



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NO.2242 OF 2007

JOSEPH ARAP SERGON.....PLAINTIFF

=VERSUS=

JOSEPH KIPCHUMBA KIGEN & 5 OTHERS.....DEFENDANTS

RULING

1. This is a ruling in respect of a notice of motion dated 9th April 2018. The application which is brought by the 3rd and 4th defendants seeks to have their names struck out of this suit. The 3rd and 4th defendants/applicants contend that the suit against them is misplaced; it was brought against them ten years after the original claim was filed; it has no reasonable cause of action against them and that in any case the allegations of fraud attributed to them are statute barred.

2. The applicants also contend that they had already been listed as witnesses of the 1st defendant herein and can shed light as witnesses instead of being parties to this suit. The applicants argue that the suit against them is brought in bad faith and they are not necessary parties. They therefore want their names struck out of the suit with costs to be paid by the plaintiff.

3. The counsel for the 5th and 6th defendants indicated that they did not wish to put in any replying affidavit. In other words they were not opposed to the application or they did not wish to participate in the same. The plaintiff opposed the application by the applicant based on a replying affidavit sworn on 7th June 2018. The plaintiff contends that the applicants are necessary parties as they are the ones who were involved in the transaction which he says he never took part in or signed the sale agreement which led to the transfer of the suit property to the 1st defendant. The initial deposit of Kshs,1,500,000/- was received and banked by the 3rd defendant in his account without his consent. There was another sum of Kshs.250,000/- which was again banked in his account without his authority. He denied ever signing the sale agreement and contends that the alleged sale was a scheme by the applicants to deprive him of his property.

4. The plaintiff denies ever authorizing the 4th defendant/applicant to take the 1st defendant to Buruburu to view the property in contention and that the sale agreement was drafted by the 4th defendant using his laptop. He states that his only brief to the firm of Katwa & Kemboy was to discharge the title to the property which had been charged to National bank of Kenya Limited and he does not know how the property was transferred to the 1st defendant.

5. On his part, the 1st defendant has opposed the application by the applicants based on a replying affidavit sworn on 26th June 2018. The 1st defendant contends that the application by the applicants is an abuse of the process of court. He states that the applicants were an integral part of the transaction as they acted as agents of the plaintiff and therefore they are necessary parties in this suit now that the plaintiff has denied that they had his authority to perform the roles which they performed in the transaction. The 1st defendant further states that the Kshs.1,500,000/- was received on behalf of the plaintiff by the 3rd defendant whereas the 4th defendant received Kshs.250,000/- on behalf of the plaintiff. The applicants have admitted in their application that they played a role and therefore they cannot be removed from this suit as their presence is necessary so that they can state what they know about the transaction herein.

6. I have considered the application by the applicant as well as the opposition to the same by the plaintiff and the 1st defendant. I have also considered the submission by the parties herein. There is only one issue which emerges for determination. This is whether the suit against the 3rd and 4th defendants/applicants ought to be struck out on the grounds stated. The dispute herein relates to sale of a house on **LR No. 76/545 at Buruburu** in Nairobi. The said property which I shall hereinafter refer to as suit property belonged to the plaintiff. The suit property has since been registered in the name of the 1st defendant on account of a sale agreement between the plaintiff and the 1st defendant.

7. The plaintiff has denied that he signed the sale agreement which eventually led to transfer of the suit property to the 1st defendant. The 3rd and 4th defendants/applicants were brought into the suit because they are the ones who received purchase money and banked it in the plaintiff's account. The 4th defendant is the one who took the 1st defendant to Buruburu to view the property. It is also the 4th defendant who

received part of the amount of the purchase price on behalf of the plaintiff and banked it in the account of the plaintiff. The plaintiff has denied that he signed the sale agreement or that he authorized the 3rd and 4th defendants to bank the said monies in his account.

8. The 3rd and 4th defendants have not denied the roles which they are said to have performed. They only contend that this was with the permission of the plaintiff who was busy in his ambassadorial duties out of the country. This being the case, the 3rd and 4th defendants are necessary parties in this suit. In the case of **Andy Forwarders Services Ltd. & another –Vs- Price-Waterhouse Coopers Limited & another [2012] eKLR** it was stated as follows:-

‘.....a person may be joined not because there is a cause of action against him but because that person’s presence is necessary to enable the court to effectually and completely adjudicate upon and settle all questions in the matter’

9. The 3rd and 4th defendants are arguing that since they had been listed as witnesses, it is not necessary to have them as defendants in this case. It may be true that they recorded statements as witnesses but this does not preclude them from being added as parties to the suit. The 3rd and 4th defendants have been put at the centre of the dispute between the plaintiff and the 1st defendant. It is important that they remain as defendants so that all questions in controversy can be effectually and completely be adjudicated by the court. I therefore find that the 3rd and 4th defendants are necessary parties in this suit and their names cannot be struck out on this ground.

10. I now move on to address the other ground put forth by the 3rd and 4th defendants namely that the suit against them does not disclose a reasonable cause of action. As was stated in the case of **Drummond Jackson –Vs- British Medical Association [1970] 2 WLR 688**, a cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint. In the instant case the plaintiff is alleging that the registration of the suit property in the name of the 1st defendant was facilitated by the 3rd and 4th defendants who purported to have his authority to facilitate the transaction. The plaintiff has claimed that he did not authorize the 3rd and 4th defendants to act as such. This clearly shows that he has a cause of complaint against the 3rd and 4th defendants who were active in the transaction which enabled the suit property to be transferred to the 1st defendant. Had the 4th defendant not taken the 1st defendant to Buruburu to view the suit property and had the 3rd and 4th defendants not received and banked the monies in the plaintiff’s account, perhaps the transaction would not have gone ahead. It is the alleged actions of the 3rd and 4th defendants which are the source of complaint by the plaintiff and this is what the court will interrogate during the hearing. It cannot therefore be said that the plaintiff’s claim does not disclose a reasonable cause of action against the 3rd and 4th defendants.

11. The plaintiff is alleging that the 3rd and 4th defendants have been to the suit property where they intimidated his tenant claiming that they have interest in the property. The 3rd and 4th defendants may not be the registered owners of the suit property but if it be true that they have done any act complained of, then the plaintiff has a reason to seek injunctive relief against them. The 3rd and 4th defendants cannot therefore argue that no injunctive relief can lie against them and as such they should be removed from this suit.

12. On the issue of the cause of action against the 3rd and 4th defendants being statute barred, I have looked at the original plaint which was filed. The particulars of the alleged fraud were pleaded. They are not being raised for the first time by the plaintiff. The context in which the 3rd and 4th defendants have been brought in this suit is clear from the pleadings. There is therefore no basis upon which this suit as against the 3rd and 4th defendants can be struck out on account of being statute barred. I find no merit in the application by the 3rd and 4th defendants/applicants which is hereby dismissed with costs to the plaintiff.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 25th day of October 2018.

E.O.OBAGA

JUDGE

In the presence of:

M/s Kivindu for M/s Gaituri for 1st defendant

M/s Nyambura for M/s Chebet for 3rd & 4th defendants

Court Assistant: Hilda

E.O.OBAGA

JUDGE