



Ethics and Anti Corruption Commission v Maundu & 5 others; Kenya Deposit Insurance Corporation (Interested Party) (Environment and Land Case Civil Suit E162 of 2023) [2023] KEELC 22090 (KLR) (4 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22090 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E162 OF 2023
LN MBUGUA, J
DECEMBER 4, 2023

BETWEEN

ETHICS AND ANTI CORRUPTION COMMISSION PLAINTIFF

AND

PETER ELIUD MUTUA MAUNDU 1ST DEFENDANT

SWANYA LIMITED 2ND DEFENDANT

VICTOR SWANYA OGETO 3RD DEFENDANT

JANET NYANDUKO OGETO 4TH DEFENDANT

WILSON GACANJA 5TH DEFENDANT

DAIMA BANK LIMITED (IL) 6TH DEFENDANT

AND

KENYA DEPOSIT INSURANCE CORPORATION INTERESTED PARTY

RULING

1. This ruling relates to the amended Preliminary Objection dated 26.7.2023 as well as prayer 3 in the application dated 26.7.2023.

Preliminary Objection dated 26.7.2023

2. The 1st Defendant contends that this suit is statute barred and untenable in law and that the court lacks jurisdiction to adjudicate the criminal offence of corruption. In his submissions dated 16.10.2023, the 1st defendant argues that the court with the requisite jurisdiction to adjudicate over the matter of fraud,



- illegality, and abuse of office is the Anti-Corruption and Economic Crimes Court as contemplated by Section 2, 3, 4, 45 (2) and 46 of the [Anti-Corruption Crimes Act](#), 2003.
3. He further submits that since the certificate of title in contention I.R 65477 LR No. 209/12118 was registered on 10.3.1995, the suit is outside the statutory limitation of 12 years therefore it is statute barred under Section 7 of the [Limitation of Actions Act](#).
 4. The 1st Defendant further argues that the doctrine of *stare decisis* limits the jurisdiction of this court as the Court of Appeal decreed a consent order dated 9.7.2014 in Civil Appeal No. 270 of 2001 between the 2nd Defendant and Daima Bank whose subject matter is the suit property herein.
 5. In opposition to the 1st Defendant's Preliminary Objection, the Plaintiff filed submissions dated 1.11.2023 arguing that Sections 41 and 42 of the [Limitation of Actions Act](#) excludes the application of the said Act on matters concerning government land, including proceedings towards recovery of government land.
 6. It is further submitted that statutory Limitation does not apply to anti-corruption matters. The case of [Ethics & Anti-Corruption Commission v Gitbaiga & 4 others](#) (Environment and Land Case Civil Suit E087 OF 2022) [2022] KEELC 2516 (KLR) (4 July 2022 Ruling) was cited.
 7. It further submitted that the dispute between the parties is the ownership and title to the suit property, of which the 2nd Defendant claims ownership to which the Plaintiff disputes and avers the same belongs to the state and is vested in the judiciary thus only this court can issue the prayers sought.
 8. It is also submitted that the setting out of particulars of illegality in the plaint by the Plaintiff cannot be faulted as this is in tandem with the provisions Order 2 Rule 10 (a) of the [Civil Procedure Rules](#) and does not amount to a trial of criminal offences. To this end, the case of [Vijay Morjaria v Nansingh Madhisingh Darbar & another](#) [2000] eKLR was cited.
 9. The 2nd - 4th Defendants did not file any response.
 10. Does the 1st Defendant's Preliminary Objection raise pure points of law as required in [Oraro v Mbaja](#) [2005] eKLR?. To answer the question, the court will determine whether this court has jurisdiction to hear the dispute and whether the Plaintiff's claim is statute barred.
 11. I have considered the Plaintiff's claim as set out in its plaint dated 4.5.2023. It is elaborate and sets out various facts, and allegations including particulars of illegality, fraud, abuse of office and breach of trust against the Defendants. Be that as it may, the dispute concerns ownership of parcel LR 209/12118 IR 65477. Under Section 11(j) of the [Ethics and Anti-Corruption Commission Act](#), No. 22 of 2011, the Plaintiff has a mandate to file suit for recovery of public property belonging to the Government of Kenya. It has previously filed similar suits which the court has determined. See [Ethics & Anti-Corruption Commission v Ann Wanjiku & 3 others](#) [2021] eKLR. Thus this court has jurisdiction to determine the issues raised in the plaint under Article 162 (2) (b) of the [Constitution](#) as read with Section 13 of the [Environment and Land Court Act](#).
 12. On the question of whether the claim is statute barred, I find that the Plaintiff is not subjected to the [Limitation of Actions Act](#) by virtue of Section 42 of the [Limitation of Actions Act](#) as read with Section 74 of the [Anti-Corruption and Economic Crimes Act](#), 2003.
 13. On the issues relating to the Consent recorded in Civil Appeal No. 270 of 2001, I find that the court did not determine the veracity of the title herein, thus this court has jurisdiction to determine that issue.
 14. In the end, I find that the Preliminary Objection is not merited, the same is hereby dismissed with costs to the plaintiff.



Application Dated 26.7.2023

15. The application dated 26.7.2023 was filed by the Interested Party seeking orders for Daima Bank to be joined in this suit as a defendant and that its name (Interested Party) be struck out from these proceedings for being improperly joined.
16. On 4.10.2023, this court allowed the prayer for joinder, where Daima Bank LTD (IL) became the 6th Defendant. The remaining prayer for determination is whether the Interested Party should be struck out from this suit.
17. The application is supported by the affidavit of David Irungu, an employee and director in charge of Bank Resolution of the Interested Party sworn on 26.7.2023. He avers that the Interested Party is not a proper party to the suit as Daima Bank (IL) has the legal capacity to sue and be sued. He argues that once the Interested Party is appointed as liquidator, it is an agent of the bank and cannot be sued/held liable for actions of the bank and that that the Deposit Insurance Act No. 10 of 2012 draws a distinction between the Interested Party and the institutions in liquidation by allowing it to sue in the name of the institution in liquidation and not its name.
18. In their submissions dated 17.10.2023, the applicant argues that under the provisions of Section 55 (1) (o), 45 (5) and 50 (5) of the Kenya Deposit Insurance Act, it cannot be held liable for liabilities and obligations of the 6th Defendant whether before or after liquidation. To that end, the case of Andrew Muma and Charles Kanjama Trading as Kanjama Advocates & others v Deloitte & Touche East Africa & 5 others [2020] eKLR as well as the case of Atul R shah & another v Imperial Bank Limited & another [2021] eKLR were relied upon.
19. The application is opposed by the 1st Defendant vide the replying affidavit sworn on 3.10.2023. He avers that the Interested Party is an integral party to this suit as it was appointed by the Central Bank of Kenya on 13.6.2005 as the liquidator of the 6th Defendant. That there is also a binding Court of Appeal consent dated 9.7.2014 where the 2nd Defendant herein and the 6th Defendant were ordered to dispose off the suit property. It is contended that the 6th Defendant through the interested party sought review of the consent order dated 9.7.2014 which application is pending delivery of a ruling before the Court of Appeal. I did not find any submissions of the 1st defendant in regard to the application.
20. The application is also opposed by the Plaintiff vide the affidavit sworn on 3.10.2013 by Charity Muniu, an investigator employed by the Plaintiff. She avers that the Interested Party is an Integral party to the suit since it took over the affairs of the 6th Defendant and holds title to the suit property.
21. In their submissions dated 2.11.2023, the plaintiff argues that the Interested Party has a duty to ensure that any orders issued as against the 6th Defendant with regard to title to the suit property are enforced, noting that the Interested Party is in possession of the original title. The plaintiff relies on the cases of; Habiba W Ramadhan & 7 others v Mary Njeri Gitiba [2017] eKLR, John Harun Mwau v Simone Haysom & 2 others; Attorney General & 2 others (Interested Parties) 2021 eKLR as well as the case of Communications Commission of Kenya and 4 others v Royal Media Services Limited & 7 others [2014] eKLR.
22. The 2nd - 4th Defendants did not file a response to the application.
23. The provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules allows this court to join or remove a party in a suit. The Plaintiff has sued the Interested Party on the basis that it is in possession of the title to the suit property, thus any orders with regard to the title can only be enforced by it. The Interested party on the other hand avers that it is only an agent of the 6th Defendant as provided under Section



45 (5) of the *Kenya Deposit Insurance Act*, and that under Section 55 (5) of the said *Act*, it does not incur liabilities on its own account.

24. In *Joseph Njau Kingori vs. Robert Maina Chege & 3 others* [2002] eKLR, the court provided the guiding principles on the issue relating to joinder of an Interested Party as follows;

“..... (4) The ultimate order or decree cannot be enforced without his presence in the matter;
(5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit”.

25. The applicant has not denied that it was in charge of the affairs of the 6th Defendant by the time a consent to dispose off the suit property was entered into on 9.7.2014. The applicant has also not refuted the averment made by the plaintiff that it is in possession of the original title to the suit property. Further, it is noted that the matter is at the infancy stage and the court is not seized of the nature of the defence that will be proffered by the 6th defendant. Thus at this stage of the trial, the court cannot delve into the issues of liability.

26. In the final analysis, I find that the applicant is a necessary party to these proceedings so as to enable the court to effectively and to completely adjudicate the dispute at hand. I therefore find that prayer 3 in the application is not merited and is disallowed. Each party is to bear their own costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF DECEMBER, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mr. Wambugu holding brief for M/s Wambugu for Plaintiff

Kaki Mbula Cheptoo holding brief for Rao for 2nd – 4th Defendants

M/s Kungu for 6th Defendant and the Interested Party

