

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 309 of 2007

FERMENTO INVESTMENT LTD.PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATIONDEFENDANT

R U L I N G

Pursuant to Order I rule 10 and 22 of the Civil Procedure rules, Kenya Anti-corruption Commission (K.A.C.C.) applied by summons to be joined in this suit as an interested party or in any capacity this court may deem fit. The summons is supported by the affidavit of Nzioki Makau. When served, Fermento Investment Ltd, opposed the summons by filing the replying affidavit of its Managing Director, Daniel Njoroge Kihiko. With leave of court, Kenya Anti-corruption Commission filed a further affidavit in response to the replying affidavit.

It is the argument of the Kenya-Anti corruption commission that in exercise of its statutory mandate under Section 7(1) (h) of the Anti-Corruption and Economic Crimes Act, 2003 it undertook investigations on the liability for loss of numerous houses belonging to the Kenya Railways Corporation, the defendant herein. Among the houses the subject of investigations are four houses in Kizingo area along Mwamba Road in Mombasa with a view to instituting proceedings for their recovery. It is alleged that the said four houses are currently registered as Mombasa Island XXVI/698, 699, 700 and 701. The aforesaid houses are the subject matter of this suit. K.A.C.C. claims that its investigations are at an advanced stage and preliminary findings indicate that the Commissioner of Lands formerly issued letters of allotment and processed leases in respect of the four houses in favour of Kenya Railways Corporation and forwarded the same to the District Land Register in Mombasa between 2000 and 2005 for registration and issuance of certificates of leases to the said public body. It is the averment of K.A.C.C. that it found it strange that the plaintiff had certificates of leases for the four houses issued in its name on 19th September 2002 about three years before three of the leases had been forwarded from Nairobi to Mombasa for registration. K.A.C.C. states that it came to learn of the existence of this suit while it was carrying out those investigations. For the above reasons K.A.C.C. urged this court to find that K.A.C.C. is a necessary party in these proceedings to enable the court completely and effectually adjudicate on the questions in controversy in this suit. In a nutshell, K.A.C.C. is of the view that its desire is to safeguard Public Interest and to provide this court with all the necessary material evidence which is not in the possession of either the plaintiff or the defendant to enable it competently, justly and effectually determine all the questions in controversy.

The plaintiff vehemently opposed the application alleging that the applicant is not a necessary party but rather a busy body in these proceedings. It is the argument of the plaintiff that K.A.C.C. was actuated by malice in filing the application and that it is being fronted by the defendant. It is said that the application is intended to delay the expeditious determination of this matter. It is the submission of the plaintiff that K.A.C.C. can as well, pass the evidence it has through the defendant without necessarily being joined to this suit. In brief it is the argument of the plaintiff that the application should be dismissed because K.A.C.C. has not shown the interest it has over the matter and that it has not shown the prejudice it would suffer if the order is denied.

I have considered the oral submissions of Mr. Angima, and Mr. Mabeya learned counsels for K.A.C.C. and the plaintiff respectively. I have also taken into account the grounds set out on the face of

the summons dated 11th June 2008 plus the facts deponed in the affidavits filed for and against the summons. I have also considered the authorities cited by both sides. The main reasons advanced by K.A.C.C. in seeking to be joined to this suit are twofold.

First, it is said that K.A.C.C. is entitled to be enjoined to the suit in order for it to commence recovery proceedings against the plaintiff hence its presence will obviate the multiplicity of suits.

Secondly, it is said that it has vital evidence which is not within the possession of neither the plaintiff nor the defendant. It is argued that the evidence can only be tendered if the applicant is a party. Under order I rule 9 and 10 of the Civil Procedure Rules, the court is given a wide discretion to substitute or add parties to proceedings at any stage provided their presence is necessary to enable the court to effectually and to competently adjudicate upon and settle all questions involved in the action. In Amon -vs- Raphael Tuck and Sons Ltd [1956] 1 ALL E.R. AT Page 273 it was held interalia that a party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and competently adjudicate upon and settle all the questions involved in the cause or matter. It is obvious that in the light of the decision in Amon =vs= Raphael Tuck and Sons Ltd (Sic) and in the light of the provisions of order I rule 9 and 10 that the applicant need not show he has an interest over a dispute. For this reason I overrule the plaintiff's objection that K.A.C.C. had not shown what interest it has over the suit premises. Even if it was necessary for a party to show a cause of action, still I would not rule against K.A.C.C. on that ground because it has shown that it exercises a statutory mandate under Section 7(3) of the Anti-corruption and Economic Crimes Act. What I must determine now is whether or not K.A.C.C. is a necessary party to this suit. Basically, K.A.C.C. is saying it has evidence which it thinks it present which may conclude this matter. In my humble view, that alone cannot bring K.A.C.C. within the ambit of order I rule 9 and 10 of the Civil Procedure rules. It is not denied that K.A.C.C. is liaison with the defendant in its investigations over the loss and recovery of property of the defendant. I find that K.A.C.C. will to not be a necessary party to this action because it can as well if so interested seek to be a witness in the case at the time of hearing. Kenya Railways Corporation, is a public body which is capable of safeguarding the public property it holds without K.A.C.C. being made a party to this action. There is no allegation that the defendant has found it so difficult to access the evidence in possession of K.A.C.C.

One can imagine the number of suits involving public bodies, K.A.C.C. will have to be joined as a necessary party. I believe the legislature did not intend that K.A.C.C. should be enjoined to each and every suit involving public corporations in order to protect the public interest. I agree that K.A.C.C. is not a busy body in these proceedings. However it is not a necessary party. In exercise of its statutory mandate under section 3 of the Kenya Railways Corporation Act, the defendant has filed a defence with a counter claim against the plaintiffs. In the counter-claim, the defendant seeks to have the register to the suit properties rectified with a view of removing the name of the plaintiff and in its place insert that of the defendant. The defendant can competently defend the suit without K.A.C.C. being made a party.

'Necessary Party' is defined in Black's Law Dictionary 8th Edition as:

"A party who, being closely connected to a lawsuit should be included in the case if feasible, but whose absence will not require the dismissal of the proceedings."

It is obvious that this suit cannot collapse if K.A.C.C. is not made a party. In the end I dismiss the summons dated 11th June 2008 with costs to the plaintiff. The aforesaid costs shall be paid by the Kenya Anti Corruption Commission.

Dated and delivered at Mombasa this 3rd day of October 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Mabeya for plaintiff and

Mr. Ndegwa for Defendant.

N/A for K.A.C.C.