



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NUMBER 102 OF 2011

**PAMELA ACHIENG OLOTCH (SUING THRO' CHRISTINE OCHIENG
APOLLO T/A INTRO NETWORKS).....PLAINTIFF/APPELLANT**

VERSUS

GEORGE WANYOIKE.....DEFENDANT/RESPONDENT

RULING

The matter listed before me was a Notice of Motion dated 18th May, 2011 seeking to discharge the injunction order issued by this Court on 21st April, 2011 against the Defendant. Before hearing of the motion, Kenya Industrial Estates filed a motion dated 8th November, 2011 seeking to be enjoined into the suit as an Interested Party/Defendant. The application is not contested by either the Plaintiff, or the Defendant, as both consider KIE a necessary party for the disposal of the suit.

What is in issue is the nature of directions that should be issued by the court upon joinder of KIE.

Counsel for the Plaintiff urges that all that is necessary is for the interested party to file a defence, serve the same on all parties, and the matter proceeds a from there. The Defendant's position is that Order 1 Rule 10 of the Civil Procedure Rules is invoked. Sub-rule 4 thereof requires that the plaint shall be amended, amended copies of the summons and plaint be served on the new defendant, and others as the case may be. Counsel for KIE, on his part, urged that since his application was not opposed, KIE should be formally enjoined as a defendant and the plaintiff be granted leave to amend their plaint.

A perusal of the documents on record discloses the relationships between the parties. In the plaint, the plaintiff is stated to have sued as the registered proprietor of a parcel of land known as L.R. NO MN/VI/4001. The plaintiff exhibited a copy of the grant number CR 33717 for parcel MN/VI/4001, registered on 29th August, 2000, a copy of a search thereon, and copies of rates payment receipts. Plaintiff alleges that the Defendant entered upon a part of the said land and commenced conduct of business from there; and seeks a permanent restraining injunction and damages for trespass.

The Defendant, in his Replying Affidavit deponed in response to the plaintiff's motion dated 19th April, 2011, states that he is a lessee of the Kenya Industrial Estate, a State Corporation. He has annexed an agreement for Lease for a period of five (5) years and one (1) month from 1st June, 2009, and other documents reflecting the tenancy relationship. Recital 1 in the Lease Agreement annexed as exhibit 'B' to the Defendant's Affidavit dated 26th May, 2011, discloses the leased premises as follows:

“1. The landlord is the proprietor of the premises known as Open Yard on plot number 4001 at KIE Mombasa Measuring 14 X 88(ft) Square feet or thereabouts respectively.”

The rent payable is indicated as Ksh.75,000/- quarterly, subject to an increment of Ten Per Cent (10).

Kenya Industrial Estates in its uncontested joinder motion dated 1st November, 2011, filed on 8th November, 2011 and the Supporting Affidavit dated 1st November, 2011, sworn by its Legal Manager Edna Adala, states that it has been in possession of the parcel of land now known as MN/VI/4001(formerly MN/V/1616 and MN(V)) 1617 since its establishment in 1967. The deponent further avers that KIE was allotted the said land by Letters of Allotment dated 26th June, 1995, and that it subdivided the parcels of land. It then allotted some of the subdivision properties to its clients and retained others for its use. One of those retained was the parcel MN/VI/4001, the suit premises. Annexed to the said affidavit were copies of cheques and receipts for various payments made to the Government and Municipal Council of Mombasa in payment of shared premises, rates sub-division costs et cetera. The defendant is therefore challenging the proprietary interest of the plaintiff in the suit premises or part thereof, alleging it to be vested in another.

The uncontested motion by KIE seeks joinder pursuant to Sections 1A and 3A of the Civil Procedure Act, and Order 1 rule 10(2). The order sought, and consented to by the parties, is order 2 as follows:

“ 2. This Honourable Court be and is hereby pleased to order that the Applicant, Kenya Industrial Estates Limited be and is hereby joined as an interested party/Defendant herein.”

Order 1 Rule 10(2) of the Civil Procedure Rules contains the enabling powers of the Court and provides as follows:

‘ “ 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 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 question that arises is whether in the circumstances already highlighted, it is just and apt that the enjoined party, KIE, do come in as defendant, in which case the plaint may need to be amended and served afresh, or come in as interested party, without need to amend the pleading.

Order 1 rule 3 describes as a defendant who may be joined in a suit:

“ All persons [against] 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, or severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.”

Thus for KIE to be a defendant, there must be a right to relief against it by the plaintiff. Such right must firstly, be in respect of, or secondly, arise out of:

(i) The same act or transaction, or from a

(ii) Series of acts or transactions

alleged to exist whether jointly or severally, or in the alternative, and where any common question of law or fact would arise.

In this case, what appears to be in issue is clearly both the plaintiff’s right to relief against both the Defendant and KIE although not from the same act or transaction, but from a series of acts or transactions for which there is a common denominator. That common denominator in the acts and transactions appears to me to be the actions of the Commissioner of Lands who has allegedly granted some form of proprietary interest to both the plaintiff and also to the Defendant in the suit premises.

Indeed, it seems to me that the court would not be able in terms of Order 1 Rule 10 (2) to effectually and completely adjudicate upon and settle all questions in respect of the proprietorship involved in the suit, without the joinder of the Commissioner of Lands, to this suit. Whilst it is clear that a plaintiff holding a certificate of title or grant under the Registration of Titles Act is the indefeasible interest holder in the relevant parcel, such interest dissipates if obtained by fraud or misrepresentation. Although this proprietorship question is not presently before me, it will inevitably arise because the plaintiff, the defendant and KIE are all claiming entitlements inextricably linked and intertwined with the real beneficial and proprietary interests in the suit land. As legal custodian of land records, the Commissioner of Lands will be able to shed light on the proprietorship question.

Given the foregoing, it is clear to me that both the KIE and Commissioner of Lands must be enjoined as defendants in the suit, if this dispute is to be comprehensively and finally adjudicated and settled.

Accordingly, and for the foregoing reasons, I hereby invoke the provisions of Order 1 Rule 10 (2) and order the joinder of the Kenya Industrial Estates and also the Commissioner of Lands as parties to this suit. The plaintiff is further directed, pursuant to Order 1 Rule 10(4), to amend its Plaint as necessary and serve all parties to the suit with the same together with amended copies of summons. The plaintiff shall also issue applicable notices in respect of the Commissioner of Lands, and appropriate procedures shall apply. Costs shall be in the cause.

The matter is to be listed for a further mention for directions, within thirty days from the date hereof.

Dated and Delivered this 18th Day of November 2011.

R.M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwango
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)