



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 69 OF 2016

JACINTA WANJIRU MWENGWA.....PLAINTIFF

VERSUS

SAMWEL THEURI.....1ST DEFENDANT

LOISE WANGARI RATEMO.....2ND DEFENDANT

DISTRICT LAND REGISTRAR NAIVASHA.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

(Application seeking to have a bank enjoined as co-defendant; application being filed by an existing defendant; plaintiff in the matter claiming to be the rightful owner of suit land; plaintiff having previously been registered as owner and alleging that 1st defendant transferred title to himself fraudulently; 1st defendant then taking a loan with a bank and later selling the land to the applicant; applicant wishing to have the bank enjoined as co-defendant; application dismissed; it would be improper to enjoin the bank as co-defendant if the plaintiff has no claim against the bank; correct avenue for applicant is to file third party proceedings or sue the bank as co-defendant in the applicant's counterclaim; application dismissed)

1. The application before me is that dated 9 July 2018 filed by the 2nd defendant. The application is brought pursuant to the provisions of Order 10 Rules 1 and 4 of the Civil Procedure Rules, and the principal order sought is that the applicant be granted leave to enjoin Family Bank Limited as co-defendant in this suit. The applicant further seeks orders that she be allowed to amend her statement of defence to reflect the introduction of Family Bank Limited as co-defendant. The application is opposed and before I go to the gist of it, I find it prudent to lay down the background leading to the application.

2. This suit was commenced by way of a plaint which was filed on 4 March 2016. The plaintiff has pleaded that she is the owner of the land parcel Miti Mingi/Mbaruk Block 5/633 (Kianjoya) (hereinafter referred to as the suit land). She pleaded that in the year 2012, she borrowed a friendly loan from the 1st defendant but she later discovered that the 1st defendant transferred the suit land to himself which the plaintiff claims was done fraudulently. There is a parallel suit filed by the 2nd defendant/applicant which was commenced in the Chief Magistrates Court at Nakuru being Nakuru CMCC No. 2 of 2016. In that suit, the applicant has sued the 1st defendant for specific performance for the 1st defendant proceeded to sell the suit land to her. She pleaded in that suit that when she entered into a sale agreement with the 1st defendant herein, on 11 July 2015, the suit land was encumbered by a loan facility in favour of Family Bank Limited. In her suit she wanted specific performance of the sale agreement. The two suits were consolidated as they raise similar issues.

3. Among the grounds laid down in support of this application, are that the suit land was sold to the applicant by way of a private treaty approved by Family Bank and that the applicant paid Family Bank in order to discharge the 1st defendant's debt with the said bank. It is thus the view of the applicant that the said Bank ought to be enjoined in this suit.

4. In her supporting affidavit, the applicant has stated that when she bought the property, she did a search which confirmed that the title had been charged to Family Bank and that pursuant to that she did enter into a private treaty sale agreement with the 1st defendant. She paid part of the purchase price to Family Bank to offset the loan and this money was used to discharge the 1st defendant's liability. The bank then executed a discharge of charge. She has averred that all these relate to the same transaction and she wishes to make a claim against the bank.

5. The plaintiff has sworn a replying affidavit to oppose the motion. She believes that the same is a non-starter. She has deposed that Family Bank is functus officio having discharged the charge. She believes that the issue herein is a pure contest of ownership of title and whether the

1st defendant had a good title to pass to the applicant. She considers the role of Family Bank as being merely a financier .

6. I directed the applicant to file a draft of his amended pleadings and I note that what was filed was a proposed statement of claim against co-defendant. I also directed that Family Bank be served with the application and they filed a replying affidavit sworn by Esther Nungari Muniu its relationship officer. She has deposed that on 9 November 2013, the 1st defendant applied for a loan of Kshs. 1,000,000/= and charged the title to the suit land as security. The outstanding amount as at 11 July 2015 was Kshs. 485,000/= and pursuant to the 1st defendant's request, the bank approved the sale of the suit property by private treaty for the proceeds to be used to offset the loan balance. In the month of June 2015, the bank discharged the suit property and no longer has any interest in it. She has deposed that the bank should not be enjoined in the suit as it followed due procedure and acted in good faith in approving the loan and subsequent transactions with the 1st defendant.

