



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

Civil Case 199 of 2008

KENYA RAILWAYS CORPORATIONPLAINTIFF

-VERSUS-

1. LEONID LIMITED.....1ST DEFENDANT

2. CORRUGATED SHEETS LIMITED.2ND DEFENDANT

**3. NATIONAL ENVIRONMENTAL
MANAGEMENT AUTHORITY3RD DEFENDANT**

RULING

The 1st defendant came before the court by Chamber Summons dated **16th July, 2009** and brought under Order VI rule 13 (1) (b) of the Civil procedure Rules. The main prayer in the application was

“THAT the plaint be struck out and the suit dismissed against the 1st defendant as it is scandalous, frivolous and vexatious”.

The grounds founding the application are thus set out: –

(i) that the suit concerns one property, namely sub-division No. 2379 (original title No. 645/1), Section V, Mainland North;

(ii) that the suit property is owned and occupied by 2nd defendant;

(iii) that 1st defendant has nothing to do with the matter, either as owner or occupier of the suit property, and therefore none of the prayers in the suit has anything to do with the 1st defendant.

Evidence to support the application is in the form of the supporting affidavit of **Arafat Vaiani**, a director of 1st defendant, sworn on **16th July, 2009**. The deponent avers that the suit property, No. 2379/V/M.N. is owned and occupied by **2nd defendant**; and he states that he believes to be true the advice of his advocate, that the prayers set out in the plaint have nothing to do with 1st defendant and bear no relevance to 1st defendant, and that, consequently, the suit against 1st defendant is scandalous, frivolous and vexatious; he prays that the suit be dismissed as against 1st defendant.

Paul Githaka, the plaintiff’s property manager, swore a replying affidavit on **31st August, 2009** deponing that: 1st defendant was the initial owner of the suit property; at the time of filing suit, 1st defendant was and still is registered as the owner of the said property; the suit property is adjacent to the plaintiff’s railway line. The deponent deposes that the suit property is a designated railway reserve, and therefore the plaintiff is questioning the legality of 1st defendant’s title.

The deponent deposes that the plaint raises serious triable issues touching on the authenticity and validity of 1st defendant’s initial documents of title, which questions can only be determined in a full trial. The deponent deposes that the allegation of fraud on the part of 1st defendant, which is made at paragraph.12 of the plaint, can only be resolved in a full trial. The deponent deposes that the issues raised in the plaint as against 1st defendant bear effects upon 2nd defendant’s alleged title; and he avers that 1st defendant is a necessary party in the suit.

Counsel for the plaintiff at the same time filed grounds of opposition, one of these being that “the matter of fraud raised at paragraph 12 against 1st defendant can only be tried by a full trial”. It is contended that no allegation has been made that the suit does not disclose a reasonable cause of action, since the application does not involve the provisions of Order VI Rule 13(1)(a).

The plaintiff sets out the contentious issues raised by the plaint, as follows –

- a) ***Whether 1st defendant's initial registration, if any, was procured by fraud as set out in paragraph 12 (a) of the plaint ;***
- b) ***Whether 1st defendant colluded with certain Government officers to procure the alleged titles to the suit property;***
- c) ***Whether 1st defendant had knowledge of, and participated in the alleged fraud, as pleaded in paragraph 12 of the plaint;***
- d) ***Whether 1st defendant's alleged titles are null and void.***

It is contended that there is nothing scandalous, vexatious or abusive of court process in the plaint dated **7th August, 2008**.

