



Vivo Energy Kenya Limited v Kisumu County Government & 3 others; Ethics & Anti-Corruption Commission (Interested Party) (Petition 7 of 2019) [2024] KEELC 5112 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
PETITION 7 OF 2019
SO OKONG'O, J
JULY 4, 2024**

**IN THE MATTER PROTECTION OF THE RIGHT TO
PROPERTY AND ECONOMIC RIGHT OF THE USER THEREOF**

AND

**IN THE MATTER OF LICENSING AND REGULATION OF THE USER OF
IMMOVABLE PROPERTY REGISTERED IN THE NAME OF A PRIVATE CITIZEN.**

AND

**IN THE MATTER OF THE NATIONAL ENVIRONMENTAL
MANAGEMENT AND CO-ORDINATION ACT 8 OF 1999**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 10, 21, 22, 23, 25, 40,
35, 47, 50 AND 60 (1) (B) OF THE CONSTITUTION OF KENYA, 2010.**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NUMBER 4 OF 2015

BETWEEN

VIVO ENERGY KENYA LIMITED PETITIONER

AND

THE KISUMU COUNTY GOVERNMENT 1ST RESPONDENT

KENYA PORTS AUTHORITY 2ND RESPONDENT

KENYA RAILWAYS CORPORATION 3RD RESPONDENT

INSPECTOR GENERAL 4TH RESPONDENT



AND

ETHICS & ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. What is before the court is a Notice of Motion application dated 8th February 2024 by the 3rd Respondent seeking; leave to amend its answer to the petition and introduce a cross-petition in terms of the annexed draft amended answer to the petition and cross-petition, and leave to join the National Land Commission as a respondent in the cross-petition. The application was brought on the grounds set out on the face thereof and on the affidavit of Geoffrey Wekesa sworn on 8th February 2024. The 3rd Respondent averred that the parcel of land known as Kisumu Municipality/Block 7/7(hereinafter referred to only as “the suit property”) was part of a larger parcel of land reserved for the 3rd Respondent and that the same was always held and occupied by the petitioner subject to a lease that was granted initially to M/S Smith Mackenzie Oil Installation and subsequently to Kenya Shell that changed its name to Vivo Energy Kenya Ltd., the Petitioner herein. The 3rd Respondent averred that it had always received rent for the suit property since 1909 when the same was first leased to M/S Smith Mackenzie Oil Installation and that it had never surrendered the property to the Government.
2. The 3rd Respondent averred that the Petitioner claimed that it applied for the extension of the lease for the suit property and that the extension was granted by the National Land Commission the proposed respondent in the cross-petition which issued to the Petitioner a lease on 13th November 2018. The 3rd Respondent averred that in the absence of a surrender of its interest in the suit property, the proposed Respondent to the cross-petition, the National Land Commission (hereinafter referred to only as “the NLC”) had no power and/or authority to approve the Petitioner’s application for extension of lease in favour of the Petitioner.
3. The 3rd Respondent averred that it was important for it to be granted leave to amend its response to the petition to introduce a cross-petition to not only protect its interest in the suit property but also to enable the court to adjudicate upon and settle all the issues that pertain to the suit property as raised in the petition and cross-petition. The 3rd Respondent averred that it was also important for the NLC to be joined in the intended cross-petition because it was charged by law with the management of land registration. The 3rd Respondent annexed to its affidavit in support of the application a copy of the draft amended answer to petition and cross-petition.
4. The application was opposed by the Petitioner through a replying affidavit sworn by Naomi Assumani on 15th February 2024. The Petitioner averred that it was the registered proprietor of the suit property which was a private property. The Petitioner averred that the petition was part heard and that it had already called three (3) expert witnesses. The Petitioner averred that one of the witnesses called by the Petitioner was Hon. Mulusya who was an elderly and sick person who attended court with an aide. The Petitioner averred that the issues sought to be introduced through the cross-petition would drastically change the character of the proceedings and greatly prejudice the Petitioner. The Petitioner averred that the petition could be determined without the joinder of NLC to petition. The Petitioner averred that the 3rd Respondent was guilty of contempt of court by purporting to obtain an illegal instrument of title despite a court order prohibiting the same. The Petitioner averred that the application before the court was an attempt by the 3rd Respondent to validate the said illegality and to delay the just determination of the petition. The 3rd Respondent averred that the NLC had no role to play in the extension of leases and that no relief had been sought against it by the 3rd Respondent in the cross-



- petition. The Petitioner averred that the joinder of NLC was not necessary for the determination of the issues arising in the petition before the court.
5. The 3rd Respondent's application was argued by way of written submissions. The 3rd Respondent filed submissions dated 8th February 2024 in which it reiterated the contents of its affidavit in support of the application. The 3rd Respondent averred that amendment of pleadings can be undertaken at any stage of the proceedings. The 3rd Respondent averred that it had demonstrated that the intended amendment was not frivolous and that it was intended to enable the court to determine conclusively the issue of the ownership of the suit property. The 3rd Respondent averred that the Petitioner would be at liberty to respond to the cross-petition and also to recall any of its witnesses who had testified. The 3rd Respondent averred that any prejudice to the Petitioner could be remedied in costs. The 3rd Respondent cited two cases in support of the foregoing submissions which I have considered. The 3rd Respondent reiterated that it sought to join the NLC to the petition because it had a constitutional and statutory mandate of administering and managing land in Kenya an exercise that was being undertaken by the Commissioner of Lands at the time the suit property was allocated to the Petitioner or when the Petitioner had its lease extended. The 3rd Respondent submitted that the Commissioner of Lands (now the NLC) had no power or authority to allocate or extend the lease of the suit property in favour of the Petitioner. The 3rd Respondent averred that the reliefs sought in the cross-petition could not be granted without the joinder of the NLC to the suit as doing so would amount to condemning it unheard. The 3rd Respondent urged the court to allow the application as prayed.
 6. The Petitioner filed its submissions dated 15th February 2024. The Petitioner reiterated the contents of its affidavit in opposition to the application. The Petitioner submitted that the 3rd Respondent had not made a case for the joinder of NLC to this part heard petition. The Petitioner cited Rule 2 and Rule 5(d) (ii) of *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013(Rules) and submitted that the 3rd Respondent's proposed cross-petition had not satisfied the threshold for the joinder of a party to a petition. The Petitioner submitted that the NLC was not a necessary party to the proceedings herein. The Petitioner cited the advisory opinion of the Supreme Court in *In the Matter of the National Land Commission* in which the court stated that the NLC had no mandate in the process of issuing title deeds and leases and as such it had no role to play in this petition. The Petitioner submitted that the 3rd Respondent would not suffer any injustice if the application was refused.
 7. The Petitioner submitted further that the joinder of the NLC in the suit would occasion injustice and delay in the determination of the petition. The Petitioner submitted that the joinder of NLC to the petition would have the effect of re-opening the petition a move that would necessitate fresh site visits and recalling of the Petitioner's witnesses who had testified for further cross-examination by the new party. The Petitioner submitted that the prejudice and injustice likely to be occasioned to the Petitioner could not be atoned in costs. The Petitioner submitted further that the 3rd Respondent's application was brought after unreasonable delay which delay had not been explained. The Petitioner submitted that the application was brought five years after the 3rd Respondent had filed its answer to the petition. The Petitioner submitted that the 3rd Respondent had a duty to explain the delay which it did not. The Petitioner submitted that the 3rd Respondent was not deserving the exercise of the court's discretion. The Petitioner submitted that the 3rd Respondent had not made a case for the joinder of the NLC to the suit. The Petitioner urged the court to dismiss the 3rd Respondent's application with costs. The Petitioner cited several authorities in support of its submissions which I have considered.



Analysis and determination

8. The 3rd Respondent's application was brought under Articles 47 and 50 of *the Constitution* and Rules 3(8), 5, 18 and 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (hereinafter referred to only as "the Rules"). The 3rd Respondent's application has two limbs; the first limb seeks leave to amend the answer to the petition to introduce a cross petition while the second limb of the application seeks the joinder of NLC to the cross-petition as a Respondent.

Rule 18 of the Rules provides as follows:

- " 18. A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court."

Rule 15 of the Rules provides as follows:

" 15.

- (1) The Attorney-General or any other State organ shall within fourteen days of service of a petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.
- (2)
 - (a) A respondent not in the category of sub rule (1) shall within seven days file a memorandum of appearance and either a—
 - (i) replying affidavit; or
 - (ii) statement setting out the grounds relied upon to oppose the petition.
 - (b) After filing either of the documents referred to in sub rule (2) (a), a respondent may respond by way of a replying affidavit or provide any other written document as a response to the petition within fourteen days.
- (3) The respondent may file a cross-petition which shall disclose the matter set out in rule 10(2).

9. Rule 18 of the Rules gives the court power to allow an amendment of pleadings at any stage of the proceedings. The application before the court was prompted by the filing by the Petitioner of the Further Amended Petition on 23rd June 2023 following the leave that was granted by the court on 19th June 2023 on an oral application by the Petitioner. Upon being served with the Further Amended Petition, the 3rd Respondent filed Amended Answer to Petition and a cross-petition against the Petitioner, the 1st Respondent and a new party, the NLC. In a ruling delivered on 30th January 2024 on a preliminary objection taken by the Petitioner to the said Amended Answer to Petition and a cross-petition, the court found the amendment of the Answer to the petition proper but held that the filing



of the cross petition was irregular, and gave the 3rd Respondent time to move the court to regularise the same. The court stated as follows in part:

“...Rule 5 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to only as “the Rules”) gives the court power to add, join, substitute or strike out a party to the petition. Rule 15 of the Rules provides for the reply to the petition and cross petition while Rule 18 provides for the amendment of pleadings. I am of the view that a respondent to a petition has a right to file a cross-petition together with his answer or reply to the petition without leave of the court within the time provided under Rule 15 of the Rules. I am also of the view that filing of a cross-petition outside the time prescribed under Rule 15 (1) and (2) of the Rules would require leave of the court as it would involve amendment of pleadings under Rule 18 of the Rules and filing of further “information” under Rule 21 (2) of the Rules that require leave of the court.

...The 3rd Respondent’s amended answer to the petition was therefore filed within the ambit of the orders granted by the court on 19th June 2023. The filing of a cross-petition and joining of a new party to the proceedings was however outside the scope of the said orders and required leave of the court under Rules 5 (d) and (e), 18 and 21 (2) of the Rules. For the foregoing reasons, it is my finding that the 3rd Respondent’s cross-petition having been filed without leave of the court is irregular. Pursuant to Rule 3 (2), (4) and (5), and Rule 8 of the Rules, I grant leave to the 3rd Respondent to file an application and submissions in support thereof to regularise its impugned cross-petition within 14 days from the date of this ruling for the court’s consideration.”

10. The first limb of the 3rd Respondent’s application is seeking to further amend the answer to the further amended petition to introduce a cross-petition. I have perused the draft cross-petition that the 3rd Respondent has sought to introduce through the amendment sought. I have found nothing incompatible with the 3rd Respondent’s case as pleaded in the amended answer to further amended petition. I agree with the 3rd Respondent that the 3rd Respondent has not sought to introduce a new case through the cross-petition. The 3rd Respondent has only reiterated that the suit property was at all material times part of its larger parcel of land and that the NLC had no power or authority to grant a lease in respect thereof to the Petitioner. The 3rd Respondent has sought a declaration that it is the rightful owner of the larger parcel of land within which the suit property is situated, a declaration that the creation of the suit property and registration of the same in the name of the Petitioner was illegal, null and void and an order compelling the 1st Respondent in the main petition and the NLC to rectify the register of the suit property by cancelling the title held by the Petitioner.
11. The Petitioner’s case as set out in its further amended petition is that it is the registered owner of the suit property and that the 3rd Respondent has no interest in the suit property apart from the siding fees that was being paid to it by the Petitioner. The Petitioner has sought among other reliefs a declaration that it is the registered owner of the suit property and as such entitled to quiet possession and lawful use thereof. The crux of the dispute between the Petitioner and the 3rd Respondent is the ownership of the suit property. This is what the court has been called upon to determine both in the further amended petition and the proposed cross-petition. I am not persuaded that the Petitioner will suffer any prejudice or injustice if the 3rd Respondent is granted leave to further amend its answer to the further amended petition to introduce the proposed cross-petition. As I have mentioned above, the intended amendment of the answer to petition to introduce a cross-petition was prompted by the Petitioner’s amendment of its amended petition. The Petitioner cannot therefore accuse the 3rd



Respondent for the delay in bringing the application to amend the answer to the further amended petition to introduce a cross-petition. In any event, the court has the power to allow amendment of pleadings at any time. The Petitioner has so far amended its petition twice with the last one having been made in the middle of a hearing. I have noted also that the petition is in its early stages of disposal. The Petitioner has so far only called three expert witnesses. The Petitioner is yet to close its case. It has more witnesses to call and will be at liberty to recall any of the witnesses who have already testified. For the foregoing reasons, I find merit in the limb of the application seeking the amendment of the answer to the further amended petition to introduce a cross-petition.

12. The second limb of the application is seeking leave to add NLC as a party to the cross-petition. Rule 5(d) and (e) of the Rules provide as follows:

- “(d) 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 just—
 - (i) order that the name of any party improperly joined, be struck out; and
 - (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
- (e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.”

13. The functions of the NLC is set out in Section 5 of the [National Land Commission Act, 2012](#) as follows:

- “5.
 - (1) Pursuant to Article 67(2) of [the Constitution](#), the functions of the Commission shall be —
 - (a) to manage public land on behalf of the national and county governments;
 - (b) to recommend a national land policy to the national government;
 - (c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
 - (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
 - (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;



- (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
 - (g) to assess tax on land and premiums on immovable property in any area designated by law; and
 - (h) to monitor and have oversight responsibilities over land use planning throughout the country.
- (2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of *the Constitution*—
- (a) on behalf of, and with the consent of the national and county governments, alienate public land;
 - (b) monitor the registration of all rights and interests in land;
 - (c) ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations;
 - (d) develop and maintain an effective land information management system at national and county levels;
 - (e) manage and administer all unregistered trust land and unregistered community land on behalf of the county government; and
 - (f) develop and encourage alternative dispute resolution mechanisms in land dispute handling and management.
- (3) Despite the provisions of this section, the Commission shall ensure that all unregistered land is registered within ten years from the commencement of this Act.
- (4) Parliament may, after taking into consideration the progress of registration, extend the period set by the Commission under subsection (3).”

14. Among the functions of the NLC is to manage public land on behalf of the national and county governments, and on behalf of, and with the consent of the national and county governments to alienate public land. These functions were initially performed by the Commissioner of Lands under the Government Lands Act, Chapter 280 Laws of Kenya. According to the Petitioner, the suit property was Government Land and the Petitioner obtained its current title through an extension of Government Lease. The Petitioner has placed before the court a letter dated 13th February 2009 from the Commissioner of Lands approving the extension of the Petitioner’s lease over the suit property for a term of 50 years with effect from 1st January 2009 on terms and conditions that were set out in the said letter. The Petitioner placed evidence before the court of the payment that it made to the Commissioner of Lands on 22nd June 2009 for that extension. I believe we will get to know from



the Petitioner's remaining witnesses how the lease of Government Land that was extended by the Government and payment made to the Government was ultimately issued by the 1st Respondent in the main petition, The Kisumu County Government as the lessor.

15. It is not disputed that the office of the Commissioner of Lands is now defunct and that the functions such as extension of leases and alienation of public land is now being undertaken by the NLC. I believe that the NLC is better placed to tell the court whether the suit property was; Government Land, County Government of Kisumu's land or the 3rd Respondent's land. The 3rd Respondent has accused the NLC of illegally and fraudulently allocating the suit property and/or extending its lease in favour of the Petitioner without authority. I agree that the NLC is entitled to be heard on the question before the court determines the same. I am satisfied in the circumstances that the NLC is a necessary party to the cross-petition and that its joinder to the cross-petition would enable the court to adjudicate upon and settle all the issues relating to the ownership of suit property as raised in the petition and cross-petition. A case has therefore been made for the joinder of the NLC to the cross-petition.

Conclusion

16. In conclusion, I find merit in the Notice of Motion application dated 8th February 2024 and make the following orders;
1. The 3rd Respondent is granted leave to further amend its amended answer to further amended petition and to introduce a cross-petition in terms of the draft amended answer to petition and cross-petition annexed to the application.
 2. The 3rd Respondent is also granted leave to join the National Land Commission as a party to the cross-petition.
 3. The further amended answer to the further amended petition, and the cross-petition shall be filed within 14 days from the date hereof.
 4. The Petitioner shall be at liberty to file a reply to the further amended answer to the further amended petition and an answer to the cross-petition within 14 days from the date of service.
 5. The 1st Respondent to the main petition which is also the 3rd Respondent in the cross-petition shall file its reply to cross-petition within 14 days from the date of service of the further amended answer to the further amended petition and cross-petition.
 6. For the NLC, summons shall be taken out forthwith by the 3rd Respondent and served upon it together with a copy of the further amended answer to the further amended petition and cross-petition. For the completeness of record, the 3rd Respondent shall also serve upon the NLC a copy of the Petitioner's further amended petition and a copy of this ruling.
 7. NLC shall enter appearance within 7 days of service and file its response to the cross-petition within 14 days thereafter if it wishes to defend the cross-petition.
 8. The costs of the application shall be in the cause.

DELIVERED AND DATED AT KISUMU ON THIS 4TH DAY OF JULY 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Luseno for the Petitioner



Mr. Sala for the 1st Respondent

Ms. Swaka for the 2nd Respondent

Ms. Moraa h/b for Mr. Mutei for the 3rd Respondent

Ms. Kakuvi for the Interested Party

Ms. J. Omondi-Court Assistant

