



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. NO. 1544 OF 2013**

**PATRICK KARANJA NJENGA..... PLAINTIFF**

**VERSUS**

**AFRICA BEIT LIMITED.....1<sup>ST</sup> DEFENDANT**

**NOEL MUTUNGA MALINDA**

(sued in his capacity as executor of the estate of

the late **Martin Kitisya Malinda.....2<sup>ND</sup> DEFENDANT**

**CATHERINE NDUKU MALINDA.....3<sup>RD</sup> DEFENDANT**

**CONSOLATA NDINDA MALINDA-ABE.....4<sup>TH</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 29<sup>th</sup> September 2014 in which the 1<sup>st</sup> Defendant/Applicant seeks an order that the suit against it be struck out and the costs of this Application be provided for.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Wainaina Kenyanjui, the director of the 1<sup>st</sup> Defendant/Applicant, sworn on 30<sup>th</sup> September 2014 in which he averred that the 1<sup>st</sup> Defendant entered into a Property Development Agreement dated 15<sup>th</sup> October 2008 with the 2<sup>nd</sup> Defendant who was the duly appointed attorney of the 3<sup>rd</sup> Defendant but that there was no privity of contract between the 1<sup>st</sup> Defendant and the Plaintiff. He added that the 1<sup>st</sup> Defendant is not aware nor did it take part in any negotiations between the Plaintiff and the 2<sup>nd</sup> Defendant. He added that no money was exchanged between the Plaintiff and the 1<sup>st</sup> Defendant. He also added that the other Defendants did not mention any contract between the 1<sup>st</sup> Defendant and the Plaintiff in their Statements of Defence. He also added that with respect to the alleged letter of allotment offered by the 1<sup>st</sup> Defendant to the Plaintiff as nominee of the 2<sup>nd</sup> Defendant, the same was cancelled by a letter to the 2<sup>nd</sup> Defendant dated 17<sup>th</sup> May 2010 and automatically ceased to exist. He further added that the 1<sup>st</sup> Defendant dealt strictly with the legally appointed attorney and agent of the 3<sup>rd</sup> Defendant and transferred

the suit property to the appointed attorney at the termination of the PDA Agreement, the 4<sup>th</sup> Defendant. He stated that in the circumstances, no cause of action has been disclosed by the Plaintiff against the 1<sup>st</sup> Defendant and that the 1<sup>st</sup> Defendant shall suffer unwarranted and irreparable damage to its reputation if forced to defend a suit wherein it has been wrongly joined as a defendant.

The Application is contested. The Plaintiff/Respondent, Patrick Karanja Njenga, filed his Replying Affidavit sworn on 9<sup>th</sup> February 2015 in which he averred that contrary to the provisions of Order 2 Rule 15(2) which provides that ‘no evidence shall be admissible on an application under sub-rule 1(a) but the application shall state concisely the grounds on which it is brought’, the 1<sup>st</sup> Defendant has annexed exhibits in the supporting affidavit which are inadmissible and ought to be disregarded by the court. He added that the 1<sup>st</sup> Defendant is seeking to invite the court to consider facts and documentation which will be the subject of the main trial. He further averred that he is aware that Martin Kitisya Malinda (deceased), the 2<sup>nd</sup> Defendant was the sole and lawful donee of a Power of Attorney from the 3<sup>rd</sup> Defendant in her capacity as the registered proprietor of L.R. No. 1/153 (the “suit property”). He added that pursuant to a Property Development Agreement entered into by the 1<sup>st</sup> Defendant, in its capacity as a real estate investment company, and the 2<sup>nd</sup> Defendant, the latter agreed to transfer the suit property to the former to develop it in the manner agreed on terms that he would retain 4 apartments being 1 duplex apartment, 1 three-bedroom apartment and 2 two-bedroom apartments. He averred further that pursuant to a conveyance dated 18<sup>th</sup> February 2009, the 2<sup>nd</sup> Defendant duly transferred the suit property to the 1<sup>st</sup> Defendant as earlier agreed and as a result the 1<sup>st</sup> Defendant is therefore the registered proprietor of the suit property and by extension the apartment subject matter of this suit. He further stated that pursuant to the said Property Development Agreement, the 2<sup>nd</sup> Defendant nominated the Plaintiff to be assigned the suit apartment and accordingly procure that the 1<sup>st</sup> Defendant directly transfers the same to the Plaintiff. He further added that in fulfillment of that obligation, the 1<sup>st</sup> Defendant issued to him a letter of allotment dated 5<sup>th</sup> May 2010 with regard to the suit apartment which it later purported to cancel vide a letter dated 17<sup>th</sup> May 2010 on grounds that it was not authorized to transfer the suit apartment to him. He asserted that the 1<sup>st</sup> Defendant though not a direct party to the contract of sale between him and the 2<sup>nd</sup> Defendant for the sale of the suit apartment, it was nevertheless bound by the same to the extent of such assignment. He added that the notion of assignment represents an important limit to privity of contract and in particular that a party to a contract may assign his rights from that contract to a third party even without first procuring the consent of the other party. He stated that in the circumstances, the 1<sup>st</sup> Defendant/Applicant is a necessary party in these proceedings and this Application should be disallowed.

In response thereto the 1<sup>st</sup> Defendant/Applicant filed the Further Affidavit of Wainaina Kenyanjui filed on 23<sup>rd</sup> March 2015 in which he averred that in the spirit of the Property Development Agreement, the 1<sup>st</sup> Defendant/Applicant dealt strictly with the legally appointed attorney of the 3<sup>rd</sup> Defendant to whom it transferred the suit property at the termination of the Property Development Agreement. He stated that that the 1<sup>st</sup> Defendant/Applicant no longer has any rights over the suit property.

I have considered the Application and the issue for determination is whether or not to strike out the suit as against the 1<sup>st</sup> Defendant/Applicant. The applicable law is found in **Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010** which provides that,

*“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”.*

**Order 1 Rule 3** of the **Civil Procedure Rules, 2010** provides as follows,

***“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 questions of law or fact would arise.”***

My assessment of the above legal provisions is that the court shall have regard to the necessity of a party in the suit for the purpose of “effectually and completely to adjudicate upon and settle all questions involved in the suit”. The question that therefore arises is whether the participation of the 1<sup>st</sup> Defendant/Applicant in this suit is necessary for this purpose. The answer in my view is positive, arising from the fact that the cause of action arises from a transaction of the transfer of the suit property from the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant for the purpose of developing the same. The Plaintiff/Respondent’s claim to one of the apartments constructed by the 1<sup>st</sup> Defendant/Applicant brings the 1<sup>st</sup> Defendant/Applicant at the core of this dispute. Further, though the 1<sup>st</sup> Defendant/Applicant cancelled the letter of allotment it issued to the Plaintiff/Respondent, the question whether the Plaintiff/Respondent has a cause of action against the Defendants as claimed in the Plaint is an issue that can only be determined at the main trial after the court has heard all the evidence adduced by the parties. As matters stand, the Plaintiff alleges that it has a right to relief against the 1<sup>st</sup> Defendant/Respondent. In my view, the 1<sup>st</sup> Defendant/Applicant is a necessary party to this suit to assist the court to ‘effectually and completely adjudicate upon and settle all questions involved in the suit’.

In light of this finding, this Application is hereby dismissed. Costs in the cause.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF JULY 2016.**

**MARY M. GITUMBI**

**JUDGE**