



Esikar Gardens and Hotels Limited v Antona Investments Company Limited (Environment & Land Case E014 of 2022) [2025] KEELC 149 (KLR) (27 January 2025) (Ruling)

Neutral citation: [2025] KEELC 149 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E014 OF 2022
MN MWANYALE, J
JANUARY 27, 2025**

BETWEEN
ESIKAR GARDENS AND HOTELS LIMITED APPLICANT
AND
ANTONA INVESTMENTS COMPANY LIMITED RESPONDENT

RULING

1. Before court for determination is the Notice of Motion dated 29th July 2024 moved by the Plaintiffs for orders that: -
 - i. That the court be pleased to order joinder of Mr. Geoffrey Makan Asanyo as the 2nd Defendant in the suit.
 - ii. That the court be pleased to order joinder of Mr. Ombati Samson Omwanza and Nyasimi Advocates as the 3rd Defendant in the suit.
 - iii. The Applicant be and is hereby granted leave to amend its Plaint in terms of the Draft Amended Plaint annexed to its application.
 - iv. That the Draft Amended Plaint be and is hereby deemed as duly filed and served upon payment of requisite court fees within 7 days of this ruling costs in the cause.
2. The application is grounded on grounds interalia,
 - i. That the 2nd and 3rd Intended Defendants, Geoffrey Makana Asanyo and Ombati Samson Omwanza, respectively are necessary parties to enable the court to effectively and completely adjudicate upon and determine the suit.



- ii. That the resultant joinder and amendment will assist the court to determine the true substantive merits of the case and adjudicate on all issues in dispute once and for all, and no prejudice will be suffered if the application is allowed.
3. The Application is supported by the affidavit of Mr. Charles Talengo Sunkuli who reiterates the grounds in support of the application, and depones further
- i. That the Plaintiff vide an Agreement for sale dated 21.09.2018 purchased 40.46 Ha (100 acres) which were to be excised from Narok/Transmara/Intona/5 measuring 400 acres at a purchase price of Kshs.15,000,000/=
 - ii. That the 2nd Intended Defendant is the sole director/shareholder of Intona Investments Limited;
 - iii. That vide a decree in Kilgoris Environment and Land Case No. 007/2007, Vincent Kantet Kapeen Vs. Geoffrey Makana Asanyo, Intona Investments Limited the title Narok/Transmara/5 was cancelled and re-issuance was ordered to be in the name of Estate of John Lemuita Naiguran and Geoffrey Makana Asanyo.
 - iv. That pursuant to the decree the 2nd Intended Defendant shall now be one of the registered proprietors of Narok/Transmara/Intona/5 in place of Intona Investments Limited the 1st Defendant as it was at time of execution of the Agreement for sale of the property.
 - v. That Ombati Samson Omwanza acted as the joint Advocate for the Plaintiff and Defendant during the sale and purchase, and the 1st Defendant has alleged a refund of the deposit of Kshs.10,000,000 which was paid to the 1st Defendant as the vendor in the transaction.

In addition, the Applicant has exhibited 3 annexures in the supporting affidavit.

4. The 2nd and 3rd Intended Defendant oppose the application, they have filed their respective Replying Affidavits.
5. In opposition, the 2nd Intended Defendant deposes
- i. That he is a stranger to the agreement between the Plaintiff and the 1st Defendant, and had no obligations that accrue from the Agreement, and no averment in the Draft Amended Plaintiff, indicative of an obligation not performed by him.
 - ii. That the judgment in ELC No. E007/2022 was stayed pending hearing and determination of an appeal lodged by the 1st Defendant.
 - iii. That only the 1st Defendant is capable of transferring the 100 acres if the court so directs or the refund the of Kshs.10,000,000/=.
 - iv. That there is no ground that has been established for joinder, as there is no prayer sought against him.
6. On his part the 3rd Intended Defendant opposes the application and deposes interalia
- i. That he had no role in the transaction between the parties as he was the Advocate who drew the Agreement for sale, and was not a party to the transaction and his presence in the suit will not assist the court to reach a determination on the crux of the matter; but and
 - ii. That he is ready and willing to appear before court as a witness in relation to the transaction in question.



