



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 55 of 2014

GREEN SQUARE LIMITEDPLAINTIFF

VERSUS

SHELADIA ASSOCIATES.....1ST DEFENDANT

ABDUL MULLICK ASSOCIATES INC.....2ND DEFENDANT

SBI INTERNATIONAL AG (KENYA).....3RD DEFENDANT

RULING

This Ruling is in respect of the application dated 3rd August, 2016. The said application is brought by the 3rd Defendant pursuant to **Article 159** of the **Constitution**, **Order 10 Rule 11** and **Order 51 Rule I** of the **Civil Procedure Rules** and **sections 3A** and **63** of the **Civil Procedure Act**. The 3rd Defendant/applicant seeks to be removed from the proceedings herein.

The application is based on the grounds set out in the Notice of Motion and is supported by the affidavit of Evgeney Strelniker, the 3rd Defendant's Project Manager sworn on the 3rd August 2016.

The application is opposed by the Plaintiff through his Replying Affidavit sworn on the 20th September, 2016.

The background of the suit is that the plaintiff filed a suit against the 1st, 2nd and 3rd defendants who were jointly awarded the tender through the Kenya National Highways Authority for the rehabilitation of the Mau Summit- Kericho- Nyamasaria road. It is the plaintiff's case that in the course of constructing the said road, the defendants erroneously alleged that the plaintiff who was constructing a shopping mall on L.R No 631/1033 (I.R No. 6637)9 within Kericho Municipality and adjacent to the said road was encroaching on the road reserve and thereby designed the road in such a way that they were likely to trespass onto the plaintiff's land.

In order to allay any fears that the plaintiff had encroached on the road, the parties agreed to conduct a joint survey which established that no such encroachment had taken place. In spite of the report of the joint survey, the defendants did not alter the design of the road in order to stop any interference with the plaintiff's land. It is against this background that the plaintiff moved the court seeking a permanent injunction to restrain the defendants from interfering with his land and seeking an order that the defendants re-design and shift the road where it abuts the suit land in conformity with the surveyor's report.

The main issue for determination is whether the plaintiff's suit discloses any reasonable cause of action

against the 3rd respondent to warrant its continued participation in the suit.

In his submissions counsel for the 3rd defendant/applicant states that the 3rd defendant was contracted by KeNHA to rehabilitate and upgrade the Mau Summit Nyamasaria road through a separate contract from the one signed by the 1st and 2nd defendants. It is further submitted on behalf of the 3rd defendant that the construction site and designs of the road were handed over by KeNHA to the 3rd defendant who had no role to play in determining the alignment of the road. Consequently, it is submitted that the 3rd defendants have been wrongly enjoined in the suit and their name should be removed.

Order 1 Rule 10 (2) of the **Civil Procedure Rules** provides that:

“The court may at any stage of the proceedings, whether upon application of either party, and on such terms as may appear 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 a plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added”

In the case of **Pizza Harvest Limited V Felix Midigo 2013 eKLR** Justice Havelock faced with a similar situation took into account the case of **Amon V Raphael Tuck & Sons 1956 I All ER 273, in which Devlin J held at p. 286-287:**

“What makes a person a necessary party? It 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 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 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”

The definition of a necessary party is further illustrated by Havelock J in **Elisheba Muthoni Mbae V Nicholas Karani Gichoe and 2 Others (2014) eKLR** where the learned judge cited the case of **Werrot & Co Ltd & Others V Andrew Douglas Gregory and Others Nairobi HCCC No. 2363 of 1998 (unreported)** where justice Ringera observed as follows:

“The guiding principle in deciding whether to add a party is whether the presence of that party is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.”

As stated in **Sarkar’s Law of Civil Procedure, Vol 1** at **p. 531-532** there are two tests in the application of this principle:

- 1) There must be a right to some relief against the party sought to be added in the matter involved in the proceedings in question.*
- 2) It should not be possible to pass an effective decree in the absence of such a party.*

In the case of **Laisa Mpoke & 2 Others V Kajiado Central Milk Project “ The Board” and 5 Others (2012) eKLR** Justice Odunga restated what Nambuye J (as she then was) **held in Kingori V Chege & 2 Others 2002 2 KLR 243 as the principles for determining whether or not to join a party to a suit:**

- i. He must be a necessary party.*

ii. *He must be a proper party.*

iii. *In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.*

iv. *The ultimate order or decree cannot be enforced without his presence in the matter.*

v. *His presence is necessary to enable the court effectively and completely adjudicate upon and settle the questions involved in the suit*

It is submitted by counsel for the 3rd defendant that it is not a necessary party and further that the construction of the road was completed without any interference with the plaintiff’s proprietary right over the suit land. It is further submitted that the prayers sought by the plaintiff cannot be fulfilled by the 3rd defendant as KeNHA is the only statutory body empowered to satisfy such prayers.

On his part counsel for the plaintiff/ respondent submitted that the 3rd defendant did not address himself to the issues raised in the amended plaint as his application was filed before the plaint was amended. In the amended Plaint, the Plaintiff maintains that the contract for rehabilitation of the road was awarded to the defendants jointly hence his position that the 3rd defendant is a necessary party to the suit. He further submitted that the applicant had moved the court under the order 10 rule 11 which has no relevance to the orders sought. He submitted that even assuming that this was a typographical error, the court was being asked to make a summary decision on a weighty issue without hearing the parties.

He pointed out that **Order 1 rule 9** of the **Civil Procedure Rules** provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. He submitted that the application and the authorities cited by the applicant’s counsel are premised on the old dispensation where cases were determined on technicalities. Article 159 2(d) of the Constitution now enjoins the court to decide cases without undue regard to technicalities. He maintained that there was no misjoinder and the court ought to determine the suit as presented. He submitted that the 3rd defendant was looking for a shortcut as it had failed to file its documents which would have assisted the court in determining whether or not it was a necessary party to the suit.

I have considered the pleadings, notice of motion and all documents filed herein as well as the submissions by both counsels and the authorities cited to me and I agree with the respondent’s counsel that the court will only be able to make a proper determination after hearing the parties in this this case. I therefore decline to grant the application for removal of the 3rd defendant and order that the parties comply with order 11 within the next 30 days to pave way for an expeditious disposal of the suit.

The applicant shall bear the costs of this application.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF JUNE 2017.

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J. M ONYANGO

JUDGE

In the presence of:

1. Mr. Oboso for Siele for the Plaintiff.
2. N/A for the Defendant