



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

ELC CASE NO. 78 OF 2012

BOMET TECHNICAL INSTITUTE LIMITED T/A

LOMU INVESTMENTS.....PLAINTIFF

VERSUS

JOEL MARITIM & 21 OTHERS.....DEFENDANTS

AND

THE COUNTY GOVERNMENT OF BOMET.....INTERESTED PARTY

RULING

Brief background

1. What is before me is the Notice of Motion dated the 10th December, 2018 by the Applicant/Interested Party which seeks the following orders:

- a) Spent
- b) THAT the County Government of Bomet be enjoined in this suit as Defendant or interested party.
- c) THAT the intended party be allowed to amend the pleadings to reflect the interested party.
- d) THAT costs of this application be provided for.

2. The application is premised on the grounds stated on the face of the Notice of Motion and the Supporting Affidavit of Oscar Sang, the Director Legal Services of the intended Interested Party sworn on the 10th December 2018.

3. In the said affidavit Mr. Sang deposes that the intended Interested Party is the lawful trustee and lessor of all public land in Bomet County. He deposes that the intended Interested Party is the custodian of all documents relating to public land in the said county including the documents relating to the suit property which indicate the same was approved, allocated, surveyed and awarded to the Permanent Secretary to the Treasury as Trustee for St. Michael Primary School.

4. He further deposes that the Defendants have no legal or beneficial interest in the suit property to warrant their being sued. He deposes that enjoining the intended Interested Party will assist the court in arriving at a just and informed decision regarding the ownership of the suit property.

5. He deposes that if the application is allowed, it will save judicial time as the Applicant will not need to file a separate suit and the plaintiff will not be prejudiced in any way.

6. The application is opposed by the Plaintiff through the Grounds of Opposition dated 17th December 2018 in which he raises the following grounds :

- i. *The Interested Party does not know whether it wants to be a defendant or an interested party;*

ii. Protection of public land is vested in the Attorney General and not the County Government pursuant to Article 156(4) of the Constitution and in doing so, the Attorney General should be independent, promote, protect and uphold the rule of law in defending the public interests;

iii. The subject land in question is not public land but rather private land and as such the intended Interested Party has no place in this suit;

iv. There is no sufficient reason proffered for the joinder;

v. The application is *res judicata* Kericho ELC Judicial Review No.14 of 2012 and the interests sought to be protected were extinguished through withdrawal of Kericho ELC Judicial Review No. 16 of 2012 and dismissal of Kisii ELC No.428 of 2013.

7. The application was canvassed by way of written submissions and counsel for both parties filed their submissions which I have considered.

Issues for determination

8. There is only one issue for determination.

1. Whether the Applicant/Intended Interested Party should be enjoined in this suit.

Analysis and Determination

9. The law on joinder of parties is set out under the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules which provides as follows:

“10 (2) 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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

10. The court therefore has a discretion to enjoin a party whose presence is necessary to assist the court in adjudicating all the questions involved in the suit even in the absence of an application by either of the parties. The emphasis here is whether that party will enable the court adjudicate all the issues in the suit. See **Pius Mbugua Ngugi & 2 others v Chief Land Registrar & 7 others [2018] eKLR**. In order to do this, it is important for the court to evaluate the pleadings and discern the issues that need to be determined.

11. In his Amended Complaint dated 14th September, 2012 the Plaintiff herein has pleaded that he is the allottee of plot No. BOMET TOWNSHIP/270. He has pleaded that on or about 10th September 2012, the defendants trespassed upon his plot and deposited building materials and started constructing permanent structures and have remained in wrongful occupation thereof. Among the reliefs sought by the Plaintiff are “a declaration that he is entitled to exclusive and unimpeded right of possession and occupation of the suit property; a permanent injunction to restrain the Defendants from occupying, building, cultivating or in any way dealing with the suit property; vacant possession and general damages for trespass”.

12. In their Defence dated 11th October 2012, the Defendants deny entering the suit property save when they are invited by the management of St. Michael’s Primary School who according to them are the actual/bona fide owners of the suit property.