7. By way of a further affidavit, the Applicant through the deponent Charles Talengo Sunkuli, depones further
- i. That the 2nd Intended Defendant is the sole director/shareholder of the 1st Defendant and that in the judgment delivered in case number E007/2022, the title belonging to the 1st Defendant was cancelled and it was ordered that the same be registered in the joint names of the 2nd Intended Defendant and the Estate of John Lemuita Naigun and
 - ii. That no stay order against the judgment had been exhibited.
8. The Application was canvassed by way of written submissions, which the court has considered and summarizes them as follows: -

On behalf of the Applicant, 4 issues for determination were framed and it was submitted that Section 100 of the *civil procedure Act* granted the court with powers to allow amendments for purposes of determining the real question or issue raised by or depending of the proceeding; Further that Order 8 Rule 3, provides for amendment while Order 1 Rule 8 provided for who may be joined as a defendant.

9. On issue 1, the Applicant submits that the presence of the 2nd Intended Defendant was critical because their presence is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter. Reliance was placed on the decisions in the cases of Habiba W. Ramadhan and 7 Others Vs. Mary Njeri Gitiba (2017) eKLR, as well as the case of Andy Forwarders Service Limited Vs. Price Waterhouse Coopers Limited and Another (2012) eKLR.
10. On issue 2 on the joinder of the 3rd Intended Defendant, the Applicant submits that paragraphs 5, 6, 7 and 8 of the 3rd Intended Defendant's replying affidavit, raises issues that can only be addressed by the 3rd Intended Defendant and the Applicant places reliance on the decision in the case of Njweri Development Group and 16 Others Vs. Matumaini Ventures Limited and Another. On the proposition of a joinder of an Advocate as a principal party to a suit.
11. The Applicant further places reliance on the decision by the Court of Appeal in the case of Mehul Nemchand Haria Vs. Hombé Saw Mills Civil Appeal No. 16/2004 on the joinder of a single partner in a firm. On the strength of the above submissions, the Applicant submits that the application be allowed.
12. The 2nd Intended Defendant in his submissions has framed and submitted on two issues; to wit, whether the 2nd Intended party should be joinder in the suit, and who bears the costs of the application.
13. On issue number 1, the 2nd Intended Defendant, submits that a contract cannot confer rights or obligations on anyone who is not a party to it. In support of this, the 2nd Intended Defendant cites the decision in the case in Agricultural Finance Corporation Vs. Lengetia Limited.
14. The 2nd Intended Defendant further submits that a company is a separate legal entity from its owners, unless there is lifting of the corporate veil through the Established procedures and cites the decision in the case of Multichoice Kenya Limited Vs. Mainkam Limited and Another.
15. The 2nd Intended Defendant further submits that the court to take judicial notice of the fact that the judgment in Kilgoris ELC E007/2022 was stayed by the Court of Appeal in Nakuru Civil Appeal No. E014 of 2024.

That the said stay order has not been set aside hence the property is still in the name of the 1st Defendant who is the property defendant in the suit.



16. On costs, the 2nd Intended Defendant submits that upon dismissal of the application, costs be awarded to him and cites the decision in the case of Jasbir Singh Rai and 3 others Vs. Tarlochan Singh Rai and 4 Others.
17. On his part the 3rd Intended Defendant did not file submissions on the CTS and neither were hard copies availed hence no submissions in respect of the 3rd Intended Defendant were considered by the court, only the Replying Affidavit was considered.

Issues for Determination

18. Having analyzed the application, the affidavit in support and in opposition to the application, the submissions and the authorities cited as well as the law, the court frames the following as issues for determination.
 1. Whether or not the applicant has made out a case for joinder of
 - i. The 2nd Intended Defendant.
 - ii. The 3rd Intended Defendant.
 2. What orders ought to issue?
 3. Who bears the cost of the application?

