



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 296 OF 2014 (O.S)

PAUL WANYIRI NDERITU..... PLAINTIFF

VERSUS

ESTHER NJIRU – OMULELE & OTHERS T/A

MURIU MUNGAI & COMPANY ADVOCATES.....DEFENDANT

AND

JOEL VICTOIRE FRANCOIS PETERS...INTENDED INTERESTED PARTY

RULING

The Application

The Applicant herein is the Intended Interested Party, and he has filed an application by way of a Notice of Motion dated 28th November 2014 is seeking orders he be enjoined as an Interested Party in these proceedings. The grounds for the application as set out therein, and in the supporting affidavit and further affidavit sworn by the Applicant on 26th November 2014 and 28th January 2015 respectively.

These are that the Applicant is the purchaser of a portion of the property known as Land Reference Number 5842/17 situated in Karen within Nairobi (hereinafter referred to as "the suit property") from the Plaintiff herein, who is the Vendor, and whose title the Defendant is holding. Further, that the said Defendant are the Advocates representing the Intended Interested Party in the purchase of the property, and were also acting for the Plaintiff at some point during the sale of the property, before the Plaintiff decided to engage other advocates.

The Applicant stated that upon deposit of the titles with their joint advocates, he paid the Plaintiff in line with his instructions a sum of Kshs.4,443,413.60 as part of the consideration towards the purchase of the aforesaid property out of the agreed purchase price. Further, that he has instructed his advocates to institute a separate suit for specific performance against the Plaintiff, wherein the subject matter is similar to the matter herein, and he therefore seeks to be enjoined in the present proceedings to enable this Court have all relevant facts at hand and arrive at a just conclusion.

The Applicant further stated that the orders being sought by the Plaintiff herein for release of the title to the suit property to his advocate will defraud him of the property being purchased and/or the sum of purchase price already paid. He also averred that the Plaintiff has not disputed the contractual relationship between them for the purchase of a portion of the subject property to which the subject title documents relate, and/or the fact that they had mutually agreed that the said subject title documents be deposited with the Defendant law firm which at the material time represented both of them in the sale transaction.

It was the Applicant's averment that the fact that the Plaintiff had ceased his instructions to the Defendants law firm did not release the latter from its obligation to hold the title documents to the subject property that were deposited with it, and that the same can only be released to the Plaintiff by the Defendant law firm with his consent. He stated that he never consented to any such release of the said title documents to the Plaintiff.

The Response

The Plaintiff filed a replying affidavit sworn on 15th November 2014, wherein he stated that this suit arose out of to an Advocate – Client relationship which was between the Plaintiff and the Defendant, and that the Applicant was not part of that relationship and should not be allowed to be enjoined in these proceedings. Further, that the Plaintiff is the registered owner and proprietor of the suit property and that he appointed the Defendant to be his Advocates in the sale of a portion of the said property. It is his averment that the said appointment placed the Defendant in a confidential position and imposed upon them the duty not to communicate to any third party and/or person information which has been confided to them as counsel without his consent as the client/employer.

The Plaintiff stated that the suit by the Applicant in which he is seeking specific performance would be the proper avenue to ventilate his issues, if any, and that joining him in these proceedings would be tantamount to bringing a third party to an agreement which he was not a party to, and which would amount to the Plaintiff's former Advocates communicating information which was confided to them in private to the Plaintiff's detriment. Further, that the Applicant is not privy to the Plaintiff's contract with the Defendant and on what basis the title deed to the suit property was released to them, which information is bound by the Client-Advocate confidentiality.

The Plaintiff further stated that he would be prejudiced if the Applicant is enjoined in this proceedings as the Defendant may communicate confidential information which may be used by the Applicant in the specific performance suit. Lastly, it was averred by the Plaintiff that the only relevant facts to this suit and which this Court should adjudicate on are the contract/relationship between the Plaintiff and the Defendant, and all other facts should be adjudicated or heard in another forum different from this suit. Therefore, that enjoining the Applicant into this suit will not assist this Court to adjudicate a contract/relationship between the client and his former Advocate.

