



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 344 OF 2015

AINUSHAMS HAULIERS LIMITED.....PLAINTIFF

-VERSUS-

MARGUERITE MCKENZIE.....DEFENDANT

RULING

1. The notice of motion dated 16th June 2016 is brought under the provisions of Order 1 Rule 1 of the Rules and Section 1 A, 1 B, 3 A and 63 of the Civil Procedure Act. The Applicants herein seek the following orders;

1. Spent

2. This Honourable Court do grant Bitima Kombo Athman, Mwanamboje Kombo Athman and Biima Abdalla Jaffu leave to be joined as Plaintiffs herein

3. This Honourable Court, upon granting prayer 2, grant the applicant leave to amend the plaint accordingly.

4. Costs of this application

2. The application is supported by the grounds listed on its face and the affidavit sworn by Bitima Kombo Athman. The applicant pleaded inter alia that they are heirs to the registered owners of plot No 2622 Section V Mainland North. That they have learnt that the defendant herein has entered into a sale agreement of freehold interest of the suit property to the plaintiff.

3. They state that they wish to be joined as plaintiffs to enable them move the Court to declare the lease between the deceased and Demito (K) Ltd as terminated therefore all subsequent acquisition of the leasehold interest is null and void. The Applicants also annexed copy of the Judgement in succession Case No 69 of 2012 to establish their entitlement to the suit property. The 2nd and 3rd Applicant swore affidavits to support the deposition made by the 1st Applicant.

4. The application is opposed by the defendant. She deposed that she owns leasehold interest for a term of fifty Nine (59) years from 1.1.1988 in the suit land. She also deposes that she has no intention of selling freehold interest in the land as alleged by the applicants. It is her contention that the joining of the applicants in this case as plaintiffs will not add any probative value but will delay the conclusion of the case. She urged the Court to disallow the application.

5. Mr Abubakar advocate for the plaintiff submitted that there is no valid leasehold interest and the defendant having no freehold interest does therefore have any capacity to sell whether leasehold or freehold interest in the suit property.

6. Mr Kamani advocate for the defendant on his part submitted that the applicants herein cannot be joined as plaintiffs because the causes of action are different. He submits that the provisions of Order 1 rule 2 apply. He urged the Court to disallow the motion.

7. Under the Civil Procedure Rules, Order 1 rule 1 states which persons can be joined as plaintiffs as “ ... in 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 such persons brought separate suits any common question of law or fact would arise”.

8. In the suit before Court, the plaintiff in the plaint held that ;

A permanent injunction be issued against the defendant restraining her from disposing, selling, leasing or interfering with plaintiff’s possession and occupation of the suit property in any manner whatsoever.

Paragraph 5 of the plaint reads thus:

“The plaintiff avers that it was a term of the sale agreement that the Plaintiff purchases the suit property for a purchase price of Kshs 70,000,000. It was further term of the agreement that the plaintiff pays to the defendant 10% deposit and the balance to be paid on successful transfer”.

9. From the reading of the Plaint, it is not clear whether what was sold was the remainder term of the lease or the whole leasehold interest in the property. The applicants claim the freehold interest in the suit land and aver that they will demonstrate to this Court that the defendant had no capacity to sell either leasehold or freehold interest. To this extent I find that were they to file a separate suit, same questions of fact or law would arise as in this suit. For instance one of the question that would arise is whether the whole property was sold and if the defendant had capacity to sell and transfer.

10. I do appreciate the causes of action may be different as between the plaintiff and the applicants. But the issues in dispute can be determined in the same suit. In my view the applicants claim is against the defendant and therefore he should be joined as a defendant and probably bring his claim as a counter-claim. If they are joined as plaintiffs, the ends of justice will not be served.

11. For the reasons given, I do find merit in the application and allow it with a variation in prayer 2 that the applicants herein are joined to this suit as second defendant. I order each party to bear their costs of the application.

Ruling dated and delivered at Mombasa this 1ST day of September 2016

A. OMOLLO

JUDGE