Analysis and Determination

19. The application before court is for joinder of two Intended Defendants and upon their joinder an amendment to the plaint in terms of the draft annexed Plaint. The application is brought under Order 8 Rule 3 and Order 1 Rule 3 of the Civil Procedure Rules.
20. The cited provisions of the law empower a court to consider and allow an application for amendment, and provides who can be joined in a suit as a defendant.
21. On issue number 1, the gravaman of the Applicant's submission for joinder of the 2nd Intended Defendant is that there is a judgment delivered in Kilgoris ELC Case No. E007/2022, where the court cancelled the title of the 1st Defendant and directed a reissuance of the title in the joint names of Estate of John Lemuta Naiguran, and the 2nd Intended Defendant, the 2nd Intended Defendant submits that the said judgment was stayed so as to enable an appeal be determined, and that in view of the principle of privity of contract, the 2nd Intended Defendant having not been a party to the Agreement for sale between the Plaintiff and the 1st Defendant, cannot legally execute any transfers if the appeal were to fail.
22. The 2nd Intended Defendant did not exhibit the stay order but urged the court to take judicial notice of the same. Indeed, the court takes judicial notice of the stay orders issued since the appeal has not been heard and determined, with the result of setting aside the decision in ELC No. E007/2022, the said judgment although stayed is still valid and being declaratory in nature has the consequences of pronouncing the proprietary rights in Narok/Transmara/Intona/5 as between the 1st and the 2nd Intended Defendant. The 2nd Intended Defendant by virtue of the said judgment is now a joint owner of Narok/Transmara/Intona/5 and since the suit involves the said property, he ought to be joined in the suit, as it stands, as he has beneficial interests in the suit property.
23. The issue of lack of privity of contract is a defence that is readily available to the 2nd Intended Defendant and is to be considered during full trial and not at the interlocutory stage as is this application.



24. In respect of issue number 1, the Applicant has demonstrated that by virtue of the judgment in case No. E007/2022, the 2nd Intended Defendant has proprietary interests in the suit property and ought to be made a principal party, a defendant and the court answers, issue number 1, in the affirmative.
25. On issue number 2, the Applicant case is that the 3rd Intended Defendant in his capacity as an Advocate acted as the joint Advocates for the parties (the vendor and the purchaser) in the conveyance that has led to the filing of this suit. Allegations of unethical and unprofessional conduct have been made against the 3rd Intended Defendant to which he responded that this court lacks jurisdiction to handle the same. Indeed, correspondences authored by the 3rd Intended Defendant in respect of the failed transaction have been annexed in the further affidavit and the same need to be interrogated at trial.
26. Do the allegations of professional misconduct against the 3rd Intended Defendant warrant his joinder as a principal party to this suit? I think not, for the reasons that the 3rd Intended Defendant acted as an Advocate in the transaction, thus was an Agent of a disclosed principal, the 1st Defendant who is already a party, to this suit.
27. The Applicant has placed reliance in the decision in the case of Nyweri Development Group and 16 Others Versus Matumaini Ventures Limited where an Advocate was joined as a principal party in a suit, and the learned judge stated that the doctrines of privity of contract and agency were not available to the Advocate. The court finds that the circumstances in that case were different, in that the Advocate therein had been accused of fraud and other issues that touched on criminality, and the High Court was vested with jurisdiction to handle the issues of criminality. In this case, the Advocate has been accused of bias, unethical and professional misconduct which are under the jurisdiction of the Advocates Complaints Commission and not this court, and the court notes from annexure CTS 4 in the further affidavit, that such a complaint has already been lodged at the Advocates Complaints Commission, which is the statutory body with the said jurisdiction.

In light of the above the court does not find merit in the application for joinder of the 3rd Intended Defendant.
28. The 3rd Intended Defendant has volunteered to be a witness so as to shed light on the transaction and having acted in the transaction, the Plaintiff is at liberty to call the 3rd Intended Defendant as a witness in the matter.
29. Thus, the court answer issue number 2, in the negative.
30. Having found sufficient grounds for the joinder of the 2nd Intended Defendant and having found no grounds for the joinder of the 3rd Intended Defendant, the application party succeeds in respect of joinder of the 2nd Intended Defendant but is declined on the joinder of the 3rd Intended Defendant.
31. Having found no grounds for joinder of the 3rd Intended Defendant, the prayer for joinder of the Law Firm equally fails.

Disposition

32. The Applicant is thus granted leave to Amend its Plaint so as to join the 2nd Intended Defendant, but not the 3rd Intended Defendant, Amended Plaint shall not be in the form of the Draft Amended Plaint annexed to the application.
33. Having partially succeeded in the application, the costs of the application shall abide by the outcome of the case.
34. Orders accordingly.



DATED AND DELIVERED AT KILGORIS THIS 27TH DAY OF JANUARY, 2025

HON. M.N. MWANYALE

JUDGE

In the presence of:

Mr. Muiruri for the 1st Defendant and the 2nd Intended Defendant

Mr. Michuki for the 3rd Intended Defendant

Ms. Wanjiku h/b for Ms. Motintent for the Plaintiff

C/A Emmanuel.