The Issues and Determination

The Applicant's application was prosecuted by way of written submissions. The Applicant's Advocates filed submissions dated 9th February 2015, while the Plaintiff's Advocates submissions were dated 3rd March 2015. I have carefully considered the pleadings filed and submissions made by the Plaintiff and Defendant. The issue for determination is whether the Applicant should be joined as an Interested Party to this suit. The applicable law on joinder of parties is Order 1 Rule 10(2) of the Civil Procedure Rules which provides as follows:

“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.”

The Applicant submitted in this regard that he had demonstrated a genuine interest in the suit property and stands to be adversely affected by the release of the tile to the suit property to the Plaintiff without being given a chance to be heard. The Applicant cited various cases in support of this position, including *Lois Siano Konana vs Permanent Secretary, Ministry of Lands and Housing (2008) e KLR*.

The Plaintiff on the other hand submitted that the suit herein is brought about by an Advocate/Client relationship under Order 52 of the Civil Procedure Rules and that it should remain a confidential matter,

The Plaintiff relied on the decisions in Slyvester Hasusa Makhokha vs James Okao (T/A Okao & Company Advocates) & 4 Others (2014) e KLR in this regard. The Plaintiff also relied on the provisions of section 143 of the Evidence Act and Rule 9 of the Advocates (Practice) Rules to argue that if the Applicant is enjoined, it is likely that the Defendant will disclose confidential information as a witness at the hearing of this suit, having practiced for both parties. The decisions of King Woolen Mills & Another vs Ms Kaplan Stratton (1993) KLR 273, Kamindi Selfridges Ltd vs Kiambu Murutani Company Ltd, (2013) e KLR and Uhuru Highway Development Ltd vs Central Bank Ltd, (2002) 2 E.A 654 were also cited in support of this argument.

The Court has considered the arguments made, and notes that the Applicant claims to be a necessary party for reasons that he entered into a sale agreement with the Plaintiff with respect to a portion of the suit property, and paid part of the purchase price. This claim is corroborated by the Defendant in its replying affidavit sworn on 28th November 2014 by Esther Njiru- Omulele, a partner in the Defendant law firm, in response to the Originating Summons filed herein by the Plaintiff.

The said deponent confirmed the existence of a sale agreement between the Applicant and the Plaintiff dated 31st January 2007 in which the Applicant was to purchase 3 acres of the suit property from the Plaintiff for a consideration of Kshs 12,250,000/=. Further, that the Applicant as at the time of signing the said sale agreement had already paid the sum of Kshs 777,084.60 to facilitate the payment of land rents which was acknowledged by the Plaintiff.

The deponent further stated that the Applicant paid for various costs in relation acquisition of title to the suit property and the subject property of the sale agreement, as well as for the Plaintiff's legal and other debts, which payments were to be deducted from purchase price payable by the Applicant. It was averred that the Applicant and Plaintiff entered into a supplementary sale agreement dated 24th November 2009 which extended the validity of the sale agreement for a further period of 24 months, and which particularized the payments already made by the Plaintiff of Kshs 3,843,413.60. The deponent attached copies of the said sale agreement and supplementary agreement.

To this extent I find the Applicant has demonstrated that he has an interest in the suit property, and will be affected by the orders that the Plaintiff is seeking in his Originating Summons dated 17th September 2014 for the delivery up by the Defendant of the title to the suit property. I therefore find that the Applicant is a necessary party to this suit. I am in this regard persuaded by the decision in Werrot and Company Ltd and others v Andrew Douglas Gregory and others, Nairobi (Milimani) High Court Civil Case No. 2363 of 1998 (1998) LLR 2848 (CCK) where Ringera J. (as he then was) held as follows:

“For determining the question whom is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”

The Plaintiff has indicated that he will be prejudiced by the release of confidential information to the Applicant in this suit that may be used against him in the suit for specific performance that has been filed by the Applicant. However, it is in my view premature to raise such a concern at this stage, and in addition, the Plaintiff's concerns can be raised and addressed by the Court at the appropriate moment during the hearing of this suit and/or the suit for specific performance as the case may be.

The Applicant's Notice of Motion dated 28th November 2014 is accordingly allowed, and Joel Victoire Francois Peters is hereby joined as an Interested Party to this suit. The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____21st____ day of

_____April_____, 2015.

P. NYAMWEYA

JUDGE