



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL CASE 210 OF 2008

DAVID ANUNDAPLAINTIFF

VERSUS

JOHN KARU (Sued in his own capacity
and as Chairman of Kileleshwa Githunguri
Road Residents Association **DEFENDANT**

MARGARET OWINO (Sued in here own capacity
and as Secretary of Kileleshwa Githunguri
Road Residents Association
2ND DEFENDANT

EUNICE MIMA (Sued in her own
capacity and as Treasurer of Kileleshwa
Githunguri Road Residents Association **3rd DEFENDANT**

RULING

The defendants /applicants hereinafter referred as the applicants has filed a Notice of Motion dated 15/6/2011, under Order 1 Rule 10(2) of the Civil Procedure Rules and section 3A of the Civil Procedure Act and all other enabling provisions of law seeking the following orders;

1. That this Honourable Court be pleased to order that the Attorney General be added as a co-defendant in this suit.
2. That the costs of this application be in the cause

The application is based on the following grounds.

1. That the proposed Co-defendant is the proper party to be sued on behalf of the Commissioner of Lands;
2. That the section 8 of the Government Lands Act provides for all actions, suits and proceedings by or on

behalf of the president or Government respecting Government Land be commenced, prosecuted and carried on in the name of the commissioner of lands;

3. That the Commissioner of Lands is the only person who has locus standi to protect government Land;
4. That the defendants herein intend to raise that defence that the land the subject matter of this suit is public Land, to wit, way leave which defence can only be raised and confirmed by the Commissioner of Lands.
5. That in the interest of justice that the said Attorney General be joined in these proceedings to enable the court effectually and completely adjudicate upon and settle all questions involved in this suit.
6. That no prejudice will be occasioned to the plaintiff by the proposed joinder of the proposed co-defendant.

The application is supported affidavit of John Karu the 1st defendant dated 24th February 2011, he depones as follows as brief; that he is the 1st defendant and a registered official of the Kileleshwa Githunguri Residents Association and has been authorized to swear the affidavit on behalf of the 2nd and 3rd defendants; that the plaintiff in this matter filed an application dated 7th May 2008 seeking injunctive relief against the defendants herein; that the defendants filed their replying affidavit sworn on 10th June 2008 wherein they raised the defence that the parcel of land the subject of this suit is a public land, to wit, way leave, which should not have been allocated to the plaintiff; that he is informed by their advocates that in a ruling delivered by the Honourable Justice J. L. A. Osiemo on 9th October 2008 the judge stated that the only person with Locus Standi to protect public land is the Commissioner of Lands; that it is in the interest of justice that the Attorney General who acts on behalf of the Government be joined in these proceedings to enable the court effectually and completely adjudicate upon and settle all questions involved in this suit; that no prejudice will be occasioned to the plaintiff by the proposed joinder of the proposed co-defendant.

The plaintiff/ respondent filed a replying affidavit sworn by David Anunda dated 18th April 2011; he depones as follows in brief; that he is advised by his advocates that the defence raised by the defendants is not available to the defendants on account of his private property on the grounds; that he is the registered owner of all that land known as L.R. No 209/13260 situated at Kileleshwa; that the property in issue is not public land as contemplated by the constitution of Kenya Articles 61,62 and 64 as read together with section 23 of the registration of Titles Act Cap 281 laws of Kenya; that the defendants have no Locus standi to raise a public action on private property; that if the property as suggested by the defendant which he denies is public property the defendants lacked Locus standi to institute public causes without the consent of the Attorney General on behalf of the Commissioner of lands and the Registrar of lands; that it is trite law that an action commenced without Locus Standi is fit for dismissal; that the defendants application to enjoin the Attorney General is filed belatedly in the matter and is an attempt to cure what is evidently hopelessly and incurable defects that go to the substance and root of the purported defence; that in alternative to the above if the state had any claim as against his property L.R. No. 209/13260, the same would have been addressed by the Principal Registrar of titles as provided by section 60,61 and 65 Registration of Titles Act Cap 281 laws of Kenya; that he has no claim against AG and no evidence has been offered that he is being included will serve any purpose in this suit; that he has been advised by his advocates that if the applicants had a claim against the Attorney general then the same ought to be addressed in a different suit not this one and that the ruling delivered by the Honourable Justice J. L. A. Osiemo on the 9th of October 2008 states the true position ; that further no reasons or excuse has been proffered whatsoever by the applicants for their failure to refer the matter to the Commissioner of lands or the Principal Registrar of titles.

In a supplementary affidavit sworn by John Karu and filed on the 15th of June 2011 he deponed in brief that; that the estate where the suit premises are situated is an estate that used to belong to the Government of Kenya and the units therein was eventually sold to Civil Servants under the tenant purchase scheme, the plaintiff is not a civil servant and does not qualify and could not possibly qualify for purchase of a

unit within the estate and or allocation of the suit premises; that the property is public land set aside for a way leave; that the suit property being public land that is set aside for a public purpose, the same cannot be the subject matter of a grant allocated to an individual; that in July 2004 they applied to the Ministry of Roads and Public Works to be allowed to construct a social hall at the premises the subject of this suit and it was allowed.

