



REPUBLIC OF KENYA



KENYA LAW
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**Kitonga v A Kenya Investment Limited & 3 others (Environment & Land
Case 59 of 2018) [2023] KEELC 18237 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18237 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 59 OF 2018**

**AA OMOLLO, J
JUNE 22, 2023**

BETWEEN

REV. JOSEPHINE MURUGI KITONGA PLAINTIFF

AND

A KENYA INVESTMENT LIMITED 1ST DEFENDANT

GERALD KARIUKI WABACHA 2ND DEFENDANT

CITY COUNCIL OF NAIROBI 3RD DEFENDANT

JANE WAMBUI GAKURE 4TH DEFENDANT

RULING

1. The Applicant filed a notice of motion dated 3rd October 2022 seeking for the following orders;
 1. That the Plaintiff's suit as per the plaint herein dated 12th February 2018 be and is hereby struck out as against the 4th Defendant.
 2. That the cost of this application be borne by the Plaintiff.
2. The application was based on the grounds that the Plaintiff's suit discloses no or any reasonable cause of action against the 4th Defendant as it cannot be sued merely on account of an alleged letter of allotment and that the prayers sought in the plaint against it are misconceived and do not lie. The 4th Defendant/Applicant stated that it has also been sued by the 2nd Defendant in another similar suit Nairobi ELC no 347 of 2013.
3. The Plaintiff filed Grounds of opposition dated 9th February 2023 stating that the 4th Defendant is a proper and necessary party in accordance with Order 1 Rules 3, 4, 5 & 7 of the [Civil Procedure Rules](#) 2010 because the Plaintiff and the 1st Defendant are claiming ownership of the same property within the jurisdiction of the 4th Defendant with each party having her or its own title documents, therefore



the 4th Defendant is in a better position to guide the court as to who is the rightful owner of the suit property.

4. The Plaintiff contended that she is also seeking demolition orders against illegal structures erected on the suit property and the 4th Defendant is in charge of issuing development, building and construction permits, therefore it is well placed to inform the court on whether or not it has issued building and construction permits to anyone and if so, why.
5. The plaintiff also contended that she was issued with an allotment letter dated 20th August 1992 by the 4th Defendant after making payments for the sum of ksh 80, 000/= as ground premium and ksh 8,000/= for annual rent and was subsequently issued with a Certificate of Lease for Land Ref. no Nairobi/Umoja/Block 107/1/1130 and since the 1st Defendant is equally claiming ownership of the same property, the Plaintiff is entitled to seek indemnification and compensation from the 4th Defendant should it be established that it wrongly allotted the suit property to her. Further, the plaintiff stated that she has been in consultation with the 1st Defendant in an attempt to settling the matter out court but their negotiations have been hampered by the illegal constructions on the suit property. That the 4th Defendant being in charge of demolishing illegal structures which it has failed to do needs to explain to the court why it has allowed persons not known to the Plaintiff and the 1st Defendant to erect illegal structures on the suit property.

Submissions.

6. The 4th Defendant filed submissions dated 20th February 2023 stating that the Plaintiff can only bring a cause of action against it upon establishing its capacity in this suit or giving a reasonable cause of action against it and that it is misjoined in these proceedings for reasons that even if orders sort by the Plaintiffs were all to be granted, none can be enforced against it. In support, the 4th Defendant cited the case of *Alumark Investments Limited v Tom Otieno Anyango & 4 others* [2018] eKLR where Hon. B. M Eboso, held that in view of the fact that no prayer is sought against the 5th Defendant, the court do not find him to be a necessary party whose presence will enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit as the 5th defendant can properly be summoned as a witness at the instance of either party.
7. The 4th Defendant further submitted that the principles which guide a court in the exercise of its discretion when considering an application under Order 2 rule 15 like the instant motion, have been enunciated in several authorities and relied in *DT Dobie & Co (K) Ltd V Muchina*, [1982] KLR, where the Court of Appeal when interpreting Order VI Rule 13 (1) of the repealed *Civil Procedure Rules* (the equivalent of the current Order 2 Rule 15) defined the term “reasonable cause of action” to mean “an action with some chance of success when allegations in the plaint only are considered. The 4th Defendant contended that the Plaintiff’s claim as stated in the Plaint are claims which can only be determined by her and the other Defendants if the 4th Defendant is better summoned as a witness at the instance of either party.
8. The Plaintiff filed submissions dated 9th March 2023 stating that having been issued with an allotment letter by the 4th Defendant and subsequently issued with a certificate of lease for the suit property, it is not sufficient to rely on the documents of title, as the 1st Defendant is also claiming the same property and the 4th Defendant recognized the 1st Defendant as the owner of the same having authorized him to carry out construction work on the suit property, hence, she needs evidence to show the process the title documents were obtained. In support , she cited the case of *Peter Gicheru Mwangi v Landline Quests Limited* (2021) eKLR where the court relied on the Court of Appeal decision in *Munyua Maina v Hiram Gathiba Maina* [2013] eKLR in stating that it is important to note that the fact of ownership



and holding of a title document by itself, is not enough, for clarity, the holder of the title document, which is being challenged, is obliged to tender before the Court, evidence to show the process of how that title was obtained.

