



**Ethics and Anti-Corruption Commission v Leiyagu & 2 others;
Macharia (Interested Party) (Environment & Land Case E002 of 2023)
[2023] KEELC 22570 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22570 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE E002 OF 2023
AK BOR, J
DECEMBER 18, 2023**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

PAMELA N LEIYAGU 1ST DEFENDANT

RICHARD N LEIYAGU 2ND DEFENDANT

SAMMY KOMEN MWAITA 3RD DEFENDANT

AND

NICHOLAS MACHARIA INTERESTED PARTY

RULING

1. The Plaintiff filed suit on 1/3/2023 claiming that the Defendants illegally alienated government house number MG 8 from which the suit property was hived and a house erected after the house was purportedly offered for sale by the government. It claimed that the sale was rescinded. Further, that the Defendants knew or ought to have known that the suit property constituted alienated public land in respect of which the 3rd Defendant had no power to allocate to the 1st Defendant. In the suit, the Plaintiff seeks a declaration that the allocation of Nanyuki Municipally Block 8/860 to the 1st Defendant and the issuance of a lease to the 2nd Defendant was illegal. The 3rd Defendant was sued on the basis of having been a Commissioner of Lands at the material time when the transaction took place.
2. The 3rd Defendant brought the application dated 20/7/2023 seeking to have his name struck out of the suit. The application was made on the grounds that during his appointment as Commissioner of Lands, the 3rd Defendant was restricted to signing leases as an agent on behalf of a known principal who was the President of the Republic of Kenya. He contended that he did not have any personal



interest in the matter other than discharging his official duty and that he relied on the advice of the other government officers in line with the procedures prevailing at the time. Further, that he did not know the allottees of the land. He contended that the Plaintiff's allegations against him were presumptive and unsubstantiated. He argued that he was improperly joined as a party to this suit out of malice, vindications, statics and playing to the public gallery to be seen to be working.

3. The 3rd Defendant swore the supporting affidavit to which he annexed the gazette notice vide which he was appointed Commissioner of Lands on 3/12/1999. He argued that the suit had been brought 20 years after he left office which amounted to discrimination contrary to Article 27 of the Constitution because it excludes other officers who participated in the land allocation process. He pointed out that no lease signed by him had been exhibited and that he did not know the allottees of the land. He cited Section 26 of the Land Registration Act. He argued that land allocation was a process which was the main function of that land administration department of the Ministry of Lands and Physical Planning. He set out the steps and processes followed in land adjudication and was of the view that the issuance of the title for the suit property followed the existing due process at the time. He argued that in the absence of other officers who participated in the process of allocation from this suit, it was an abuse of the court process for him to continue to be in the suit. He contended that in the alternative, his name should be substituted with that of the current office holder. He pointed out that the District Land Registrar who issued the certificate of lease was not a party to this suit. He relied on Petition No. 41 of 2018 in support of the contention that the Supreme Court declined to grant the reliefs sought because the petitioner elected to only sue the late President Moi but failed to join the Attorney General or the State in that suit.
4. The 3rd Defendant gave a tip to the Plaintiff in the supporting affidavit that if it desired to restitute the suit land to the Government it should use the clause in the letter of allotment indicating that the Government would not accept any liability in the event of prior commitment or otherwise. Further, he argued that the suit seeks to review the grant of leases which is the preserve of the National Land Commission under Article 68 (c) (v) of the Constitution.
5. The Plaintiff opposed the application through the replying affidavit sworn by its investigator, Simon Lei. Mr. Lei averred that the contention by the 3rd Defendant that the allegations against him were presumptive and unsubstantiated by fact was a fact to be determined during the trial. He averred that the 3rd Defendant was not only a necessary party but was also important in the suit without whose participation the issues raised in the suit cannot be effectually and completely adjudicated upon. He went further to depone that the case against the 3rd Defendant was premised on actions or inactions done by the 3rd Defendant outside the scope of his legal mandate as a public officer.
6. The Plaintiff averred that the 3rd Defendant was joined to this suit so that he can answer the allegation that he abused his office and breached the trust vested in him by facilitating the issuance of a lease to the 1st and 2nd Defendants when he knew or ought to have known that the suit property constituted alienated public land and therefore was not available for further alienation. He added that the 3rd Defendant had a duty to ascertain that the applicable laws and procedures were complied with by his officers before signing the leases. The Plaintiff took the view that the excuse offered by the 3rd Defendant was tantamount to admitting that he was negligent in the manner in which he carried out his duties. Mr. Lei expressed the opinion that the law did not afford protection to public officers for actions amounting to breach of trust or abuse of office.
7. The court directed parties to file submissions. The 3rd Defendant submitted that his role was only restricted to signing the lease documents which was purely a statutory function involving several players including the Nanyuki Municipal Council, District Lands Office, District Commissioner and



the District Surveyor. The 3rd Defendant relied on Article 236(a) of the Constitution on the point that a public officer should not be victimised or be discriminated against for having performed the functions of the office in accordance with the Constitution or any other law. He relied on Section 26 of the Land Registration Act by which the court is to take the certificate of title issued by the Registrar as prima facie evidence that the person named as proprietor of the land was the absolute and indefeasible owner subject to the encumbrances and conditions contained in the certificate.

8. The 3rd Defendant relied on Order 1 Rule 10 (2) of the Civil Procedure Rules which allows the court to order the name of any party improperly joined to be struck out and that of the person who ought to have been joined added where their presence is necessary to enable the court effectually and completely adjudicate and settle all questions involved in the suit.
9. The Plaintiff submitted that the 3rd Defendant was a necessary party as can be discerned from paragraphs 7, 9,10,11,14,15 & 19 of the plaint in which it faults the 3rd Defendant for unlawfully alienating or causing to be alienated the land known as Nanyuki Municipality block 8/860 to the 1st and 2nd Defendants. It urged that the 3rd Defendant knew or ought to have known that the law was not complied when he purported to alienate the suit land to the 1st and 2nd Defendants. The Plaintiff urged that the 3rd Defendant was a necessary party to this suit because specific allegations have been made against him which only he can answer.
10. The issue for determination is whether the court should allow the application dated 20/7/2023 and have the 3rd Defendant's name struck out from this suit. The 3rd Defendant argues that when he served as Commissioner of Lands, his role was only restricted to signing lease documents as an agent of a known principal, that is the President of Kenya. He also contends that the process of titling of land involved many government ministries and departments; and that he relied on the actions and advice of other government officers during the processes and procedures that were prevailing at the time.
11. The 3rd Defendant relied on Werrot & Company Ltd & Others v Andrew Douglas Gregory & Others Milimani High Court Civil Case No. 2363 of 1998 on the determination of who is a necessary party but failed to furnish a copy of the decision to the court. Rule 5 of Order 1 of the Civil Procedure Rules states that it shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.
12. The Plaintiff contends that the 3rd Defendant is a necessary party to the suit without whose participation the issues raised in the plaint cannot be effectually and completely adjudicated upon. Further, it contends that its case against the 3rd Defendant is premised on actions or inactions of the 3rd Defendant during his tenure as Commissioner of Lands which fell outside the scope of his legal mandate as a public officer.
13. In the plaint, the Plaintiff averred that the suit property constituted alienated government land within the meaning of the repealed Government Lands Act and was the compound of government house number MG 8 in Nanyuki town. Its case is that under that Act, neither the Plaintiff nor the Commissioner of Lands had power to alienate or allocate alienated government land. Particulars of knowledge on the part of all the Defendants are given in the plaint and include knowing that the suit land was hived out of alienated government land with a development on it, and failure to follow the procedure for alienation of government property. The Plaintiff seeks inter alia, a declaration that the allocation of the suit property to the 1st Defendant and the issuance of a lease to the 2nd Defendant was unlawful.
14. At the trial, the Plaintiff will have the onus of proving the allegations which it has made against the 3rd Defendant in the suit and if it does not do so to the standards required by law, then its claim will



fail. The 3rd Defendant is a necessary party for the court to effectually and conclusively determine the issues arising from the suit.

15. The court declines to grant the orders sought in the application dated 20/7/2023. The costs of the application will be in the cause.

DELIVERED VIRTUALLY AT NANYUKI THIS 18TH DAY OF DECEMBER 2023.

K. BOR

JUDGE

In the presence of: -

Ms. Grace Omari for the Plaintiff

Mr. Jefferson Okemwa for the 1st and 2nd Defendants

Ms. Dolphine Awuor for the 3rd Defendant

No appearance for the Interested Party

