



Varma & another (Suing as the administrators of the will of Santosh Kumari Varma) v Chief Land Registrar & another; Athi Stores Limited (Proposed Interested Party) (Environment & Land Petition E024 of 2021) [2023] KEELC 19242 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19242 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION E024 OF 2021**

**A NYUKURI, J
JULY 24, 2023**

BETWEEN

**SUDARSHAN SINGH VARMA 1ST PETITIONER
SONAL SURYAKANT RAVAL 2ND PETITIONER
SUING AS THE ADMINISTRATORS OF THE WILL OF SANTOSH KUMARI
VARMA**

AND

**THE CHIEF LAND REGISTRAR 1ST RESPONDENT
THE HON ATTORNEY GENERAL 2ND RESPONDENT**

AND

ATHI STORES LIMITED PROPOSED INTERESTED PARTY

RULING

1. Before court is a Chamber Summons dated November 15, 2022 filed by the proposed Interested Party seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That in the first instance and thereafter pending hearing and determination of this application, Athi Stores Limited be joined to these proceedings as an Interested Party.
 - d. Upon grant of prayer (3) above this Honourable Court be pleased to grant Interested Party leave to file a response to the application dated December 3, 2021.



- e. In the first instance and thereafter pending the hearing and determination of this application, the Petitioners, by themselves, their agents, employees, servants or persons acting under their direction be restrained from further dealings and/or interfering with the suit property LR No 18696/1 North West of Athi, Mlolongo or its Title documents.
- f. The costs of this application be borne by the Petitioners.
2. The application is supported by the affidavit sworn by Shamit Niranjandass Ghai on November 15, 2022. The Applicant's case is that the Applicant is the legal and beneficial owner of parcel of land known as LR 18696/55 measuring approximately 20 acres which is part of LR No 11895/1 and that the Applicant registered a caution on the suit property which caution is subject of this matter.
 3. He further deponed that although adversely mentioned herein, the Applicant was not joined to this suit to conceal the registration of the caution. He stated that the Petitioners filed application before court in Mis Appl No E026 of 2021 in regard to the suit property seeking eviction. That the Petitioners left out the Applicant in those proceedings. Further that the suit property is charged to Imperial Bank Limited to secure the Applicant's repayment obligations and that therefore, the Interested Party has an identifiable stake in the suit property.
 4. The application was opposed. Sunit Singh Varma a majority shareholder of Athi Stores Limited swore a replying affidavit opposing the application. The Respondent's case is that he is the registered owner in common with the late Madan – Mohan Singh Varma and Santosh Kumari Varma of the suit property. He opposed the joinder of the Applicant to this suit on ground that the latter is a moribund entity that has lost its legal status and has been coopted by Mr Ghai with the primary goal of defrauding shareholders, appropriate assets of the company and throw in disarray the management of the company.
 5. He stated that he was a majority shareholder of the Applicant and that the company had not authorized Mr. Ghai to institute or join any legal proceedings and that the instant application is meant to distract the court. He stated that for 20 years, the company has never held Board or Annual General Meetings or complied with statutory reporting requirements to the Registrar of Companies. According to the Respondent, no resolution to file/join this suit had been passed and that the attached resolution was contrary to Article 119 and 120 of the Company's Articles of Association which required that handling ordinary company business required quorum of two directors "one who shall be original member and the other incoming member". He stated that the document presented by the Applicant was only signed by incoming members with no original shareholders and that the resolution is wanting in form.
 6. It was his assertion that the Applicant Company had no equitable or legal interest in the suit property. He stated that the suit property was LR 11895/1 and what the Applicant alleges to be interested in was LR No 11896/55. As regards the Memorandum of Understanding, he stated that the same was breached by Mr Ghai and the same although having been entered into on 1997, has never been performed in the 27 years. That Mr Ghai formed three entities which he employed as suppliers to the company and engaged in an embezzling scheme leading to the bankruptcy of the company. That Mr Ghai mismanaged the company while running it as his private entity; making unilateral decisions and committing the company to legal arrangements like is the case with the Respondent.
 7. He insisted that the company's registered office is on LR No 18696/55 and not on LR No 18695/1 and that the Applicant's application for joinder in ELC Misc Appl No E026 of 2021 was unsuccessful. On the charge to Imperial Bank, he stated that the bank was wound up and no charge has been created by its successor's in title.



8. In a rejoinder, Shamit Niranjandass Ghai filed a further affidavit on July 12, 2023 and stated that Sunit Singh Varma is not the Petitioner or executor of the will of Santosh Kumar Varma on whose behalf the Petition is filed and therefore lacks capacity to swear the replying affidavit.
9. He denied the allegation by the Respondent that Sunit Varma holds majority shares and stated that his shareholding was only 12.5% and stated that the company had filed its annual returns hence it was not moribund. According to him, the estate of Santosh Kumari Varma has no interest in the suit property. He stated that the interest of the Applicant in the suit property was based on the Memorandum of Understanding executed on December 15, 1996 and that they had interest in LR No 18696/55 which was part of the suit property.
10. Parties filed written submissions in respect of their respective arguments. On record are the Applicant's submissions filed on July 12, 2023 and the Petitioners' submissions filed on March 30, 2023.

