



Ethics and Anti-Corruption Commission v Diwani & 3 others (Environment & Land Case E070 of 2024) [2025] KEELC 328 (KLR) (4 February 2025) (Ruling)

Neutral citation: [2025] KEELC 328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E070 OF 2024
FM NJOROGE, J
FEBRUARY 4, 2025**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

FRANCIS BAHATI DIWANI 1ST DEFENDANT

ISAAC MURIITHI MWITARI NDEGWA 2ND DEFENDANT

RABAI MINING LIMITED 3RD DEFENDANT

WILSON GACHANJA 4TH DEFENDANT

RULING

1. This ruling is in respect to a notice of preliminary objection dated 22/8/2024. The objection which was filed by the 2nd Defendant, is premised on the following grounds: -
 1. The application and the entire suit is grossly misconceived and clearly a misadventure intended to secure interests of unclear claimant and/or entity.
 2. The non-joinder of critical parties to the suit renders the application and the suit under which it is founded incapable of adjudication and its wholly an abuse of the court process and procedure.
 3. The deliberate non-joinder of equity Bank Limited and the estate of the late Ernest Kahiro Kimani negates the principles of law and basic civil procedure rules on pleadings.
 4. The nexus of the 2nd Defendant to the subject property is lost for non-inclusion of the said Equity Bank Limited and the Estate of the late Ernest Kahiro Kimani.



5. The subject property namely as Land Portion No. 9279 (Grant No. CR 27387) pleaded by the Plaintiff has always been a private property and it is not clear under what law or provision of the Constitution the same was converted to a public property and capable of being reclaimed.
2. The Preliminary Objection was canvassed by way of written submissions.

2nd Defendant's Submissions

3. Citing the definition of a bona fide purchaser established in the case of *Jackson Kipngetich Komen v K-Rep Bank Limited & 2 Others* [2018] eKLR, counsel argued that the deliberate non-joinder of critical parties to this suit, being the estate of one Ernest Kahiro Kimani and Equity Bank Limited, renders the suit incapable of adjudication and an abuse of the court process.

Plaintiff's Submissions

4. The submissions dated 15/10/2024 were quite brief and straightforward. Counsel submitted that the grounds as raised do not meet the threshold set out in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* [1969] EA 696 and *Nitin Properties Limited v Jagjit Singh Kalsi & another* Civil Appeal No. 132 of 1989 [1989] LLR 4863 (CAK) [1995-1998] 2 EA 257 since the issues raised therein require probing of evidence.

Determination

5. The Preliminary Objection herein seeks to oust the suit herein on the basis of non-joinder and also on the basis of the allegation that the suit property has always been private property. The case of *Mukisa Biscuits v West End Distributors Ltd (supra)* defined a preliminary objection as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ...

In the same case Justice Newbold in the said suit held that:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”

6. It therefore follows that a preliminary objection is one that consists of a pure point of law. It is raised on assumption that all facts pleaded are correct and further that if demonstrated it can dispose of a matter.
7. The present objection as raised does not meet the threshold of what constitutes a preliminary objection. It is obvious that the grounds raised are not pure points of law and would require the court to probe some sort of evidence to determine the same. For example, it requires evidence to establish that the suit property has always been private property. Also, allegations of non-joinder of critical parties to the suit requires a consideration of evidence to show that they are necessary parties. Moreover, the rules of civil



procedure provide that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. Order 1 Rule 9 provides as follows: -

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

8. The above rule has been applied in the decision of Gikonyo J. in *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Matagaro And Ezekiel Misango Mutisya* (2014) eKLR where, in dicta demonstrative of the fact that non-joinder is not a fatal flaw, he held 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 effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

9. The Court of Appeal in *William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others* (2016) eKLR held that:

“...Most critically Order 1 Rule 9 of the *Civil Procedure Rules (2010)* makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

10. This is further supported by Article 159(2)(d) of the *Constitution* which abhors procedural technicalities at the expense of substantive justice. The said article stipulates that:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles

- (a)
- (b)
- (c)
- (d) justice shall be administered without undue regard to procedural technicalities.”

11. In view of the foregoing, I find no merit in the preliminary objection, and it is consequently dismissed with costs to the plaintiff only.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 4TH DAY OF FEBRUARY, 2025.

MWANGI NJOROGE

JUDGE, ELC MALINDI

