



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 218 OF 2013

ETHICS AND ANTI-CORRUPTION COMMISSION .. 1ST PLAINTIFF

KENYA PORTS AUTHORITY.....2ND PLAINTIFF

VERSUS

BONIFACE KATANA KILAVERI1ST DEFENDANT

ZABLON AGWATA MABEYA..... 2ND DEFENDANT

NATIONAL LAND COMMISSION..... 3RD DEFENDANT

RULING

(Application by a party seeking to be joined to the suit as third plaintiff; original suit filed by one plaintiff; subsequently another party sought to be joined as second plaintiff which application was allowed and filed a separate plaint; later an amended plaint filed consolidating in terms of the second plaint; applicant now wishing to be joined to the suit and annexing a draft plaint separate from the amended plaint on record; 1st defendant objecting to the joinder of the applicant; issue in the suit being a lease which the plaintiffs contend was fraudulently issued to the 1st defendant because the land is public land vested in the 2nd plaintiff and leased to the applicant; applicant therefore having a clear interest in the subject matter of the suit and qualifies to be joined as plaintiff; multiplicity of plaints; rules not contemplating a situation where there are multiple plaints; plaintiffs directed to agree on the pleadings and file one amended plaint)

1. The application before me is that dated 26 February 2021 filed by African Marine and General Engineering Company Limited (the applicant). It seeks orders to be joined in this suit as the 3rd plaintiff and to have an annexed draft plaint to be deemed as duly filed, or in the alternative, be allowed 14 days to file the said plaint. The application is opposed.

2. To put matters into context, this suit was commenced on 27 September 2013 by the Ethics and Anti-Corruption Commission (EACC) as sole plaintiff. The suit was filed against two defendants, respectively, Boniface Katana Kilaveri and the Commissioner of Lands. EACC pleaded that the land Mombasa Island/Block XLVIII/45 is vested in Kenya Ports Authority (KPA) and is leased to the applicant for a period of 99 years from 1 January 1960. It was further pleaded that the applicant subsequently, with the agreement of KPA, and at its own expense, reclaimed from the sea, some land around the demised parcel to facilitate berthing of sea going vessels, which led to creation of two land parcels being Mombasa Island/Block XLVIII/145 and 146, and KPA granted subleases to the applicant for a term of 59 years from 1 January 1990. Why EACC filed suit is because the Commissioner of Lands allocated to the 1st defendant a lease over the same properties for a period of 99 years from 1 November 2012. It was the pleading of EACC that this allocation was fraudulent and illegal, and was likely to occasion loss to KPA, the public and the Republic of Kenya. Various orders were sought in the original plaint but they more or less seek a cancellation of the lease to the 1st defendant. There is also a prayer seeking demolition of a wall which was said to be interfering with the operations of the applicant.

3. The 1st defendant appointed counsel and filed an application dated 25 November 2013, where he argued that EACC has no locus standi. That application was dismissed in a ruling delivered by Mukunya J, on 5 June 2014.

4. On 14 July 2014, KPA filed an application seeking to be joined in the suit as 2nd plaintiff. The application was allowed on 23 October 2014. On 13 November 2014 KPA, now 2nd plaintiff, filed what it titled as "Plaint of 2nd Plaintiff." The substance of the plaint remained the same but it added the National Land Commission as 3rd defendant and there are some additional pleadings to reflect this and loss to KPA in the body of that plaint. The 1st defendant filed defence on 2 December 2015. It inter alia pleaded that the plaint by KPA is irregular and what ought to have happened is for the original plaint to be amended. An amended plaint was filed on 15 September 2017 which more or less followed the plaint of the 2nd plaintiff but now substituted the Commissioner of Lands with the person of Zablon Agwata Mabeja. The

matter came before me for directions on 18 November 2021 and there was consensus that the matter will proceed on the basis of the amended plaintiff. Subsequently, the 1st defendant filed an amended defence to this plaintiff on 28 January 2019 and on 11 November 2019 filed a notice of claim for indemnity against the 2nd and 3rd defendants. That is where the case stood when this application was filed.

5. The core basis of the application is that it is the applicant who holds leases to the disputed properties. The supporting affidavit is sworn by Alnoor Habib Jiwan, who has annexed documents to support this position. He has also annexed what he refers to as the “Third Plaintiff’s Plaintiff” which is the draft plaintiff that it seeks to be allowed admitted or to later file.

6. Only the 1st defendant opposed the application through Grounds of Opposition. He complains that it is totally anathematic and unwholesome to entertain a new party in these proceedings armed with a totally new plaintiff, to litigate its own cause, in addition to that of both EACC and KPA. He also questions whether several advocates should appear for the different plaintiffs in the matter.