Submissions

11. Counsel for the Applicant submitted that the Applicant is the legal and beneficial owner of LR No 18696/55 which is part of the suit property and therefore has an identifiable stake in these proceedings. Counsel argued that no prejudice will be suffered by the primary parties if the Applicants are joined to these proceedings. Counsel submitted that the Applicant placed a caveat on the suit property to secure its interest over LR No 18696/55. That this Constitutional Petition seeks for the removal of the lawful caution registered by the Applicant who has been left out.
12. Counsel relied on the decision in the cases of *Francis Kariuki Muruatetu & Another v Republic & 5 Others* [2016] eKLR, *Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v Attorney General & 4 Others* [2017] eKLR and *Meme v Republic* [2004] KLR to argue that where a party's presence in a suit is necessary to enable the court settle all the questions before court, such party ought to be joined to such proceedings.
13. It was also submitted that the person who swore the replying affidavit had no capacity to do so as no authority to swear for the Petitioner was provided.
14. On their part, counsel for the Respondent submitted that the Applicant failed to file authority to sue from the company. Reliance was placed on Section 37 (2) of the *Companies Act* and Articles 119 and 120 of the Applicant's Articles of Association to argue that what was filed by the Applicant did not meet the threshold for a company resolution. Counsel submitted that the application herein was therefore filed without authority of Athi Stores.
15. On whether the Applicant ought to be joined to these proceedings, counsel relied on Order 1 Rule 10 (2) of the *Civil Procedure Rules* and the cases of *Parmet Ole Kiseet v Sylvia Moi & 3 Others Ndegwa Kabogo (Interested Party)* [2021] eKLR, *Communications Commission of Kenya & 4 Others v Royal Media Services Ltd & 7 Others* [2014] eKLR, Francis Kariuki Muruatetu & Another (Supra) *Skou Estate Limited & 5 Others v Agricultural Development Corporation & Another* [2015] eKLR to contend that joinder can only be done where the Applicant demonstrates an identifiable stake in the proceedings with an interest beyond being merely affected.

Analysis and Determination

16. Having considered the application, as well as the response together with the rival submissions, what emerges for determination are;
 - a. Whether the application is competent,



- b. Whether the Applicant has met the threshold for joinder
- c. Whether injunction should be granted.
17. On the competency of the application, what was raised by the Respondent is that the resolution filed did not comply with Section 37 (2) of the *Companies Act* and Articles 119 and 120 of the Applicant's Articles of Association requiring a resolution to be by an original shareholder and incoming shareholder. Section 37 (2) of the *Companies Act* provides that a company validly executed a document if it is signed on behalf of the company by two authorized signatories or by a director of the company in presence of an attesting witness. Having considered Article 120 of the Applicant's Articles of Association, it shows that the quorum for the business of the directors shall be two (one who shall be original member and the other an incoming member). The Applicant did not provide definitions of who was an original member or an incoming member. But more importantly, while the resolution to file this application was signed by four directors, the Respondent did not provide a list of original members and incoming members for the court to decide on the matter. As the resolution presented by the Applicant has met the threshold set out in Section 37 (2) of the *Companies Act*, I find and hold that the application is not incompetent.
18. Order 1 Rule 10 (2) provides for the jurisdiction of the court to join a necessary party to proceedings before it 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 any 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 Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit be added.
19. Principles governing joinder are well settled. The Applicant needs to demonstrate an identifiable stake in the proceedings making his presence necessary in such proceedings. In the case of *Commission of Kenya & 4 Others v Royal Media Services Limited & 7 Others* [2014] eKLR, the court held as follows;
- An Interested Party is one who has a stake in the proceedings though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made either way. Such a person feels that his or her interests will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.
20. In the instant matter the Applicant states that they cautioned the suit property which caution is the subject of the dispute herein. A cursory look at the Petition shows that the Petitioners' grievance is the registration of the caveat by the 1st Respondent against the title of the suit property on August 8, 2010. The title attached to the Petition shows Entry No 62 described as follows;
- Caveat by Senior Registrar of Titles claiming interest under Section 65 (1) of the Registration of Titles Act.
21. Section 65 (1) (f) of the repealed *Registration of Titles Act* Cap 281 provided for power of the registrar to enter a caveat on any property as follows;
- A Registrar may exercise the following powers in addition to other powers conferred under this Act-
- He may enter a caveat on behalf of the Government to prohibit the transfer or dealing with any land belonging to or supposed to belong to the Government and also to prohibit the dealing with any land in any case in which it appears to him that an error has been made by misdescription of the land, or



otherwise in any certificate of title or other instrument, or for the prevention of any fraud or improper dealing or for any other sufficient cause.

and shall lodge a non-absolute caveat over any property in respect of which he is informed by the National Museums of Kenya that a declaration by the Minister under the *National Museums and Heritage Act* has been applied for, or is about to be gazetted or has been gazetted affecting the property in question and upon gazettelement the caveat takes effect as a charge over the land.

22. On the other hand, the basis of seeking to be joined to this suit is a caution registered on the suit property at the instance of the Applicant. The Applicant presented a caution dated February 3, 2020. The basis of the caution is the Memorandum of Understanding between the Petitioners and the Applicant. That caution is reflected in the register of the suit property as entry No 63.
23. As the issue before this court as presented in the Petition is the legality and Constitutionality of the caveat entered by the Chief Land Registrar on behalf of the Government of Kenya on August 8, 2010, and not the caution placed on the suit property by the Applicant on 12th February 2020, it is my considered view that the Applicant has not demonstrated any identifiable stake in the dispute. In addition, it is not clear what would be the claim of the Applicant if they were to be joined in these proceedings as they have not stated whether the caveat was lawful or not what they are keen on is to be in these proceedings. In the premises, I am not satisfied that the presence of the Applicant is necessary in determining the issues herein.
24. The upshot is that the application dated November 15, 2022 lacks merit and the same is hereby dismissed with costs to the Petitioners.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Njoroge for Petitioners

Mr. Ndungu holding brief for Mr. Dacha for proposed Interested Party

Abdisalam – Court Assistant

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