Parties filed written submissions which I have carefully read and considered together with the affidavits filed and the annexures.

The applicants in their submissions have raised 4 issues namely;

- i. At what point may a party apply for the joinder of a party to the proceedings?
- ii. Is the AG on behalf of the Commissioner on behalf of Commissioner of Lands a necessary and proper party to the proceedings?
- iii. Will the plaintiff suffer any prejudice by the proposed joinder?
- iv. What is the test applicable for the Court to determine whether to add a party to the proceedings?

There plaintiff/respondent has raised the following issues in his submissions;

- i. That the applicants have come to Court late in the day with an application to enjoin the Attorney General as a Co-defendant on behalf of the Commissioner of Lands
- ii. That the application is in contravention of Section 3 of the Public Authorities Limitation Act Chapter 39 of the Laws of Kenya, Section 1A and 1B of the Civil Procedure Act Chapter 21 of the Laws of Kenya.
- iii. That if the orders sought by the defendants are granted he would be greatly prejudiced.
- iv. That the issues raised in the defendant intended defence at paragraphs 4 and 3 of the said application of the defendant/applicants dated 24th February 2011, have already been adjudicated upon by Justice Osiemo in his ruling dated 9th October 2008.
- v. That the defence relied upon by the defendants that the suit property is public land is misconceived.
- vi. That if the defendants were to be allowed to rely on their said defence, which they lack *locus standi* to, nothing stops them from calling the Commissioner of lands as a witness
- vii. That plaintiff has no claim or any dispute against the Commissioner of lands and it would be improper to join him as a defendant.
- viii. That if the defendants has any dispute with the Commissioner as regards the allocation of the suit property herein, then they should lodge a complain with him and/or sue him in another suit.

The applicant seeks to join the Attorney General as a co- defendant under Order 1 rule 10 states that;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court 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 plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”

The applicants grounds and affidavits states the reasons why they seek to join the Attorney General. An injunction was granted by Justice Osiemo to restrain the defendants from entering the suit premises and interfering with the plaintiff acquired possession and enjoyment.

In the defence and counter claim filed by the defendant the issue of the suit plot being public land has been raised. It is apparent that the plaintiff has a title to the said property but that title is being challenged by the defendants.

Under Order 1 rule 10 any party may seek to join a party to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit. This order gives the Court a discretion to join any party at any stage of the Proceedings. Justice Warsame in the case of **Cllr. Omondo Kokore Vs. The Town Clerk, Municipal council Of Kisumu and Another, HCCC No. 109 of 2004** stated that the Court has a discretion but also a judicial duty to perform and that in cases where a person ought to have been joined or was improperly left either as a plaintiff or defendant then in such situation the Court has no discretion but a judicial duty to join the said persons. There is an allegation that the suit premises is public land. The office of the Commissioner of Lands is the appropriate office to give evidence on the legality of the plaintiff's title. I therefore find that the Attorney General is an appropriate party to be enjoined.

The plaintiff/respondent has raised the issue that the Commissioner of Lands can be called as a witness and that the applicant has come to Court late. From a perusal of the pleadings I find that joining the Attorney General as Co-defendant will enable the Court adjudicate on the issues raised on the pleadings by the parties. I do not find that the defendant application to enjoin the Attorney General is late as claimed. The suit has not been set down for hearing. Further on the issue raised by the plaintiff on the application being in contravention of Section 3 of the Public Authorities Limitation Act Chapter 39 of the Laws of Kenya I find that this issue should be dealt with once the Attorney General is made a party. I do not find that granting the orders will be greatly prejudicial to the plaintiff as claimed. In Justice Osiemo's ruling orders were granted to protect the interest of the plaintiff at the time he came to Court. Justice Osiemo did give direction on who has the locus to protect the public land. I find that by joining the Attorney General this Court will be able to deal with all the issues raised by the parties in their pleadings, on whether the suit property is public land to wit a way leave, whether the Title is one under RTA or RLA, the defendant's right to defend suit and the Court will be able to adjudicate on the said issues. I also note the provisions of article 40, 61, 62 and 64 of the constitution which deals with the right to own property, public and private land. I find that these are matters to be dealt with when the suit will be heard. I do not find the application unprocedural and an abuse of the Court process as claimed. The Attorney General is a proper party whose presence is necessary for a complete and final decision on the questions involved in the pleadings. The Attorney General has relevant information on the issues raised by the parties. For the ends of Justice it is only just and fair that I grant prayers 1 and 2 of the application dated 24th February 2011. Orders accordingly

Dated and delivered this 18th Day of April 2012

R. OUGO

JUDGE

In the Presence of:-

..... For the Plaintiff/Respondent

..... For the Applicant/Defendant

..... Court Clerk