7. I invited counsel to file submissions to the application which they duly did and I have taken these into account.

8. The application is premised upon the provisions of Order 10 Rules 1 and 4, but as rightly pointed out by Mrs. Mukira, learned counsel for the plaintiff, these provisions cannot apply. Order 10 generally deals with consequences of non-appearance and failure to file defence. Rule 1 of Order 10 deals with the situation where no appearance is entered for an infant or a person of unsound mind and rule 4 relates to judgment in a suit making a liquidated demand. These provisions clearly, do not apply in an application to enjoin a co-defendant. I do note that in his submissions, Mr. Githui, learned counsel for the applicant, indeed did not cite Order 10 Rules 1 and 4, but rather Order 1 Rule 3 and rule 10 (2). These two provisions are drawn as follows :-

Order 1, rule 3

All persons may be joined as defendants against 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 separate suits were brought against such persons any common question of law or fact would arise.

Order 1 Rule 10 (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.

9. It will be seen from Order 1 Rule 3, that the court may order the joinder of a person as defendant if there is a claim against him arising out of the same act or transaction complained of or if a separate suit were brought against him it will bring common questions of law or fact as in the existing case. It should however be noted that the joinder of the person as defendant in this instance must be in relation to a claim made against him by the plaintiff, for if it were not the case, he would not be defendant. The very presence of a person as defendant implies that the plaintiff has a case against him.

10. With regard to Order 1 Rule 10 (2), it will be noted that the court has discretion to order the name of a person to be removed from proceedings or to be added to the proceedings, either as plaintiff or defendant, or the joinder of a person whose presence the court feels is necessary for the determination of all questions in the suit. Now, the court will only enjoin a person as defendant if the court feels that the plaintiff has a claim against such person, and as I have explained above, you cannot be defendant if there is nothing that the plaintiff has against you. Before giving the order to enjoin a person as defendant, the court must thus be satisfied that the plaintiff has a claim against such person, for you would not wish for a situation where a person is enjoined as defendant, but there is really nothing that the plaintiff has against such person. It is the same thing where a person is enjoined as plaintiff. The court must be satisfied that such person has a claim similar to what the existing plaintiff has against the existing defendant.

11. Now, in our case, it is not the plaintiff who has asked that Family Bank be enjoined as defendant, and in fact from her reply, it is apparent that the plaintiff believes that she cannot sustain any claim against Family Bank for the alleged fraudulent transfer of her title. If the plaintiff feels that she has no claim against Family Bank, then I cannot impose the said defendant upon her, for she has nothing against the bank. Rather, it is one of the defendants who wants the bank to be enjoined as co-defendant because the said defendant/applicant wants to pursue a claim against the said bank. It would be different if the bank was already a defendant, for if that was the case, then the applicant could file a claim against co-defendant as provided for under the provisions of Order 1 Rule 24 which provides as follows :-

Defendant claiming against a co-defendant [Order 1, rule 24.]

(1) Where a defendant desires to claim against another person who is already a party to the suit—

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such

question or issue.

(2) No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.

12. It will be seen from the above that one defendant can claim against a co-defendant, but that is not what we have in this case, for Family Bank is not a defendant and therefore a claim against co-defendant cannot be made as wished by the applicant.

13. Is the applicant therefore hamstrung and unable to lodge any claim against Family Bank if she feels that she has a claim against the bank? Far from it. First she can consider filing a Third Party notice under Order 1 Rule 15 which specifically takes care of a situation where a defendant claims against a person who is not already a party to the suit that he is entitled to indemnity or remedy against such person over the subject matter before court. Secondly, the applicant can file a counterclaim and name Family Bank as defendant as provided for under Order 7 Rule 8. Thirdly, the applicant can amend her pleadings in the case that she originated, that is Nakuru CMCC No. 2 of 2016, and include Family Bank as a defendant. These to me are the options available to the applicant which she needs to think about. I am not persuaded that a court would order the joinder of a person as defendant merely to have an existing defendant lodge a claim against such person while the law has provided for various options which address such situation.

14. For the above reasons, I see no merit in this application and it is hereby dismissed with costs.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 13th day of June 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Ms. Amulabu holding brief for Mr. Githui for the 2nd defendant/applicant.

Mrs Mukira for the plaintiff.

Mr. Ondieki for the 3rd and 4th defendants.

M/s Maragia & Co. Advocates for the 1st defendant – Absent.

M/s Mbaluka & Co Advocates for Family Bank Limited – Absent.

Court Assistants: Janepher Nelima /Patrick Kemboi

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU