



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 116 OF 2014

NOORDIN ADAMALI.....1ST PLAINTIFF/APPLICANT

NAJMUDDIN ADAMALI.....2ND PLAINTIFF/APPLICANT

VERSUS

SUNSHINE SUPERMARKET LTD.....1ST DEFENDANT/RESPONDENT

PIYUSH RATILAL SHAH.....2ND DEFENDANT/RESPONDENT

AND

DIRECTOR OF PHYSICAL PLANNING1ST INTERESTED PARTY

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY....2ND INTERESTED PARTY

KENYA POWER AND LIGHTING COMPANY.....3RD INTERESTED PARTY

RULING

Coming up before me for determination is three applications as follows:

1. The 2nd Defendant's Notice of Motion dated 5th March 2014;
2. The 3rd Interested Party's Notice of Motion dated 13th March 2014; and ,
3. The 1st Interested Party's Notice of Motion dated 24th March 2014.

The 2nd Defendant's Application seeks for this suit against the 2nd Defendant be struck out and for costs of the suit and the Application to be awarded to the 2nd Defendant. It is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 2nd Defendant, Piyush Ratilal Shah, sworn on 5th March 2014 in which he averred that whilst he is a Director of the 1st Defendant, it is the 1st Defendant which is the current registered proprietor of L.R. No. 1870/111/499 (hereinafter referred to as the "suit property") which was previously owned by him. He produced a copy of the Certificate of Title of the suit property to support this assertion. He further averred that the Development on the suit property which is the subject matter of this suit is being undertaken by the 1st Defendant and not him in

his individual capacity. He further contended that this suit does not disclose any known cause of action against him.

The 3rd Interested Party's Application seeks for orders that the 3rd Interested Party be struck out from this suit and that the costs of this Application be borne by the Plaintiffs. The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of David Makezi, the Legal Services Manager of the 3rd Interested Party, sworn on 13th March 2014 wherein he stated that the 3rd Interested Party has been wrongfully and improperly named in this suit as an Interested Party yet it has no interest in any claim or reliefs sought by the Plaintiff in this suit. He further swore that since the repeal of the Wayleaves Act, all wayleaves and communal rights of way are created solely by the National Land Commission on an application by a party or public entity as provided for under Sections 143 and 146 of the Land Act, 2012. He further averred that the 3rd Interested Party had not applied to the National Land Commission for the creation of any wayleave or common rights of way on the suit property or at all and as such has no interest in the dispute between the parties herein or at all. He further added that no liability and/or allegation of breach, impropriety and/or negligence has been pleaded as against the 3rd Interested Party and no orders, prayers or reliefs have been sought as against it and that it is only proper and fair that the 3rd Interested Party be removed from the proceedings herein.

The 1st Interested Party's Application seeks for the Complaint dated 6th February 2014 to be struck out, that the case against the 1st Interested Party be dismissed and that the Plaintiffs do bear the costs of the Application. The Application is premised on the grounds appearing on the face of it which are to the effect that the Complaint does not illustrate any cause of action as against the 1st Interested Party as the particulars of illegality set out therein are based on actions of the Nairobi County Government and not of the Director of Physical Planning.

All three applications raise the question of who may be joined in this suit either as a defendant as in the case of the 2nd Defendant or as an interested party as in the case of the 1st and 3rd Interested Parties. If I may commence with the issue of the joinder of the 2nd Defendant, the relevant legal provision setting out who may be joined as a defendant in a suit is **Order 1 Rule 3 of the Civil Procedure Rules, 2010** which provides as follows:

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

The question therefore is whether there exists any right to relief as against the 2nd Defendant. It is not disputed that the suit property belongs to the 1st Defendant. The dispute to be resolved in this suit is the activities being conducted on the suit property. According to the Plaintiffs, who are the owners of the property adjacent to the suit property, their enjoyment of their property is being impaired by the activities of the defendants as well as the failures on the part of the interested parties. In the Complaint, the Plaintiffs have set out particulars of illegality in relation to the Physical Planning Act, particulars of illegality in relation to the Environmental Management and Coordination Act, particulars of illegality in relation to the Building Code, particulars of violation of their right to a clean and healthy environment and particulars of breach of right to privacy. After careful perusal of the Complaint and particularly the reliefs set out, I do not see any specific relief directed at the 2nd Defendant. The Complaint is also silent as to the Plaintiffs' grievances against the 2nd Defendant. It is clear that the 2nd Defendant is a Director of the 1st Defendant and that the suit property was once owned by the 2nd Defendant but has subsequently been transferred to the 1st Defendant. It is not therefore clear why the 2nd Defendant has been sued in his personal capacity alongside the 1st Defendant. I find that no right to relief exists in respect to the 2nd Defendant. Accordingly, I find that the 2nd Defendant is wrongly enjoined in this suit and proceed to allow the 2nd Defendant's Application with costs to the 2nd Defendant.

Turning now to the 1st and 3rd Interested Parties, the question is who may be enjoined in a suit as an interested party and do the 1st and 3rd Interested Parties qualify to be enjoined in this suit as such. Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 defines an interested party as a party whose involvement is necessary for the court to “effectually and completely adjudicate upon and settle all questions involved in the suit”. Further, the Supreme Court of Kenya decision in the case of **Trusted Society of Human Rights Alliance versus Mumo Matemo & 5 Others (2014) eKLR** defines an interested party as follows:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause.”

Unlike in the above Supreme Court decision cited above where parties were seeking to be enjoined in the suit as interested parties, in the present suit, the 1st and 3rd Interested Parties are seeking to have their names struck out of the suit altogether. Therefore, in deciding whether or not to grant their request, I am guided by the provisions of Order 1 Rule 10(2) set out above which alludes to the questions before the court for resolution. If the presence of these two parties is required for this purpose, then they cannot be struck out from the suit but if their presence is not necessary for the court to “effectually and completely adjudicate upon and settle all questions involved in the suit”, then they can be released from this suit. I have already stated the questions before the court in a summary fashion earlier. These are issues of illegality in relation to the Physical Planning Act, particulars of illegality in relation to the Environmental Management and Coordination Act, particulars of illegality in relation to the Building Code, particulars of violation of the Plaintiffs’ right to a clean and healthy environment and particulars of breach of right to privacy. After careful consideration of the questions raised in this suit, I am reasonably satisfied that the presence of the 3rd Interested Party is not necessary for this court to adjudicate upon and settle the same. I am satisfied that the 3rd Interested Party is not involved in this dispute at all and should therefore be granted it’s request to have its name struck out and I so find. The Plaintiff shall bear the 3rd Defendant’s costs. When it comes to the 1st Interested Party, there are questions raised by the Plaintiffs in their Plaint which touch on the authorisations purportedly given to the 1st Defendant to construct the development complained of in the suit property. Those authorisations emanate from the 1st Interested Party who delegated this authority to the Nairobi County Government. Under the Physical Planning Act, Cap 286, the 1st Interested Party is responsible for, inter alia, formulating national, regional and local physical development policies, guidelines and strategies as well as advising the Commissioner of Lands and local authorities on the most appropriate use of land including land management. In light of this, this court will no doubt require the participation and input of the 1st Interested Party in determining whether or not the 1st Defendant committed any illegalities in constructing the development complained of by the Plaintiffs on the suit property. To that extent therefore, I decline to strike out the 1st Interested Party from this suit. I therefore dismiss the 1st Interested Party’s Application with no order as to costs.

DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2014.

MARY M. GITUMBI

JUDGE