

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION No. 724 OF 2014

[ARISING FROM ORIGINATING SUMMONS No. 1 OF 2014]

NICKSON AROJJO

APPLICANT

VERSUS

1. STANBIC BANK UGANDA LIMITED

.....

RESPONDENTS

}

2. CONSTANCE WAKYEMBA

BEFORE: HON MR. JUSTICE B. KAINAMURA

RULING

The applicant brought this application under the provisions of Article 28 of the Constitution of Uganda, Order 1 rule 10 of the CPR and Section 98 of the CPA. The applicant seeks orders that the applicant be joined as a 2nd defendant to Originating Summons no.1 of 2014 and costs of the application to be in the cause.

The application was supported by the affidavit of the applicant; Nickson Arojjo.

The respondent filed an affidavit to oppose the application deponed by the Legal Manager of the respondent; Ms. Viola Kyaterekera.

The grounds of the application as set out in the affidavit in support of the Notice of Motion sworn by the applicant are that;

The suit property is comprised in Kyadondo Block 221 Plot 482 Land at Nalyako Wakiso District measuring approximately 0.030 Hectares and together with his family has been in possession of the same.

The suit property is a matrimonial property/home of his lawfully married wife Mrs Betty Kirangi where they currently stay with their children Anisha Bakufu and Caleb Depuhu.

The 1st respondent through the referenced Originating Summons has applied to this court for vacant possession and sale of the said property.

The deponent's wife without consent sold the suit property to the 2nd respondent and the latter mortgaged the property to the 1st respondent who has since sold the property to Richard Gombya. The deponent got to know of the facts when he was threatened with eviction by the said Richard Gombya.

The deponent filed Civil Suit No.102 of 2014 Nickson Arojjo versus Gombya Richard & Betty Kirangi challenging the said transaction which suit is still pending in Court.

The 1st respondent is a party to High Court Civil Suit No. 102 of 2014 as a 2nd defendant by Counter claim.

The applicant is in possession of the suit property in question and should be joined as a defendant to O S 1 of 2014.

It is just and equitable that he is added as a party to the suit as the outcome of the suit directly affects him.

The proprietary rights of the applicant may be affected by the orders sought by the 1st respondent.

In the affidavit in reply Ms. Viola Kyaterekera deposed that;

The applicant is not known to the 1st respondent and it has never had any dealings with him.

The 1st respondent was approached by the 2nd respondent who borrowed money from it for purposes of acquiring the land and property comprised in Kyadondo Block 221, Plot 482, Nalya,

Mengo District. The same property was mortgaged by 2nd respondent as security for the repayment of the loan, a total of UGX 150,000,000/=.

The 2nd respondent defaulted in repaying her loan and the 1st respondent in accordance to the Mortgage Act exercised its right to recover its loaned money but was prevented from doing so by the 2nd respondent acting through the police and her agents including the vendor of the said property.

At the material time one Betty Kirangi the said vendor of the property and agent of the 2nd respondent so happened to be have still been in possession of the property and through the LC1 Chairman of the area requested for a period of two weeks to peacefully vacate the property.

Betty Kirangi refused to hand over possession of the property and the 2nd defendant did not also pay up any outstanding sum of money that was being demanded.

One Richard Gombya to whom the 1st respondent could have completed a sale of property by delivering vacant possession to him, rescinded the transaction on account of non delivery of vacant possession and was refunded his money.

The 2nd respondent's outstanding loan balance has since further accumulated and as at 24th January 2014 stood at UGX 249,117,917/= and continues to accumulate.

The only option the 1st respondent has to recover the accumulating loaned sums is through getting possession of the mortgaged property and fully selling it.

The 1st respondent did not contract with a one Betty Kirangi who the applicant claims to be a spouse to have necessitated spousal consent. The 1st respondent specifically contracted with the 2nd respondent and it is the only person against whom it has a cause of action.

Civil suit No.102 of 2014 filed in the pendency of Originating Summons No.1 of 2014 is not known to the 1st respondent.

The 1st respondent has no cause of action against the applicant and therefore Court should proceed to hear the Originating Summons No.1 of 2014 as it stands.

Applicant's Submissions

Counsel for the applicant submitted that the applicant is in physical possession of the suit property. He urged that 1st respondent has through Originating Summons applied for vacant possession and sale of the said property. Counsel added that before a person can be added as party, it must be established that the party has high interest in the case. Counsel submitted further that it must be clearly demonstrated that the orders sought in the main suit would directly legally affect the party seeking to be added as a party as was emphasised in the Supreme Court decision of ***Departed Asians Property Custodian Board Vs Jaffer Brothers Ltd[1991]1 E.A 55.***

Counsel submitted that the applicant contends that his wife without his consent sold the suit property to the 2nd respondent who later mortgaged the same to the 1st respondent and was and is still in possession of the suit property. Counsel submitted that this is the more reason why the applicant ought to be joined as a party to enable Court effectually and completely determine the issues in controversy and avoid multiplicity of proceedings that would arise there from. Counsel submitted further that joining the applicant in this case would be line with the purpose and effect of **Section 33 of the Judicature Act (Cap 13)** which enjoins Courts to determine all matters in controversy as between the parties completely and finally to avoid multiplicity of legal proceedings. Counsel concluded by stating that this is a proper case in which the applicant should be added as a party to the main suit as a defendant. Counsel prayed that the applicant be granted leave to be added as a defendant to the Originating Summons.

First respondent's submissions

Counsel for the first respondent submitted that the applicant fails to meet the requirements and/ or conditions under **Order 1 rules 10 and 13 of the CPR** and those set out in the case of ***Mukuye Steven & 73 other Vs Madhivani Group Ltd, HCMA 821 of 2013.*** Counsel submitted that the summons were brought under Order 37 rule 4 of the CPR and the question to be resolved as indicated in the summons is whether the plaintiff (1st respondent) is entitled to take possession and sell property comprised in Kyadondo block 221, Plot 482, Nalya, Mengo district having advanced a loan of UGX 150,000,000/=to the 2nd respondent so as to recover all the amounts due to it in respect of the principal, interest and other charges.

Counsel for the 1st respondent further submitted that it is a fact known to the applicant that his alleged wife, Betty Kirangi was not and is not a mortgagor. Counsel further submitted that from the applicant's application, he puts forward two questions VIZ;-

Whether the applicant was married to Betty Kirangi

Whether the applicant gave spousal consent to Betty Kirangi for the sale of her land

Counsel argued that the two issues above are clearly outside the scope of the Originating Summons No. 1 of 2014 which only revolves around the rights and obligations between the mortgagor and mortgagee in respect of the land comprised in Kyandondo Block 221, Plot 482, Nalya, Mengo district, with the 2nd respondent as registered proprietor. Counsel submitted that the applicant was not and is not privy to that contract. Counsel added that the case of ***Departed Asians property Custodian Board Vs Jaffer Brothers Ltd [1991] E.A 55*** cited by Counsel for the applicant is inapplicable. Counsel argued that in that case the court canvassed the issue of a defendant applying to have another party joined to it as a defendant for purposes of bolstering its defence or helping it to put up a stronger defence to a case which is not what the current applicant seeks.

Counsel further submitted that the applicant has no legal interest in the suit property and should pursue his wife elsewhere as he actually did in Civil Suit No. 102 of 2014. Counsel submitted that in the case of ***Kato Fred Mazinga Vs Emmanuel Lukwajju and Others, HCMA 186 of 2012*** while addressing a similar issue court argued the applicant to pursue his lost rights to a conclusion in the other suit. Counsel argued that in this same case the applicant should pursue his lost rights in respect of property previously owned by his wife than be involved in a case where he is a total stranger to the issues in contention.

Counsel further submitted that the argument by the applicant that to add him as a party would avoid multiplicity of suits is a misapplication of the principle considering that the applicant has already filed a suit No. 102 of 2014.

Counsel in conclusion prayed that the application be dismissed with costs and also prayed that court proceeds with hearing the Originating Summons No. 1 of 2014.

Applicant's Submission in Rejoinder

Counsel for the applicant reiterated his submissions by submitting that the applicant has an equitable interest in the suit property being their matrimonial home and the place that the applicant is raising his children from. Counsel cited the case of **Samson Sempasa Vs P.K Ssendo H.C.M.A No. 577 of 2013** in support of his position that the suit will directly affect the applicant as a party seeking to be added as a defendant. Counsel further submitted that while the relationship between the 1st respondent and 2nd respondent was contractual in nature, the relationship was born out of an illegal transaction between the 2nd respondent and the applicant's wife. Addressing the issue of multiplicity of suits, Counsel submitted that the applicant chose who to sue in C S No. 102 of 2014 and cannot be condemned for taking such an active concise decision of suing the wife.

In conclusion, Counsel prayed that leave should be granted to be added as a 2nd defendant to the suit.

Decision of Court

I have carefully considered the application and arguments of both Counsel. The applicant seeks to be added as a party to a suit filed by Originating Summons No. 1 of 2014 in which the 1st respondent seeks to enforce its rights as a mortgagee following a default by the 2nd respondent in making payment. As a mortgagor she undertook and secured the loan with property comprised in Block 221, plot 482, Nalya, Mengo district as registered proprietor.

Counsel for the applicant argued that the applicant and his two children are in possession of the land for which the 1st applicant seeks to have vacant possession. It is upon that premise that the applicant seeks to be added to the suit because the decision of the court will directly affect the applicant. However on the other hand, Counsel for the 1st respondent contended that the applicant is not privy to the contract between the 1st and 2nd respondent and cannot be added as a party to the suit.

Order 1 rule 10(2) of the CPR provides that:-

“The court may at any stage of proceedings either upon or without application of either party, and on such terms as may appear to the court to be just, order that the name of any party be joined, whether as plaintiff or defendant, be struck out,

and the name of any person who ought to have been joined, whether as plaintiff or defendant, whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added”.

While interpretation this rule in ***Delinj in Amon Vs Raphael Tuck & Sons Ltd [1956] 1 ALL ER 273*** court held that:

“..... one cannot say that the court has no power to join a party against whom the plaintiff has no cause of action, unless the requirement that he should have one is contained expressly or impliedly in the rule.... accordingly, this case in my view, really turns on the true construction of the rule, and, in particular, the meaning of the words;

“.....whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter.....”

The beginning and end of the matter is that the court has jurisdiction to join a person whose presence is necessary for the prescribed purpose and has no jurisdiction under the rule to join a person whose presence is not necessary for that purpose”

With regard to this application, it is my considered opinion that whereas it may be that the holding in the Originating Summons may directly affect the occupation of the applicant on that land, the truth of the matter is that the applicant is in physical possession of land whose title and ownership had been transferred to the 2nd respondent who is the only party known by the 1st respondent. In my view the applicant cannot therefore succeed in this application to be added as a party to a suit in which the 1st respondent seeks to enforce its rights after the default of the 2nd respondent.

I agree with Counsel for the respondent’s position that if there is any remedy available to the applicant, it is through pursuing the vendor who is his own wife.

In the result this application stands dismissed with costs.

B. Kainamura

Judge

08.12.2015