7. I have taken note of the submissions made by Ms. Akwana, learned counsel for the applicant, and Mr. Buti, learned counsel for the 1st defendant. Ms. Akwana submitted that her client wishes to join the suit to enable the court effectually and completely adjudicate upon and settle all questions in the case without a multiplicity of proceedings. She referred me to Order 1 Rule 1 on who may be joined in a suit as plaintiff and Order 1 Rule 10 (2) on joinder of parties. She submitted that her client has sufficient interest in the subject matter of the suit. She referred me to various authorities including the case of *Ahmed vs Commissioner of Customs & Excise (2000) 2 EA 293* where the court of appeal dealt with the issue of two plaintiffs in a suit.

8. On his part, Mr. Buti argued that all along EACC has been litigating for and on behalf of the applicant and the pleadings already on record are for the benefit of the applicant. He submitted that the applicant’s proper position ought to be that of witness and a witness does not need to be made a party before he/she can participate. Counsel also brought up the issue that there cannot be two or more plaintiffs in the same case. He submitted that this is a state of affairs that should be frowned upon and such eventuality will deny the 1st defendant a fair hearing. In his words, “if the 1st defendant surmounts the traps of the 1st plaintiff, then he inevitably falls into the snares of the 2nd plaintiff. If he avoids both, then there is the dragnet of the third plaintiff lying in wait, to contend with.” He submitted that if the applicant wishes to come into the suit to replace EACC then it should openly say so. He argued that under no circumstance should both be allowed to litigate on the same cause against one individual. Counsel distinguished the decided cases cited by Ms. Akwana and submitted that they do not apply for the unique circumstances of this case.

9. I have taken all the above into consideration. What I have is an application by a party seeking to be joined to this suit as 3rd plaintiff. I am alive to the fact that the 1st defendant has strongly opposed the joinder of the applicant to the suit, but it is apparent to me that the applicant has a very direct connection to the disputed properties, for it purports to hold leases to the same. The applicant can as well file a separate suit seeking cancellation of the leases of the 1st defendant and nobody will say that it has no locus or has no cause of action. I am persuaded that the applicant passes the test of who may be joined as plaintiff which is set out in Order 1 Rule 1 that provides as follows :-

All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

10. The relief sought by the applicant is the same relief that the other plaintiffs seek. The case of the applicant is based on the same transaction, a grant of a lease to the 1st defendant, which the two existing plaintiffs also challenge. Having a lease of its own, and as I have alluded earlier, nothing stops the applicant from filing a separate suit, but such suit will bring about the same questions of law and fact that are already in this suit. This would only lead to a multiplicity of suits and will in fact prejudice the 1st defendant more, for instead of defending one suit, the 1st defendant will now be forced to defend two. I am thus inclined to allow the joinder of the applicant to this suit as third plaintiff.

11. The other issue which I think disturbs the 1st defendant is the presence of another plaintiff. The rules actually only contemplate a single plaintiff and nowhere have I seen the rules addressing two plaintiffs in one suit. Both counsel addressed me quite substantially on the Court of Appeal decision of *Ahmed vs Commissioner of Customs*. In that case, a suit was instituted by one plaintiff. There was later issued an order allowing the joinder of two other persons as plaintiffs. What was filed was a document headed “plaint for second and third plaintiffs.” The Court of Appeal in addressing this issue found that no new suit was filed in the registry and the amendment done amounted to a technical amendment which did not prejudice the respondents. It doesn’t come out clearly in the judgment, but it appears to me that what was titled “plaint for second and third plaintiffs” was actually an amended plaintiff, for there had earlier been granted leave to amend the original plaintiff.

12. My view is that where a new plaintiff is added, then what should happen is for the original plaintiff to be amended, not for a completely new plaintiff to be filed. It follows that if a completely new plaintiff is filed, then the defendant will have to file two defences, one to the first plaintiff, and the other to the second plaintiff, for the two plaintiffs may be drafted differently. You can imagine the scenario where there are multiple plaintiffs added to a case and each comes armed with a different plaintiff. It is of course easy where the additional plaintiff is represented by the same counsel who appears for the original plaintiff. The issue can however become complicated if the additional plaintiff is being represented by different counsel. Thankfully, this is not a common occurrence, but in such circumstance, the parties need to agree on how the amendment of the plaintiff is going to be effected, and all should sign the amended plaintiff to demonstrate that they are bound by it. The defendant can then file defence to this amended plaintiff.

13. This is exactly what I will direct for this case. I have already stated that I have allowed the joinder of the applicant in this case. I observe that all plaintiffs are now being represented by three different counsel. Let them agree on one amended plaintiff and file it jointly with each signing the amended plaintiff. I direct that the amended plaintiff be filed within the next 14 days and be served in the usual manner. After the amended plaintiff is filed, the defendants can file a defence to it, if they have not already filed a defence, or if they have, they can file an amended defence within the time stipulated in the rules.

14. I make no orders as to costs.

15. Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF JANUARY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.