13. Counsel for the Applicant has submitted that the Applicant was interested in assisting the court to determine the suit in a just and expeditious manner as well as protecting the future of the education facility located in the suit property. He has cited the case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v Attorney General (2017) eKLR** where the court held as follows:

“The elements to be satisfied where a party seeks to be enjoined in proceedings as an interested party are that:

- a) The intended interested party must have an identifiable stake*
- b) Or legal interest*
- c) Or duty in the proceedings*

“...A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally, that is by curtailing his legal rights. In determining whether or not an applicant has legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party, the true test lies not so much in an analysis of what are the constituents of the applicant’s rights, but rather in what would be the result on the subject matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty in the proceedings directly identifiable by examining the questions involved in the suit”

14. At the core of this suit is the ownership of the suit property. St. Michael Primary School which is mentioned by the Defendants as being the bona fide owner of the suit property has not been sued in this case. In his submissions, counsel for the Plaintiff has alluded to other suits between the Plaintiff and other parties all touching on the ownership of the suit property. These include **Kericho ELC Judicial Review No. 14 of 2012, Kisii ELC No.428 of 2013 and Kericho ELC Judicial Review No. 16 of 2012**. He has submitted that since **E.L.C Judicial Review Case number 14 of 2012** has been determined, this application is *res judicata*. In **Judicial Review No. 14 Of 2012**, the parties were Bomet Technical Institute T/A Lomu Investment as the Ex-parte Applicant and the Director of Survey, the Commissioner of Lands and the Permanent Secretary, Ministry of Lands as the Respondents. In the said suit the Ex- parte applicant challenged the manner in which its letter of allotment had been cancelled and the court held that the process was unlawful and quashed the decision of the Commissioner of lands. In Kisii ELC case No. 428 Of 2013, the St. Michael's Primary School had sued the Plaintiff over allotment of Plot No.2/12 Bomet. The said suit was dismissed for want of prosecution. With great respect to counsel for the plaintiff, the issue of *res judicata* does not arise. Even though the subject matter in **Kericho ELC Judicial Review No. 14 of 2012** and **Kisii ELC No.428 of 2013** is the same, the parties are different.

15. Before the court can determine whether or not there is trespass by the Defendants, the issue of ownership of the suit property must be determined. Even though the Plaintiff contends that the suit property is private property, it is not in dispute that the plot was initially known as Unsurveyed Educational Plot No. "A" Bomet. That being the case, the said property was at some point public land vested in the intended Interested Party in line with Article 162 (2) of the Constitution. The intended Interested Party would therefore be instrumental in assisting the court understand how the suit property was converted from public land to private property. Even though I agree with learned counsel for the Plaintiff that the Attorney General has the duty to protect the public interest, the said duty is not exclusive to the Attorney General.

16. In the case of **Nasela and Mukakaik Ltd v Urban Roads Authority & 3 Others 2017 eKLR** the court cited the case of **Deported Asians Property Custodian Board V Jaffer Brothers Limited (1999) E.A 55 (SCU)** which was cited with approval in the case of **Pravin Bowry v John Ward and Another** where the court stated as follows:

"For a person to be joined on the grounds that his presence in the suit is necessary for the effectual and complete settlement of all questions in the suit, one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit would legally affect the interests of that person and that it is desirable, for the avoidance of multiplicity of suits to have such a person joined so that he is bound by the decision of the court in this suit. Alternatively, a person qualifies (on application by a defendant) to be joined as a co-defendant where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind the person"

17. In allowing the County Government of Kitui to be enjoined as an Interested Party the court observed as follows:

"...I have said enough to show that the applicant's application to be enjoined as a defendant in this suit has no merit. I do appreciate however, that the road construction in dispute is being undertaken within the jurisdiction of the applicant and for that reason, although the applicant may have no legal interest in the dispute over the construction of the said road, it has a general interest in the outcome of the case due to the nature of the dispute. For that reason, I would allow the applicant to participate in the proceedings as an interested party rather than as a defendant."

18. In the instant case, the Applicant has applied to be enjoined as either an Interested Party or a Defendant and considering the fact the suit property is under the jurisdiction of the Applicant and was originally vested in the Applicant, they have a stake in it. I therefore allow the Applicant to be enjoined in the proceedings as an Interested Party. I am of the view that under the current constitutional dispensation, parties should not be denied access to justice as Article 159 (2) (d) enjoins the court to administer justice without under regard to procedural technicalities. Even though the Interested Party could file a separate suit, this would be inconsistent with the overriding objective of the Civil Procedure Act which is to facilitate a just, expeditious and proportionate resolution of disputes.

19. For the foregoing reasons, I find merit in the application and I grant it in terms of prayers 2 and 3 of the Notice of Motion. The Plaintiff is granted 14 days to amend the pleadings to include the Interested Party and effect service upon them. Thereafter the Interested Party shall file its documents within 14 days.

20. The costs of the application shall be in the cause.

Dated, signed and delivered at Kericho this 14th day of March 2019.

J.M ONYANGO

JUDGE

In the presence of:

1. Miss Chepkinui for Mr. Koko for the Applicant
2. Mr. Langat for Mr. Kipkoech for the Respondent
3. Court Assistant- Rotich