



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 933 of 2002

AUGUSTINE KIMENTERIA NTHIGAPLAINTIFF

V E R S U S

DAVID NDUBI STOWERDEFENDANT

R U L I N G

This is an application (by chamber summons dated 21st January, 2008) by the Defendant for the main order that Nairobi City Council be added as 2nd Defendant in this suit. It is brought under Order I, rules 10(2), 13 and 22 of the Civil Procedure Rules (the Rules). Under rule 10(2) aforesaid, 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. Under rules 13 and 22 an application such as the present one may be made at any time before trial by summons or orally at the trial. It is pleaded that the Plaintiff will not suffer any prejudice if the order sought is granted. There is an affidavit sworn by the Defendant in support of the application.

The Plaintiff has opposed the application as set out in the replying affidavit sworn by him and filed on 28th January, 2008. The main ground of opposition emerging therefrom is that Nairobi City Council is not a necessary party to these proceedings.

I have read both the supporting and replying affidavits. Each is essentially a rehash of the respective parties' cases against each other in the suit. I have also considered the submissions of the learned counsels appearing, including the cases cited. As observed by Waki, J (as he then was) in a ruling delivered herein on 30th July, 2003 (upon an application for temporary injunction filed by the Plaintiff), each party claims ownership of a leasehold interest in the suit property allegedly granted or initiated by the City Council of Nairobi. It appears that the City Council has disowned the documents held by the Plaintiff as forgeries while upholding those held by the Defendant as genuine. Upon the documents allegedly issued by the City Council the Plaintiff was issued a grant over the suit land by the Government. But when the Council disowned those documents the Government (through the Chief Land Registrar) moved to cancel the grant. See the documents annexed to the supporting affidavit.

Waki, J further observed:-

“..... Valid issues have been raised in affidavits on record and in submissions of counsel on the authenticity of the respective documents relied on by the parties to claim their rights. Central to those issues is who between the Central Government and the City Council is entitled to the head lease and

therefore the right to sublease (the suit property). It is not an issue that can be resolved without joining those two institutions in these proceedings”

It was upon the strength of those observations by Waki, J that the Defendant has now applied. The observations were an invitation to the parties to re-think their respective cases and apply to join one or the other of the two institutions as they may deem fit. It may be observed that the Plaintiff could challenge the action of the City Council in allocating the property to the Defendant when it had already allocated the same to him. He can do this by applying to join the City Council as a defendant in the suit. Equally, the Defendant could challenge the grant made by the Government to the Plaintiff which he alleges was based upon forged documents. He has not formally done so by way of counterclaim.

The Plaintiff does not want to sue the City Council. Should he be compelled to do so? The court has a wide discretion under rule 10 of Order I. But it is to be observed that where a defendant is added or substituted, the plaint must ordinarily be amended in such manner as may be necessary unless the court otherwise directs. The Plaintiff says he has no case to plead against the City Council as he does not wish to claim anything against it. If the Council is added as 2nd Defendant, will it be feasible to proceed without amending the plaint? I think not. And then, will it be just to force the Plaintiff to amend the plaint and thereby sue a party he does not wish to sue? I think not either. What will he plead against the Council yet he does not wish to claim anything against it?

As observed by the Court of Appeal in the case of CENTRAL KENYA LTD –vs- TRUST BANK & OTHERS, Civil Appeal No. 222 of 1998 at Nairobi (unreported):-

“The decision as to who to sue is essentially that of the plaintiff”

But then, the Court of Appeal further stated, the court will thereafter consider the allegations made against the named defendants and if it considers that some parties were improperly joined or others who should have been joined were omitted, it will give appropriate directions for joinder or removal.

The guiding principle in deciding whether to add a party is whether the presence of that party is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. As stated in SARKAR’S LAW OF CIVIL PROCEDURE, Vol. I at pages 531 and 532 (quoted in the case of WERROT & CO. LTD & OTHERS –vs- ANDREW DOUGLAS GREGORY & OTHERS, Milimani HCCC No. 2363 of 1998 (unreported), there are two tests in the application of this principle:-

1. There must be a right to some relief against the party sought to be added in respect of the matter involved in the proceedings in question.
2. It should not be possible to pass an effective decree in the absence of such a party.

Now, there is no doubt that there is a right to some relief available to the Plaintiff herein against the City Council of Nairobi. But the Plaintiff does not want to sue the council. Will it be possible to pass an effective decree in the absence of the council as a defendant in this suit? Yes, it will be possible. The Defendant has not counter-claimed anything against the Plaintiff. Nor has he sought indemnity against the City Council of Nairobi, otherwise he would have sought leave to serve upon it a third party notice. The only claim in the suit is that of the Plaintiff against the Defendant for an injunction, damages, costs and interest. It should be possible to issue an effective decree should he succeed in his claim. The presence of the City Council of Nairobi may be necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. The Plaintiff does not wish to sue it. The Defendant also does not appear to wish to sue the council. It appears to me that the presence of the council as a witness (through its officers, of course) will still be equally useful to the court. Any of the parties can call such officers as witnesses.

Upon consideration of all matters placed before the court, I find no merit in this application. It is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF MAY, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 23RD DAY OF MAY, 2008