



East Africa Data Centre Limited v Mombasa Wonderpark Limited (Environment & Land Case 225 of 2020) [2022] KEELC 15166 (KLR) (6 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15166 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 225 OF 2020
NA MATHEKA, J
DECEMBER 6, 2022**

BETWEEN

EAST AFRICA DATA CENTRE LIMITED PLAINTIFF

AND

MOMBASA WONDERPARK LIMITED DEFENDANT

RULING

1. The application is dated February 10, 2022 and is brought under order 1 rule 9, 10(2), and 14, order 8 rule 3, 5, 8 a d order 51 rule 1 of the Civil Procedure Rules, 2010, sections IA, 1B seeking the following orders;
 1. That the honourable court be pleased to grant leave to the defendant to add or enjoin in the suit the honourable Attorney General, Chief Lands Registrar Ministry of Lands, the National Land Commission, and the Ethics and Anti-Corruption Commission as defendants.
 2. That the honourable court be pleased to grant leave to the defendant to amend the statement of defence in in the manner shown in the draft amended defence and counterclaim filed herewith.
 3. That the defendant be granted 14 days to file and serve the amended defence and counterclaim.
 4. That the costs of this application be in the cause.
2. It is based on the grounds that following the filing of this suit by the firm of Coulson Harney I-LP Advocates, the firm on record KRK Advocates I-LP entered appearance and filed a defence dated January 28, 2021 on behalf of the defendant. The dispute in this suit involves a claim as to the registration and ownership between the plaintiff and defendant of land reference number land reference No 20433/1/MN (CR 69408/1), registered to the plaintiff that is one part of the subdivision of CR No MN/1/10768, which was registered in the defendants favour. LR No MN/ 1/10768 was a subdivision of LR MN/ 1/6542. The original parcel was LR No MN/1/1298 ("the original parcel")



which was subdivided to CR No MN/ 1/6542 which was registered to the defendant and LR No MN/ 1/4628 which the school is occupied by Nyali Primary School.

3. On September 7, 2010 the defendant caused the subdivision of CR No MN/ 1/10768 into three parcels i.e MN/ 1/16701, MN/ 1/16702 and MN/ 1/16703. The subdivisions underwent a change of user and were registered on August 16, 2016 and new titles were issued i.e 20431/1/MN, 20432/1/MN and 20433/1/MN. The defendant transferred 20432/1/ MN to Petrol Oil Kenya Limited and in 2019, the defendant transferred 20433/1/ MN to the plaintiff. The defendant retained ownership of LR No 20431/1/ MN and to date exercises ownership and control over CR No 20431/1/MN.
4. On or about March, 2020 the plaintiff alleged that the National Land Commission (NLC) had brought forward allegations that the suit property stemming from the original number also subdivided from the original parcel was part of public land. Further that the Ethics and Anti-Corruption Commission (EACC) was also investigating the ownership dispute on the original number pursuant to a complaint filed by the Mombasa Parents Club that it had been fraudulently hived off public land that had been reserved for Nyali Primary School. Currently, none of the parties in this suit are well versed with registration procedures as to provide an explanation as to how the original parcel, and all subsequent subdivisions and dealings thereon, could be public land or private land. The only entities that can provide an explanation is the Chief Land Registrar and National Land Commission who are not parties to this suit. It is therefore necessary for the Chief Land Registrar to be enjoined in this suit to provide an explanation as to how the original parcel of land is claimed as by both public and public entities and how the parties came by the approvals to alienate and subdivide the original parcel and the change of user of the land. It is also critical to enjoin the Ethics and Anti-Corruption Commission as a defendant to shed light on the investigations that have been allegedly been ongoing as to the true ownership of the suit property and for the commission to verify that Mombasa Wonderpack has not been involved in any form of fraud and/or collusion regarding the suit property.
5. In the circumstances, it is only fair and just that the defendant' s statement of defence filed herewith be amended to include the aforementioned facts for purposes of enabling the court determine the real issues in controversy between the plaintiff and the defendants herein. Further, the amendments will aid the court arrive at a just and fair determination of this suit. No undue prejudice shall be occasioned to the plaintiff as a result of the amendments sought herein.
6. The respondent (intended 5th defendant) stated that the commission is currently undertaking investigations into allegations of fraudulent acquisition and disposal of public property LR MN/ 1/6542 that had been set aside for construction of Nyali Secondary School since 1982. That the said investigation is at preliminary stage and the commission is still collecting documents and recording statements from public officers in various government offices including the National Lands Commission, Departments of Survey, Physical Planning, Land Administration to establish the above facts. That the allocation of the suit property and all the subsequent transactions, transfers and submissions were undertaken prior to the commission investigation in this matter and it is therefore not true that the commission collaborated in the transfer, registration and or passed good title of LR 20433/1/ MN (CR 69408) either as alleged or at all. That the order sought if granted ,would interfere with the ongoing objectivity of the investigations which is to preserve and protect the subject property from risks of any transactions and or dealing and or transfer to third parties. That further to the foregoing the application and the defence and counter claim has not raised any reasonable cause against the commission to warrant it to be enjoined as the 5th defendant in the amended defence and counter claim and this honourable court should not be used as a platform to intimidate the commission from accomplishing its objective in this investigation. That the defendant's application lacks merit and should therefore be dismissed with costs to the intended 5th defendant in the defence and counterclaim.



7. This court has considered the application and the submissions therein. The provisions of order 1 rule 10(2) and (4) under which the application is brought provides as follows;
- (2) (2) 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.
 - (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise direct, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants”.
8. The Court of Appeal in *Civicon Limited v Kivuwatt Limited & 2 others* (2015) eKLR stated that;
- “the objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings”.
9. A more succinct test to be applied in answering the question of joinder was pronounced by the Court of Appeal in *Central Kenya Limited v West Bank Ltd & others*, CA No 222 of 1998 as follows;
- “the paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the question involved in the suit.”
10. The Court of Appeal in *Meme v Republic* (2004) KLR 637 outlined the following circumstances which would warrant grant of leave to enjoin a party;
- (i) Where the presence of the party will result in the complete settlement of all the questions involved in the proceedings;
 - (ii) Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and
 - (iii) Where the joinder will prevent a likely course of proliferated litigation.”
11. In *Central Kenya Ltd v Trust Bank Ltd & others* CA No 222 of 1998 the Court of Appeal held that;
- “the paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit.”
12. Looking at the circumstances of this case the defendant/applicant states that this is an ownership dispute between the parties and that currently, none of the parties in this suit are well versed with registration procedures as to provide an explanation as to how the original parcel, and all subsequent subdivisions and dealings thereon, could be public land or private land. The only entities that can provide an explanation is the Chief Land Registrar and National Land Commission who are not parties to this suit. It is therefore necessary for the Chief Land Registrar to be enjoined in this suit to provide an explanation as to how the original parcel of land is claimed as by both public and public entities and how the parties came by the approvals to alienate and subdivide the original parcel and the change of user of the land. It is also critical to enjoin the Ethics and Anti-Corruption Commission as a defendant to shed light on the investigations that have been allegedly been ongoing.



The defendant/applicant does not have any claim against the intended defendants but wants them to be enjoined to explain the circumstances of the case. The proposed defendants are public bodies and public officers and the defendant/applicant would be at liberty to call them as witnesses. The explanations on registration processes of original parcel and subsequent subdivisions can be pursued through provisions of section 63(1) of the [Registration of Titles Act](#) chapter 281 of the laws of Kenya, and the court upon request can summon the Land Registrar or any person to come to court and clarify and or verify any questions on the true construction or validity of effect of any instrument or entry.

13. From the foregoing I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 6TH DAY OF DECEMBER 2022.

N.A. MATHEKA

JUDGE