9. The Plaintiff submitted that the 4th Defendant is at the center of the dispute and stated that the word reasonable cause of action means an act on the part of the Defendant which gives the Plaintiff his cause of complaint as was pointed out in the case of *Hon. Kiarie Waweru v Moses Kanyira & 2 Others* (2018) eKLR where it was held as follows;

“ 12. For the Applicant to say that the suit does disclose a cause of action against the 1st and 3rd Defendants but does not disclose a cause of action against him is paradoxical since the 1st and 2nd Defendants were engaged in an interview and the alleged defamatory statements were a subject of discussion during the interview. As was correctly held in the case of *V.K Construction Co. Ltd (supra)* that, “the word reasonable cause of action means an act on the part of the Defendant which gives the Plaintiff his cause of complaint” as to whether it will succeed or not, that can only be determined after a full trial (emphasis mine). 13. In the case of *D.T Dobie & Company (k) Ltd v Muchera*, Court of Appeal Nairobi, Madan, Miller & Potter JJA held that “The words reasonable cause of action in Order vi rule 13(1) means an action with some chances of success when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.” 14. Therefore a cause of action will arise if the allegation against the defendant has some chances of success and if there is an act against the defendant which gives the Plaintiff his cause of complaint. In this matter, I find that the allegation against the Applicant amounts to a cause of action thus necessitating the Applicant to be enjoined as a Defendant in the suit.”

10. The Plaintiff submitted that the 4th Defendant has been properly joined in the suit as it is a necessary party to the suit as was explained by court in *Hon. Kiarie Waweru* case (*supra*) that what makes a person a necessary party is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.

Analysis

11. The Plaintiff joined the 4th Defendant on this suit on the basis that it issued her with the allotment letter for the suit property and that it had granted approvals to the 1st Defendant for construction on the same property, a party who is also claiming ownership of the suit property. The 4th Defendant is seeking for an order that the suit against it be struck out on the grounds that there is no cause of action against it as it cannot be sued for merely issuing a letter of allotment.
12. The issue for determination is whether the 4th Defendant is properly joined in this suit. Order 1 rule 3 of the *Civil Procedure Rules* provides that all persons may be joined as Defendants against 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 separate suits were brought against such persons any common question of law or fact would arise.

13. In the case of *DT. Dobic Company Limited v Muchina* (1982) KLR at page 9 the court expressed itself as follows: -

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

14. Danckwerts L.J. detailed the following in the case of *Wedlock Maloney and Others* (1965) 1 W.L.R. 1238;

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory, but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

15. In determining whether the 4th Defendant is a necessary party to the proceedings, I rely on the findings in the case of *Amon v Raphael Tuck & Sons Ltd* (1956) 1 ALL ER 273 which held that: -

“The party to be joined must be someone whose presence before the court is necessary as a party. What makes a party necessary?... the only reason which makes a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party”. It is not enough that the intervener should be commercially or indirectly interested in the answer. The person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally that is by curtaining his legal rights. That will not be the case unless an order may be made in the action, which he is legally interested”.

16. At this stage, the court does not deal with any merits of the case and so the suit as against the 4th Defendant can only be struck out if it appears so hopeless, that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption even with amendment. It is deduced from the application and the response thereto that both the Plaintiff and 2nd and 3rd Defendants trace the root of their titles from the 4th Defendant. The Plaintiff has pleaded that it made payments to the Applicant who then issued her with a letter of allotment. It is her argument that in the event the 1st to 3rd Defendants’ title is not cancelled; she would seek compensation from the 4th Defendant.

17. Although the plaint as filed has not sought direct reliefs against the 4th Defendant, her claim hangs on the documents issued to her by the 4th Defendant. Secondly, it is pleaded that the 4th Defendant may have issued development approvals to the 1st Defendant for the structures the Plaintiff are claiming to be illegally put on her her land. This makes the 4th Defendant a necessary party that would held the



court in answering the questions in dispute. Order 1 Rule 7 of the *Civil Procedure Rules* is very material to the case at hand, it provides:

“Where the Plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more Defendants in order that the question as to which of the Defendants is liable, or to what extent, may be determined as between all parties.”

18. From the foregoing, it is my opinion that the Plaintiff's claim against 4th Defendant is not hopeless, inept, frivolous. The suit shall proceed to full hearing against all the Defendants. The application is dismissed with costs to the Plaintiff.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE 2023

A. OMOLLO

JUDGE

In the Presence of

Mwangi advocate for Plaintiff/Respondent

Ms Kimani for Okeyo for 2nd & 3rd Defendant

Ms Ochieng h/b for Ataka for 4th Def/App

