



Gitau & another v Kenya Commercial Bank Limited & 3 others (Commercial Case 8 of 2020) [2023] KEHC 405 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEHC 405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL CASE 8 OF 2020
RB NGETICH, J
JANUARY 26, 2023**

BETWEEN

PATRICK NDICHU GITAU 1ST PLAINTIFF

PATRICK NDICHU GITAU & SONS LIMITED 2ND PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS 2ND DEFENDANT

GARAM INVESTMENT LIMITED AUCTIONEERS 3RD DEFENDANT

ALHAAJAR INVESTMENT LIMITED 4TH DEFENDANT

RULING

1. This is a ruling on application dated June 16, 2022 seeking to enjoin the County Government of Kiambu as the 5th Defendant. Grounds of the application are that the applicant was the registered owner of the property known as Land Reference Number 21096/95 located in Juja Township, Kiambu County which was sold vide a public auction held on August 18, 2020 to Alhaajar Investment Limited.
2. The allegations are that, the 4th defendant fraudulently and with concealment of material facts obtained authority from Kiambu County the intended 5th Defendant to conduct repairs and demolish part of the structures.
3. The application is supported by the annexed affidavit of the applicant sworn on June 16, 2022. He deposes that in view of the allegations, it is in the interest of justice to enjoin the Kiambu County Government as a party to the suit.



4. The 3rd Respondent did not oppose the Application, while the 4th Respondent filed grounds of opposition dated August 5, 2022 set out as hereunder: -
 - a. The applicant has not laid a basis to enjoin Kiambu County Government as a party to the suit.
 - b. The cause of action as set out in the plaint “illegal exercise of the statutory power of sale” is at variance with the grounds set for joinder.
 - c. There is no evidence that the approvals were obtained fraudulently; the information regarding the authenticity of the approvals can be obtained without enjoining Kiambu County Government and there is no evidence to prove that such information was sought from Kiambu county Government and not furnished.
 - d. The application will unnecessarily prejudice the 4th Defendant as it presupposes that the applicants are the legal owners of land reference No 21096/195. That until a declaration is made by the Honourable court as to the ownership of the property, all dealing by the 4th Defendant in relation to the subject property are legal and any order affecting or interfering with the 4th Defendant dealing with the property would violate the 4th Defendants rights under Article 40 of the Constitution.
5. On December 13, 2022, the application was argued orally in court. Mr Mungai counsel for the applicant submitted that he will rely on the supporting affidavit filed and argued that authority to demolish the subject property was obtained through deceit and misrepresentation.
6. He submitted that the court can only determine if the authority obtained by the 4th Defendant was regular at the full hearing of the suit. The authority to demolish was obtained during the pendency of the suit and Kiambu County Government has not opposed the application for a re-joinder and co-defendant cannot therefore oppose the joinder.
7. In a joinder, Mr Mungai submitted that he intends to amend the plaint once the application for joinder is allowed.
8. Mr Mutitu counsel for the 2nd applicant associated himself with the sentiments of Mr Mungai for the 1st applicant and pointed out that the Kiambu County Government brought itself to the case and therefore could not run away from it.
9. Mr Kubai for the 4th Respondent submitted that he will rely on the grounds of opposition and submitted that it is not disputed that the property belongs to the 4th Respondent. He further submitted that Order 1 Rule 3 of the Civil Procedure Rules provides for the joinder defendant that the applicant must show that there is a relief which is sought by the Plaintiff against the proposed defendant. He submitted that from the plaint filed on March 12, 2020, the cause of action is at variance with the complaint the applicant intends to introduce against the County Government of Kiambu and enjoining Kiambu County government will cause practical difficulties and unnecessary delay of the matter.

ANALYSIS AND DETERMINATION

10. The applicant herein seeks to enjoin the County Government of Kiambu as a party to this suit. Reason given by Mr Mungai counsel for the 1st applicant is, the County Government of Kiambu will shed light on whether the approvals obtained by the 4th Defendant during the subsistence of the suit were regular. From the pleadings, the allegations of fraudulent transfer of the suit property to the 4th Respondents has been raised by the applicant.



11. The key consideration by the court is whether the inclusion of the County Government of Kiambu as a party to the proceedings is necessary to enable the court effectively and completely adjudicate upon the issues raised in the pleadings. The applicant contends the County Government of Kiambu brought themselves into the suit when they issued the authority to repair and demolish part of the suit property.
12. On 19th July 2022, I directed that the proposed party Kiambu County Government be served with the application herein. No response to the application was filed by Kiambu County Government.
13. Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 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 a 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 a plaintiff or a 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.”
14. The decision by the court to allow a party to be enjoined as a defendant is discretionary; it must be exercised judiciously upon the court being satisfied that the application has a basis. The court should evaluate/consider the prejudice to be occasioned by the parties in the suit if the joinder is allowed.
15. In Joseph Njau Kingori vs Robert Maina Chege & 3 others [2002] eKLR, the court stated that the relevant tests for determining whether or not to join a party in proceedings were as follows: -
 - i. He must be a necessary party.
 - ii. He must be a proper party.
 - iii. In the case of the defendant, there must be relief flowing from that Defendant to the Plaintiff.
 - iv. The ultimate order or decree cannot be enforced without his presence in the matter.
 - v. His presence is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit.
16. This suit seeks to determine whether the transfer of the suit property to the 4th Defendant/Respondent was legal and whether the 1st Defendant properly exercised the statutory power of sale before the sale and transfer of the suit property. The applicant in the pleadings also raises the issue of selling the suit property below the market value.
17. According to the applicant, the proposed 5th Defendant issued authority to repair the suit property after the sale and transfer of the suit property to the 4th Defendant. The applicant’s position is the authority was obtained through deceit and fraud.
18. The reliefs sought in plaint dated 12th March, 2020 filed by the Applicants did not include reliefs against the proposed 5th defendant; I however take note of the fact that Counsel for the Applicants submitted to court that demolition occurred during the pendency of this suit; and the happenings during the pendency of this suit have given rise to 5th proposed defendant being involved in the proceedings herein and he will amend plaint if allowed to enjoin the proposed 5th defendant.
19. The question as to whether the approval/permit to demolish the premises was issued following misrepresentation of facts on ownership to proposed 5th defendant can only be determined during the



hearing. There is a possibility that this court may issue orders to be enforced against the 4th Defendants and the proposed 5th Defendant.

20. From the foregoing, I find that the proposed 5th Defendant is a necessary party to this suit and her participation will assist this court to wholly determine issues between parties herein.

FINAL ORDERS

1. The application dated 16th June 2022 is hereby allowed.
2. Costs in the cause.

RULING delivered, dated and signed virtually at **Kiambu**

This 26th day of January, 2023

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RACHEL NGETICH

JUDGE

In the presence of:

Martin – Court Assistant

Mr Mungai for 1st Plaintiff/Applicant

Mr Aiywa holding brief for Kubai for 4th Defendant

Ms. Kihara for 1st Defendant

Mr Mutitu for 2nd Plaintiff/Applicant

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