IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, WARSAME & G.B.M. KARIUKI, JJ.A

CIVIL APPEAL NO. 101 OF 2011

BETWEEN

PETER NGANGA MUIRURI…….....……...…..……..APPELLANT

AND

HOUSING FINANCE CO. OF KENYA LTD……..……...1ST RESPONDENT

TAIFA AUCTIONEERS (A FIRM)…….…….……..2ND RESPONDENT

BARCLAYS BANK OF KENYA LTD……...…..……..3RD RESPONDENT

CHIERA WAITHAKA……...…….……..4TH RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kimaru, J.) dated 16th March 2009

in

H.C.C.C. NO. 1928 OF 2000)

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JUDGMENT OF THE COURT

By a charge dated 23rd, October 1997, **Housing Finance Corporation of Kenya Limited** (**HFCK**, also referred to as the **1st respondent**), advanced to **Peter Nganga Muiruri (appellant)** Ksh. five million (5,000,000/=).

The appellant offered his property **LR. No. 7752/225** also has known as **IR No. 74677/1 Kibagare Way Nairobi** as security for the said sum.

After paying several instalments, the appellant unfortunately defaulted in repayment. One of the terms in the charge instrument was that if the appellant defaulted in the payment of the principal and the interest, then the 1st respondent would realise the said security by public auction, after three months prior notice to the appellant to allow him exercise his right of redemption of the property, at any time before the sale.

On 13th May 1998, 1st respondent, through its advocates, Kibuchi & Co. Advocates sent by registered post a notice notifying the appellant of his default in servicing the loan, which by then stood at Ksh 5,109,957.50/= plus interest thereon accruing at 26% per annum from 1st May 1998 till payment in full. He was given three (3) months after which the 1st respondent would proceed to exercise its statutory power of sale under **Section 69 of the Indian Transfer of Property Act**. (repealed)

There does not seem to have been any response to that letter and consequently, the 1st respondent through its lawyers, instructed the 2nd respondent, Taifa Auctioneers, to serve another demand notice on the appellant, dated 14th, August, 2000, demanding payment of Ksh. 10,364,523.86/=, which was to be paid within 45 days failing which the charged property would be sold by Public Auction. This notification of sale is what prompted the appellant to file the plaint dated 23rd ,October, 2000 in which he prayed for orders *inter alia* that the respondents be injuncted *"from selling, transferring, charging or howsoever dealing with the suit premises in any manner inconsistent"* with the appellants right to ownership and or possession thereof.

The appellant contemporaneously filed an application under then **Order XXXIX Rules 1, 2, & 3 of the Civil Procedure Act** seeking similar orders of injunction. The parties on 25th, October, 2000 agreed, by consent to have the suit property preserved pending hearing and determination of the suit.

In the meantime, learned counsel for the 1st respondent wrote to the appellant's counsel requesting that they fix the suit for hearing. This is evidenced by the letters dated 29th, November 2001, and 11th, March, 2002. When that failed, the 1st respondent filed the notice of motion dated 13th August 2002, principally seeking two orders:-

i. *Dismissal of the suit for want of prosecution pursuant to Order XVI Rule 5 of the Civil Procedure Rules and*

ii. *Vacation of the consent order dated 25th October 2000.*

The application was heard by Lesiit J, who made a finding that the appellant had lost interest in the suit, as he had failed to set it down for hearing for five years after he got the orders of injunction against the respondent. The suit was accordingly dismissed for want of prosecution on 13th, July, 2007.

An application for discovery of documents was filed by the appellant almost two (2) years later. The same was dismissed by Mbaluto, J. on 20th December, 2002. A subsequent application for leave to appeal that ruling was dismissed by Waki, J. as he then was on 27th, May, 2003.

The suit was reinstated later on 13th June 2008. However, between 13th, July, 2007 i.e after the dismissal of the suit and its reinstatement on 13th June 2008, the 1st respondent proceeded to exercise its power of sale and sold the suit property by way of private treaty to one Chiera Waithaka, 4th respondent in this appeal.

According to the agreement of sale, dated 20th February 2008, the purchase price for the suit property was Eighteen million shillings (sh. 18,000,000/=), which amount was financed by Barclays Bank, 3rd respondent in this appeal.

Following that development, the appellant moved the court under **Order 1 Rule 3, 10** and **13**, (repealed) seeking the leave of the court to enjoin Chiera Waithaka and Barclays Bank of Kenya as 3rd and 4th defendants respectively.

Following the said sale, the appellant also sued the 1st respondent in Nairobi **HCCC No. 287 of 2009**, wherein he challenged the said sale. The matter was heard by Khaminwa J. who made a finding to the

effect that the Title belonging to Chiera was not impeachable under the provisions of **Section 69 B 2 of the ITPA** (repealed). She also made a finding that the only recourse the appellant herein had against the respondent, was a claim of compensation by way of damages. It is instructive that the said judgment was not appealed against.

The appellant then filed the application for joinder of parties to enable him seek damages, or restitution of the suit property to him. This was the application that was heard by Kimaru J, who dismissed it on 16th, March, 2009.

According to the learned Judge, he was not persuaded that the 3rd and 4th respondents herein were necessary parties to the determination of the suit. The learned Judge however, opened a small window for the appellant and allowed him to amend the plaint

"provided that any reference to the 3rd and 4th defendants in the said amended plaint is deleted."

This is the Ruling that has been challenged before us. The appellant proffered twelve grounds of appeal, in his memorandum of appeal dated 23rd, May, 2011. The learned Judge is faulted for *inter alia*, failing to consider the appellants new causes of action; barring the appellant from joining the parties who had given rise to the additional causes of action; and thus shielding them from liability for wrongs he perceived them to have committed.