The applicant's advocate submitted that 1st defendant has consistently denied that the plaintiff is entitled to the prayers set out in the plaint of **7th august, 2008**, specifically the following prayers:

- a) ***that a permanent injunction restraining 1st and 2nd defendants from occupying, constructing on, digging trenches in, alienating, disposing of or developing the suit land, do issue;***
- b) ***that a permanent injunction restraining 3rd defendant from issuing an environmental impact assessment licence in favour of 1st and 2nd defendants in contravention of the Environmental Management and Co-ordination Act, 1999 (Act No. 8 of 1999) do issue;***
- c) ***that a declaration be made that the subject piece of land is a road and railway reserve;***
- d) ***that a declaration be made that the title deed, if any, held by 1st defendant is null and void.***

Counsel submitted that the foregoing prayers even if granted, can only effect a party who is either the current owner of plot No. 2379 and therefore the holder of the title deed, or the occupier of plot no. 2379 and a party who is carrying out, or who intends to carry out construction upon that land. Counsel submitted that both the plaintiff and 2nd defendant have admitted that the current owner of the suit land is 2nd defendant. In this regard, counsel invoked the further affidavit of **Abdulgafoor Vaiani** of **17th September, 2009** to which is annexed a postal search confirming that 2nd defendant owns the suit plot.

Counsel urged that 1st defendant, having sold the suit plot to 2nd defendant, has no further interest in that land which is now owned and occupied by 2nd defendant.

Counsel submitted that even if the plaintiff, at the main trial, were to prove the allegations of fraud, the orders sought in the plaint have no relevance to 1st defendant; in counsel's words: "it is futile to involve 1st defendant in this case and1st defendant being a party in this case proves no purpose". Counsel further states: "Even if the orders mentioned in the plaint are awarded they cannot [affect] 1st defendant or be performed by 1st defendant", and so "in relation to 1st defendant, it is submitted this case is frivolous, vexatious and scandalous and should be dismissed with costs."

Learned counsel urged that, far from being scandalous, frivolous, and vexatious, the plaint of **7th August, 2008** establishes "an obvious case against 1st defendant" and in this regard he cited paragraphs 6, 7, 8 and 12 as showing the triable issues raised. Paragraph 12 of the plaint pleads particulars of fraud attributed to 1st defendant, in relation to an alleged "illegal excision of the suit property from the railway reserve."

In the said particulars of fraud by 1st defendant, counsel set out the following elements:

- a) ***no change of user was ever applied for, gazetted, advertised and/or approved by the Physical Planning Department , or Mombasa Municipal Council, under the Physical Planning Act, 1996 (Act No. 6 of 1996);***
- b) ***letters of grant were issued to private persons for road reserves, in circumstances amounting to fraud;***
- c) ***lands compulsorily acquired for a stated purpose (road and railway construction) were illegitimately allocated to 1st defendant for private use;***
- d) ***the Commissioner of Lands has no powers to issue and /or sign grants in respect of GovernmentLand, under the Government Lands Act (Cap.280, Laws of Kenya) or any other law.***

Counsel urged that the foregoing grounds were a proper basis for the plaintiff's prayers in the plaint: for instance, a declaration that the subject piece of land is a road and railway reserve; a declaration that the title, if any, held by the defendants is illegal and void; costs of the suit.

Learned counsel sought to demonstrate the triability of the plaintiff's cause by drawing from the pleadings of 1st defendant:

(i) [para.6 of 1st defendant's defence]

· Pleading that sub-division No. 2379 was created out of the larger plot, No. 645/V/MN.

· Pleading that the certificate of title for sub-division No. 2379 is genuine, and that the plot has been sold to 2nd defendant who now has the original certificate of title and the transfer document;

(ii) [paragraph.9 of the 1st defendant's defence]

· Pleading that 1st defendant contends that the title document for sub-division No. 2379 is valid in accordance with the Constitution and the laws of Kenya;

(iii) [paragraph 10 of 1st defendant's defence]

· Pleading that the sub-division No. 2379 is not a road reserve, and that the issue of change of user raised in paragraph 12 (a) of the plaint is irrelevant;

(iv) [paragraph 12 of 1st defendant's defence]

· Pleading that sub-division No. 2379 was never compulsorily acquired as stated;

he urges that the issues are crisply joined, awaiting judicial determination by trial, specifically on the following points –

(a) whether 1st defendant carved out sub-division No. 2379 from the original parcel of land known as LR No. MN/V/645 which serves as a road and railway reserve falling between a railway track and the highway along the Mombasa/Nairobi Highway;

(b) whether 1st defendant was in the process of transferring and/or had already transferred the suit property to 2nd defendant as at the date of the plaint, 7th August, 2008;

(c) whether the purported title documents were obtained illegally and fraudulently by 1st defendant and/or any other person prior to the defendants obtaining these;

(d) whether 1st defendant's initial registration of title, if any, for the railway reserve was procured by fraud as set out in paragraph 12(a) of the plaint;

(e) whether 1st defendant colluded with certain Government officers to procure the alleged titles to the suit property;

(f) whether 1st defendant had knowledge and participated in the alleged fraud as pleaded in paragraph 12 of the plaint;

(g) whether 1st defendant's alleged titles are null and void.

It was submitted that the foregoing are *bona fide* triable issues "arising naturally from the plaint and [from] 1st defendant's defence dated 26th April, 2008".

Counsel invoked the now *well-recognized principle* on the striking out of suits pending: "striking out a pleading is a drastic remedy, and the powers of the court are to be exercised with great caution and only in [the] most hopeless of cases where no amount of amendment can breathe any life into [the] suit".

Counsel went on to urge that "in view of the weighty and *bona-fide* triable issues arising from the pleadings in the plaint, nothing in the plaint can fit the definition of 'frivolous, scandalous and/or vexatious'."

Counsel submitted that in the whole design of the cause, "the 1st defendant is an absolutely necessary party in the dispute between the plaintiff and the 2nd defendant": for 1st defendant is the only party who can answer the allegations of fraud and illegality of title before the excision, sub-division and transfer of the suit land to 2nd defendant.

Learned counsel submitted that Order I rule 10(2) of the Civil Procedure Rules enjoins the Court, even *suo motu*, to join the name of any party to a pending suit, if that party's presence is necessary in order to enable the court to effectually and completely adjudicate upon an issue in the cause.

The issues for determination in 1st defendant's application are straightforward. The 1st defendant objects to being made a party in the suit; and their sole reason is that even though the suit property, L.R. No. MN/V/2379, did indeed pass through their hands, it is a *thing of the past*, and only 2nd defendant now claims both ownership and possession and so,

1st defendant is improperly enjoined. Such would be an objective contention, but only before considering the gravamen in the plaintiff's case: the plaintiff is citing *statute law* which would hold the suit land to be **Government land**, compulsorily acquired for use as **road and railway reserve**; and so the transition of ownership and possession *via* 1st defendant's hands would be unlawful in the first place. The plaintiff asserts that breaches of the law have been committed by 1st defendant who purported in the first place, to acquire the suit land against the law, and then, by a fraudulent chain of transactions, purported to pass the same into the hands of 2nd defendant; since the suit is challenging that transition in the ownership and possession process, it logically follows that 1st defendant is a necessary party, without whose joinder this Court would not be able to determine the plaintiff's gravamen effectually and completely.

Order I, rule 10(2) speaks in clear terms:

"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"

It has not been doubted that the plaintiff herein has a serious, triable case which this Court has a duty to hear and to render judgment upon. From my assessment of the application and its annexed papers, and of the submissions of counsel, I have to state that the **claim of fraud** in the disposal of the suit property, is the outstanding question for this Court to resolve; but it cannot be done without fully illuminating the activities of **1st defendant**: and therefore, 2nd defendant is a **vital party** who must figure in the suit, for the matter to be effectually and completely settled.

In the instant application, 1st defendant is craving the very opposite of the purpose of the suit: and in effect 1st defendant is asking this Court to disable itself in effectually and completely disposing of the main claim. That simply cannot be done; thus, the application is a definite misconception as to the purpose of the judicial process.

The application is dismissed with costs to the plaintiff herein.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 2nd day of July, 2010.

.....
J. B. OJWANG
JUDGE

Coram: *Ojwang, J.*

Court clerk: *Ibrahim*

For 2nd Defendant/Applicant:

For Plaintiff/Respondent: