



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISII**

**Civil Case 119 of 2008**

**KENYA ANTI-CORRUPTION COMMISSION.....APPLICANT**

**VERSUS**

**LUCY KERUBO OGETO.....RESPONDENT**

**RULING.**

The applicant herein filed an application dated 29<sup>th</sup> October, 2008 seeking a temporary injunction against the respondent. That application was canvassed before **Musinga.J.** and allowed on the 18<sup>th</sup> June, 2009. In other words a temporary injunction was issued restraining the respondent by herself, her servants or agents from wasting, alienating, transferring, charging, leasing, entering or in any manner howsoever from dealing with parcel of land number **Kisii Municipality Block 3/420 “the suit premises”**, pending the hearing and determination of this suit. In the course of the ruling however, **Musinga.J** made an observation that the applicant should have enjoined whoever held the office of Commissioner of Lands at the material time as a party to this suit.

Taking cue from the said observation, the applicant immediately filed an application dated 1<sup>st</sup> July, 2009 seeking various prayers; chief of which was that one, **Sammy Komen Mwaita** be added and or enjoined in the suit as the 2<sup>nd</sup> defendant. The grounds in support of the application were that the applicant’s claim impeaches the conduct and actions of the office of commissioner of lands. The person holding the office of the commissioner of lands at all material times to the suit was, one, **Sammy Komen Mwaita** the proposed 2<sup>nd</sup> defendant. This proposed 2<sup>nd</sup> defendant was a necessary party whose presence was needed to enable the court effectuality and completely adjudicate upon and settle the issues involved in the claim. That the proposed 2<sup>nd</sup> defendant was involved in fraud in the alienation of the suit premises.

The application was also supported by the affidavit of one, **Nzioki Wa Makaa**, an investigator working with the applicant. That affidavit merely elaborates and expounds on the grounds in support of the application aforesaid.

The application was duly served on **Messrs minda & Co. Advocates**, acting for the respondent. The said firm reacted to the application by filing grounds of opposition and stated therein; that the application was incompetent and bad in law as the person sought to be enjoined cannot be sued for any duties or actions he performed or undertook whilst he occupied the office of the commissioner of lands. Secondly, that the application was a non-starter since the decision taken by the person sought to be joined as a 2<sup>nd</sup> defendant while he held the office of Commissioner of Lands ought to be challenged through judicial review proceedings. No replying affidavit however was subsequently filed by the respondent.

The application was initially heard interparties by **Muchelule.J.** In the course of the applicant’s submissions in support of the application, the court raised on its own motion the issue as to whether the proposed 2<sup>nd</sup> defendant could be sued in his personal capacity for the acts he carried out whilst serving as Commissioner of Lands rather than the office of commissioner of lands. The judge consequently adjourned the matter to enable parties to subsequently address him adequately on the issue.

At the resumed hearing of the application on 8<sup>th</sup> march, 2010, **Muchelule.J.** had by then left the station on transfer. The application thereafter fell on me to make a determination. The task was however made easier for me when **Mr. Radido**, and **Mr. Minda**, learned counsel for the applicant and respondent respectively agreed that I proceed with the application from where **Muchelule.J** had left. They further agreed to file and exchange written submissions on the issue. **Mr. Radido** duly filed and served his written submissions which I have carefully read and considered. **Mr. Minda**, later and perhaps upon reflection made a hasty retreat and opted not to file any written submissions. Indeed on the day when the matter came up for mention with a view to giving a date for ruling in the event that all written submissions were on record, **Mr. Minda** categorically stated that he did not intend to file any submissions but he would rely entirely on his grounds of opposition already on record.

Who may be sued? Order 1 of the civil procedure rules provides an answer to the question and in particular rule 3 thereof. It provides inter alia that “...All persons may be joined as defendants against who 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 separate suit were brought against such persons any common question of law or fact would arise”. As correctly observed by **Mr. Radido** this rule makes very broad provisions as to who may be sued or joined in a suit as a defendant. The only limitation however is that a right of relief exists. Order 1 rule 5 of the civil procedure rules however qualifies rule 3 aforesaid by providing that “It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him...”. Further it is trite law that where a plaintiff is not sure or is in doubt as to who to sue he should sue everybody remotely connected with the claim so that the question of liability as between the defendants may be determined or sorted out by the court. Finally, rule 9 of the same order provides that misjoinder or non-joinder cannot be used to defeat a plaintiff’s claim. From the foregoing it is quite apparent that the plaintiff or the applicant as the case here has a very wide latitude to find a cause of action against any person(s) he believes he is entitled to seek a relief or redress against, even if in the process he enjoins an innocent party. It will be upto the court to give redress to such party wrongly sued.

In any event Section 7(a)(1) of the **Anti-Corruption and Economic Crimes Act** provides for the recovery function of the applicant. It provides interalia that “.....**The commission shall have the following function....to investigate the extend of liability for the loss of or damage to any public property and to institute civil proceedings against any person for the recovery of such property or for compensation....**”. From the foregoing, it is plain that the applicant is within its rights to bring on board the intended 2<sup>nd</sup> defendant in the capacity it chooses. It is not upto the respondent to tell the applicant whom and how it should sue. The issue as to whether the intended 2<sup>nd</sup> defendant can be sued in his personal capacity or not for the acts he committed whilst holding the office of commissioner of lands would be for him to advance in his defence. It is not for the respondent to advance that line of defence on behalf of the intended 2<sup>nd</sup> defendant at this stage. The intended 2<sup>nd</sup> defendant shall have his day in court when he can canvass the issue. For now I do not see any prejudice that will be occasioned to the respondent if the application is allowed. It matters not that another remedy by way of judicial review proceedings is available to the applicant.

I am of course aware of various statutes that expressly provide a shield or immunity to persons appointed to such public offices against liability for their actions whilst in office. However such protection is accorded to such an officer when acting in good faith and without reckless negligence. As I understand it, it is the applicant’s contention against the intended 2<sup>nd</sup> defendant that he did not act in good faith in the discharge of his duties with regard to the suit premises whilst he held the aforesaid office. Thus he must be held personally to account. In other words it is the applicant’s position that if the intended 2<sup>nd</sup> defendant did not act in good faith he becomes personally liable. If a person holding the office of commissioner of lands acts beyond or outside his statutory powers of his office, he is not acting in good faith. He is abusing his office and therefore would be personally liable. It is for this reason among others that it seeks to enjoin the intended 2<sup>nd</sup> defendant in this suit so that he can explain himself with regard to activities complained of.

I have perused the proposed draft amended plaint and the applicant’s complaint against the intended 2<sup>nd</sup> defendant is that he abused his powers in the discharge of his duties with regard to the suit premises. Indeed at paragraph 6A, it is averred that he acted outside his statutory mandate. And at paragraph 13A it is averred that he owed the government a fiduciary duty but failed and he is thus liable for the misfeasance in office. The intended 2<sup>nd</sup> defendant is being accused of a tort of misfeasance in office, otherwise referred to as **abuse of office**. As to whether the applicant will be able to successfully prosecute the intended 2<sup>nd</sup> defendants on those grounds is for another day. For now the issue of competency of seeking to enjoin the 2<sup>nd</sup> defendant on the basis of actions carried out by him whilst serving as a commissioner of lands is for him to raise in his pleadings once he is enjoined. They cannot be used by the respondent to bar the intended defendant from entering the fray. If anything the defence was raised rather prematurely.

For all the forgoing reasons I would allow the application dated 1<sup>st</sup> July, 2009 in terms of prayers 1, 2, 3 and 5 on the face of the application. Upon service of amended plaint on the respondent, the respondent shall have **fourteen(14)** days within which to file an amended defence should she be minded to do so. I suppose this ruling shall apply mutatis mutandis to case members 43 and 44 of 2009 and 111, 112, 116, 120 and 121 of 2008 all in this court respectively.

Ruling **DATED, SINGED** and **DELIVERED** in court on this 23<sup>rd</sup> day of April, 2010.

**M. A. MAKHANDIA.**  
**JUDGE.**