



**Dagret Investment Limited v National Government Constituencies
Development Fund & another (Environment & Land Petition
E021 of 2021) [2022] KEELC 13662 (KLR) (18 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13662 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E021 OF 2021
MD MWANGI, J
OCTOBER 18, 2022**

BETWEEN

DAGRET INVESTMENT LIMITED PETITIONER

AND

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT
FUND 1ST RESPONDENT**

NATIONAL LAND COMMISSION 2ND RESPONDENT

RULING

Background

1. The application under consideration is the notice of motion application dated January 21, 2022 by the 3rd respondent seeking that the petition against it be struck out with costs. The basis upon which the application is premised is that the 3rd respondent has no claim over the subject property LR No 219/143. The applicant further alleges that it only financed the construction of the offices of the Ministry of Interior on the suit property, therefore it ought not to have been sued as a respondent by the petitioner.
2. The application is supported by the affidavit of one Moses Akaalo, the Chairman of the national government constituency development fund committee- Mathare Constituency, who reiterates that the 3rd respondent only financed the construction of offices for the ministry of interior in accordance with the provisions of the enabling act, the national government *Constituencies Development Fund Act*. The deponent deposes that they even erected a signage at the premises clearly stating that the construction of the offices on the suit property were financed by the 3rd respondent. They have no further claim over the suit property.



3. The deponent's therefore avers that the 3rd respondent has been wrongly sued by the petitioner and prays that the suit against it be discontinued.

Response by the Petitioner.

4. The petitioner opposes the application by the 3rd respondent by way of grounds of opposition dated March 8, 2022. The petitioner in essence states that the 3rd respondent is properly included as a party for purposes of allowing the court to determine all the questions and/or issues raised in the petition. The petitioner points out that the 3rd respondent has expressly admitted to having funded and or financed the construction of the administration offices on the suit property. The issues being raised by the 3rd respondent then can only be determined after a full hearing of the petition, not at this stage where the court does not have the opportunity to hear and evaluate the evidence.

Response by the 4th Defendant.

5. The 4th respondent too opposed the 3rd respondent's application by way of grounds of opposition dated May 6, 2022. The 4th respondent terms the application mischievous, misconceived, and devoid of any merit as well as premature and bad in law.
6. The 4th respondent agrees with the petitioner's ground of opposition to the effect that the 3rd respondent having admitted financing the construction of offices on the suit property is not only a proper party to the petition. The issues they raise in the application can only be determined after a full hearing of the petition.

Court's Directions

7. The court directed that the application be canvassed by way of written submissions. Only the 3rd respondent/applicant however filed submissions.

Submissions by the 3rd respondent/applicant.

8. The 3rd respondent/applicant submits that under order 2 rule 15 of the *Civil Procedure Rules*, the court has the discretion to strike out any pleadings, at any stage of the proceedings, that do not disclose a reasonable cause of action. The 3rd respondent notes the caution that the power however, must be exercised sparingly and cautiously. The 3rd respondent cites the case of *Crescent Construction Company Ltd v Delphis Bank Ltd* [2007] eKLR to augment its submissions on that aspect.
9. In the 3rd respondent's opinion, the main issue for determination in respect of its application herein is whether the petition in this case discloses a cause of action against it.
10. The 3rd respondent reiterates that its role was only to finance the construction of the offices for the Ministry of Interior. It has not laid any claim at all over the suit property. It therefore argues that the petitioner has no cause of action against it whatsoever, as its role was limited to financing the construction of the offices as per the national government *Constituencies Development Fund Act*. The 3rd defendant urges the court to allow its application.

Issues for Determination

11. I agree with the 3rd respondent's opinion that the only issue for determination at this juncture is whether the petitioner's petition discloses a cause of action against the 3rd respondent.



Analysis and Determination.

12. The Court of Appeal in the famous case of *DT Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina & another* [1980] KLR, in defining a ‘cause of action’ made reference to Drummond Jackson VBMA (1970) IWLR 688 at P 696 where Lord Pearson stated that,

“A cause of action is an act on the part of the defendant which gives the Plaintiff his cause of complaint.”

13. In this case, the petitioner who is the proprietor of Nairobi LR 219/43 ‘complains’ that the Mathare national government constituencies development fund (committee) ‘took over’ its property without its authority and or consent and commenced construction of an administration block, without following the due process of the law. The petitioner terms the invasion of its property without due process and compensation, arbitrary.
14. The petitioner therefore prays for a declaration that its right to property has been violated by the respondents’ acts of encroaching into, trespassing, damaging & constructing on its property. The petitioner further seeks compensation for the ‘compulsory acquisition’ of its property.
15. The 3rd respondent in its application has clearly admitted that it financed the construction of the administration block on the petitioner’s property but on behalf of the Ministry of Interior.
16. With the admission that it was the financier of the project on the petitioner’s property, how then can the 3rd respondent allege that it is not a necessary party in this petition? The act of financing the project makes the 3rd respondent a major ‘partaker’ in the alleged violation of the property rights of the petitioner and therefore not only a necessary but proper party in these proceedings.
17. The court’s finding therefore is that, from the scrutiny of the pleadings before it, that is, the petition and the application by the 3rd respondent, the petitioner has a reasonable ‘cause of action’ against the 3rd respondent. This is not the ‘plain and obvious case’ where the court would exercise its discretion to strike out the petition.
18. Accordingly, the 3rd respondent’s application dated January 21, 2022 is disallowed with costs to the petitioner.
19. From the proceedings before the court, it is apparent that the 3rd respondent funded the construction of the administration block constructed on the suit property on behalf of the Ministry of Interior. The said ministry is obviously a proper party in these proceedings for ‘effectual and complete settlement of all questions’ in this case and for avoidance of ‘multiplicity of suits’.
20. The court has the discretion to order that a ‘proper party’ be joined in the proceedings even *suo moto* as held in the case of *Zephir Holdings Ltd v Mimosa Plantations Ltd & another* [2014] eKLR, where the court stated that;

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.”



21. Accordingly, and in exercise of the power conferred on this court under rule 5 (c) of the *Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure rules, 2013* {commonly referred to as the ‘Mutunga Rules’, I direct the petitioner to amend its petition forthwith in the next 14 days and add the ministry of interior as a respondent in this case.
22. The petitioner shall within a further 14 days of filing the amended petition serve the ministry with the amended petition in accordance with the law.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2022.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr.Momanyi holding brief for the 3rd respondent/applicant.

Mr. Mutanda holding brief for Gitonga for the petitioner/respondent.

No appearance for the 2nd & 4th respondents

Court Assistant: Hilda.

M.D. MWANGI

JUDGE

