Makton Holdings Limited v Waweru; Lands Registrar & another (Interested Parties) (Environment & Land Case E008 of 2022) [2023] KEELC 18099 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18099 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E008 OF 2022

MD MWANGI, J

JUNE 15, 2023

BETWEEN

MAKTON HOLDINGS LIMITED ..... PLAINTIFF

AND

JOHN WAWERU ALIAS SIMON WAITHIRA ..... DEFENDANT

AND

LANDS REGISTRAR ..... INTERESTED PARTY

HON. ATTORNEY GENERAL ..... INTERESTED PARTY

(In respect of the Plaintiff/Applicant's Application dated 30th May, 2023 seeking to strike out the Interested Parties' Statement of Defence)

RULING

Background

1. The Plaintiff's application is expressed to be brought under Order 2 Rule 15 and Order 51 Rule 1 of the *Civil Procedure Rules* and sections 1A, 1B and 3A of the *Civil Procedure Act*. Principally the applicant seeks an order to strike out the 1st and 2nd Interested Parties' Statement of Defence dated May 19, 2023. The applicant also seeks costs of the application.

2. The 1st and 2nd Interested Parties/Respondents were named in the instant proceedings as Interested Parties. The 1st Interested Party is mandated by statute to maintain and update all government records pertaining to the subject matter. The 2nd Interested Party on the other hand was named in the proceedings as the chief legal advisor to the government and by extension the 1st Interested Party. Their joinder into the proceedings was therefore necessary only for production of the relevant documents to the suit and to ensure that any consequential orders from the court would be seamlessly enforced.

There is no claim, cause of action or prayers sought against the Interested Parties' herein and their joinder was to purposely to confirm the veracity/authenticity of the documents filed in court.

3. The Plaintiff further states that the Interested Parties have now filed a Statement of Defence dated May 19, 2023, albeit out of time. It is the Plaintiff's contention that the Interested Parties are not entitled to file a defence or take any precipitate actions in the course of litigation given their limited participatory role as Interested Parties. In any event, the Defence does not respond to the issues raised in the Plaint as it contains mere denials with no triable issues. As such the Defence is prejudicial to the Plaintiff and likely to prolong the proceedings herein for no reason whatsoever. It is therefore in the interest of justice that the Interested Parties' Statement of Defence be struck out.

4. The Plaintiff's application was further supported by the affidavit sworn by Mohammed Nyaoga, the director of the Plaintiff/Applicant Company on May 30, 2023.

5. The application was duly served upon the office of the Attorney General for the Interested Parties as per the Affidavit of Service of Alex Muganda deponed on the June 9, 2023. However, the Interested Parties did not file any response nor appear in court on the hearing day. The application is therefore unopposed.

6. The application was heard orally in the virtual court and Counsel for the Applicant restated the grounds in support of the application and the averments contained in the supporting affidavit though in summary.

7. Counsel submitted that the sole issue for determination is whether an interested party can file and prosecute a Defence without leave of the court.

8. He averred that it is only a Defendant who can file a statement of Defence. Under Order 1 Rule 10 of the *Civil Procedure Rules, 2010*, an Interested Party must seek leave of the court by way of a formal application to become a Defendant before purporting to file a statement of Defence.

9. Counsel relied on the Supreme Court's decisions in *Francis Karioko Muruatetu and Another v Republic and & 5 Others* (2016) eKLR whose decision was affirmed by the very court in the case of *Communications Commission of Kenya and 4 Othersv Royal Media Services Limited & 7 Others* Petition No 14 OF 2014 eKLR.

10. The Applicant further cited the case of *Luka Kiplelei Kotut v Joseph Chebii & Another* [2013] eKLR and *SOCAF & Company Limited vs John Maina Njoroge & 5 Others; Francis Ngau Musyoki (Interested Party)* [2022] eKLR.

Issues for Determination

11. I agree with the Plaintiff/Applicant that the only issue for issue for determination is whether an interested party can file and prosecute a Defence without leave of the court.

Analysis and Determination

12. The Civil Procedure Rules do not make an explicit provision for the role of an Interested Party in a Civil suit. Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, is the rule that defines an interested party to mean;

> "interested party" means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation"

13. Black's Law Dictionary on the other hand defines an Interested Party as "a party who has a recognizable stake (and therefore standing) in the matter."

14. It is imperative to note from the onset that in this case, the Interested Parties were impleaded as such by the Plaintiff at the commencement of this suit.

15. Under Order 7 Rule 1 of the *Civil Procedure Rules*, only a defendant in a suit can file a Statement of defence. The rule provides that: -

> " Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service"

16. An Interested Party is not a defendant and cannot therefore file a Statement of defence under the *Civil Procedure Rules*. I agree with my brother Justice Munyao Sila's position in *Luka Kiplelei Kotut v Joseph Chebii & Another* [2013] eKLR cited by the Plaintiff/Applicant, that a person who is not a defendant cannot therefore simply walk into the proceedings by filing a Statement of Defence.

17. In the instant proceedings the Plaintiff avers that the joinder into the proceedings of the Interested Parties was necessary only for purposes of production of the relevant documents to the suit and to ensure that any consequential orders from the court would be seamlessly enforced. That there is no claim, cause of action or prayers sought against the Interested Parties' herein and their joinder was to purposely confirm the veracity/authenticity of the documents filed in court. The Interested Parties have however purportedly filed a Statement of Defence responding to the Plaint. The Plaintiff seeks to strike out the Statement of defence by the Interested Parties.

18. The contest in a suit is between Plaintiffs and Defendants and if any party has a claim over the subject matter, then such party needs to apply for joinder as either a Plaintiff or a defendant. This court is guided by the holding of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic & 5 Others* [2016] eKLR where the court pronounced itself on the extent to which an Interested Party may participate in the proceedings as follows;

> " any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.
>
> Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An Interested Party may not frame its own fresh issues, or introduce new issues for determination by the Court...."

19. While expunging the Statement of Defence and Counterclaim filed by an Interested Party, the Learned Judge in the case of *SOCAF & Company Limited v John Maina Njoroge & 5 Others; Francis Ngau Musyoki (Interested Party)* [2022] eKLR stated that;

> "This Court is still left to grapple with the issue of what documents the Interested Party should file as way of his participation, in view of the subsisting consent. The Interested Party shall participate by attending the remainder part of the hearing as an observer and will be at liberty to file written submissions before judgement is delivered in this matter which the court may consider."

20. I agree with the above sentiments. An Interested Party is can participate in the proceedings by filing Witness Statements, (if need be) and submissions before judgement is delivered but not a Defence or purport to introduce a fresh claim through a Counterclaim.

21. Taking all the above provisions into consideration, it was improper for the Interested Parties to file a Statement of defence and more so without leave of court. As such the Statement of Defence dated May 19, 2023 is hereby struck out and expunged from the record. If the Interested Parties feel that they have a legitimate claim, they are at liberty seek leave of the court to be joined into the suit as either Plaintiffs or defendants or better still file a separate suit.

22. The upshot of the foregoing is that the prayers sought in the Notice of Motion dated 30/5/2023 are granted and I proceed to make the following orders; -

    a. The Notice of Mention dated 30/5/2023 is hereby allowed.

    b. Costs shall follow the cause.

23 It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Nkarichia for the Plaintiff/Applicant.

No appearance for the Defendants & Interested Parties.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE