not a necessary party in these proceedings and that the Applicant has been wrongly enjoined in the proceedings.

6. In response, the Plaintiff's advocate deponed that the suit discloses a cause of action against the 3rd Defendant; that it was a term of the Agreement that upon payment of the purchase price, the Plaintiff was to be registered as the proprietor of the suit land; that despite making all the requisite payments, the 3rd Defendant, vide a letter dated 16th October, 2014 acknowledged that there was a dispute regarding the ownership of House No. 22 and advised the Plaintiff to file a suit and that the 3rd Defendant is the main protagonist in this suit.

7. According to the Plaintiff's advocate, the 3rd Defendant/Applicant has been giving conflicting positions on the issue of ownership of House No. 22; that the 3rd Defendant has denied in its Statement of Defence that its the Plaintiff who owns the house and that the 2nd Defendant has refused to deliver vacant possession of the house.

8. The 3rd Defendant's/Applicant's advocate submitted that the Plaintiff has not averred any factual situation to prove that the Applicant violated its rights; that the Applicant confirmed in writing that the suit property belongs to the Plaintiff and that when the Applicant sold the suit property to the 1st Defendant, it lost all its interests in the property.

9. The Plaintiff's/Respondent's advocate submitted that failure to deliver vacant possession and having received the payment due to the Plaintiff raises a cause of action against the 3rd Defendant.

10. In his Complaint dated 28th June, 2017, the Plaintiff averred that he is the owner of House No. 22 situated on parcel of land known as Matungulu/Kyaume/1512; that the Plaintiff purchased the said house vide an Agreement dated 31st October, 2001 from John Musau Mupya (*deceased*) and that the consideration of Kshs. 163,000 was to be paid directly to the 3rd Defendant.

11. After paying the Kshs. 163,000 to the 3rd Defendant, the Plaintiff has averred that the 2nd Defendant, who is a stranger to him, was unable to give him vacant possession. The Plaintiff is seeking for a declaration that he is the owner of the suit property and for vacant possession.

12. Without expressly admitting that indeed the suit property belongs to the Plaintiff, the 3rd Defendant made general denials in its Defence. However, it now wants its name to be struck out of the suit with costs.

13. The only issue that I am supposed to determine at this stage is whether the Plaintiff has a cause of action as against the 3rd Defendant and whether the 3rd Defendant is a necessary party to these proceedings.

14. A cause of action has been defined as a factual situation, the existence of which entitles one person to obtain a remedy against another person (*See Letang vs. Cooper [1965] 1 QB 232*). In the case of **V.K Construction Company Limited vs. Mpata Investments Limited, Nairobi, HCCC No. 257 of 2003**, the court held that the test for the reasonableness of the cause of action is the possibility of the success thereof when only the Plaintiff is considered.

15. The 3rd Defendant has not denied that the suit property is still in its name and that it sold the house to the late John Musau Mupya. The said John Musau Mupya sold the house to the Plaintiff vide an Agreement dated 30th October, 2001.

16. The Agreement between the Plaintiff and the late John Musau Mupya shows that Mr. Mupya owed the 3rd Defendant a balance of Kshs. 163,000 which the Plaintiff paid vide a cheque dated 26th November, 2001. However, the Plaintiff has been unable to get vacant possession of the suit land.

17. The letter dated 20th February, 2014 shows that the Plaintiff complained to the 3rd Defendant that the 2nd Defendant, who was also claiming the same house, had refused to give him vacant possession. In response to the said letter, the 3rd Defendant wrote as follows:

“The Corporation wishes to advise both of you to go to court for a determination on to the rightful owner of the above mentioned House. This is due to the fact that there is a dispute regarding the ownership of the house.”

18. The 3rd Defendant’s Chief Legal Officer has admitted that it is the 3rd Defendant which constructed the house in dispute. It is only the 3rd Defendant who can avail documents to this court establishing the ownership of the said house.

19. Having received Kshs. 163,000 from the Plaintiff, and having not processed the title in respect of the suit land in favour of the Plaintiff, the 3rd Defendant is a necessary party in these proceedings. Indeed, to the extent that it participated in the Sale Agreement between the 1st Defendant and the Plaintiff by receiving Kshs. 163,000, the Plaintiff has a cause of action as against the 3rd Defendant. Being the registered owner of the suit property, it is the 3rd Defendant who will inform the court the person who is entitled to the disputed house.

20. For those reasons, I dismiss the Application dated 10th May, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF APRIL, 2019.

O.A. ANGOTE

JUDGE