He urged us to allow the appeal, set aside Kimaru J's Ruling and allow his application for joinder of the 3rd and 4th respondents herein.

Mr. Wamalwa, learned counsel for the appellant, expounding on the said grounds of appeal, reiterated that it was wrong for the learned Judge to deny the appellant the right to join parties from who he was seeking lawful remedies. Learned counsel also faulted the learned Judge for "directing" them on how to draft their suit.

On his part, Mr. Kibuchi, learned counsel for the 1st and 2nd respondents urged that, under the repealed ITPA, the only remedy available to the appellant was one of damages. He was of the view that his client (1st respondent) had a right to sell the property, and that it was not the business of Barclays Bank (3rd respondent) to investigate the right of title, a stand that was supported by Mr. Gichamba, learned counsel for the 3rd respondent. He also maintained that the 3rd respondent had conducted due diligence, and having confirmed that there was no encumbrance on the Title, extended the loan to the 4th respondent. He urged us to dismiss the appeal.

On the other hand, Mr. Melly, learned counsel for the 4th respondent, submitted that his client's Title to the suit property was valid and could not be assailed. He submitted that sale by private treaty is allowed under **Section 69(1) of the ITPA** (repealed), and there was therefore nothing untoward about the sale.

In rejoinder, Mr. Wamalwa, maintained that the entire sale transaction was fraught with collusion and fraud, and those are pertinent issues that could only be canvassed if the 3rd and 4th respondents were brought on board.

We have considered the entire record before us, the able submissions of all counsel, and the law applicable. In making our determination, we must eschew making observations or findings that could embarrass or fetter the hands of the court seized of the main suit, which is still pending hearing and determination.

The only issue calling for our determination in this appeal is whether or not the learned Judge erred in declining to allow the application for joinder of the two parties and the attendant amendments as prayed in the application giving rise to the impugned ruling.

We now turn to consider the circumstances under which joinder of parties may be allowed under **Order 1 Rule 10 (2)** of the Civil Procedure Rules (repealed). It is trite that applications for amendment of pleadings, or joinder of parties should be liberally allowed. On this proposition, we cite with approval **Sarkar's "Code of the Civil Procedure** (11th Edition. Reprint, Vol 1, P. 887)", where the eminent learned author states in respect of the said Rule:

> *"**The Section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties."***

This Court has developed vast jurisprudence in this area. For instance, in the case of **Central Kenya Ltd vs Trust Bank and 4 Others**, CA **No. 222 of 1998 [2000] eKLR,** the Court affirmed the guiding principle in amendment of pleadings and joinder of parties as follows;

> ***"All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinery, as the case may be, will not result in prejudice or injustice to the other party, which cannot be properly, compensated for costs".***

(See also the more recent decision of this Court in **J M K vs M W M & Another**, **Civil Appeal No. 15 of 2015 (2015) eKLR**. on the same proposition).

As a general rule, amendment of pleadings and joinder of parties is permitted by law and it can be done at any stage of the pleadings. Such amendment should be allowed freely, if the party sought to be joined is necessary in order to enable the court to efficaciously, effectively and completely adjudicate upon, and settle all questions involved in the suit.

However, joinder of parties may be refused where such joinder will lead to confusing or clouding issues; the party being joined is unnecessary; unnecessary delay will result; or no cause of action whatsoever arises against the party intended to be joined. The Court will also have to consider if the amendment or joinder, as the case may be, will result in prejudice or injustice to the other party which cannot be adequately compensated for in costs. (See, **Beoco Ltd .vs. Alfafa Laval Co. Ltd [1994] 4ALL ER.464**)

Amendments should be allowed to allow parties to ventilate the real issues in controversy.

In the appeal before us, the question as to whether the sale was proper or not is really not before us. This is an issue that could have been determined in an appeal against the judgment of Khaminwa J. It is also an issue which is still live before the High Court.

It is, in our considered view for the High Court to determine the issue as to whether sale by private treaty was compliant with the law, or not. Was the appellant given an opportunity to redeem his equity in the suit property by being notified of the sale? Another germane question would be, if the High Court was to find a claim of damages sustainable, against who would such an order lie? Are the 3rd and 4th respondents culpable? Was there collusion between the 1st respondent and the 4th respondent who now holds the Title to the suit property? If fraud is established between the two, would the 4th respondent's Title to the suit property be impeachable?

In **Andys Forwarders Service Ltd & Another vs Price Water Coopers Ltd & Another [2012] eKLR**, faced with an almost similar situation, this Court pronounced itself 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 effectively and completely adjudicate upon and settle all questions involved in the matter."***

In our view, the determination of these issues would require that the 4th respondent, being the current registered owner of the suit property, be joined as a party to the suit before the High Court.

On the other hand, the 3rd respondent just availed the loan facility to the 4th respondent. Its involvement in the matter was only with the 4th respondent. If the Title was not good, that is an issue between the 4th respondent and 3rd respondent, and not with the appellant, or even the 1st respondent.

We agree with the learned Judge that dragging the 3rd respondent into the fray would be stretching the issue of culpability or liability too far. In our view, it would just cloud issues rather than clear them. On the other hand, the 4th respondent should be brought on board, so that he can protect his vested proprietary rights on the suit property.

For these reasons, this appeal succeeds in part, and only to the extent that the appellant is at liberty to join 4th respondent in the suit before the High Court. The part of the impugned Ruling of Kimaru J. that relates to the 3rd respondent is upheld. The appellant is therefore, at liberty to join Chiera Waithaka, 4th respondent, as a party in Milimani Civil Suit No. 1928 of 2000.

In view of this outcome, and also the circumstances of this matter, we order that each party bears its own costs of this appeal.

Dated and delivered at Nairobi this 22nd day of July, 2016.

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR