



**Naurori v Freeman & 2 others (Environment & Land Case
E010 of 2023) [2024] KEELC 6701 (KLR) (14 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6701 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E010 OF 2023
CG MBOGO, J
OCTOBER 14, 2024**

BETWEEN

WILLIAM SANINGO NAURORI APPLICANT

AND

BRIAN WAYNE FREEMAN 1ST DEFENDANT

MARA PHOTOGRAPHIC SAFARIS 2ND DEFENDANT

FREEMAN SAFARIS LIMITED 3RD DEFENDANT

RULING

1. Before this court for determination is the notice of motion dated 10th June, 2024 filed by the 3rd defendant/ applicant and it is expressed to be brought under Order 1 Rule 10 (2) and (14), Order 2 Rule 15 of the Civil Procedure Rules, and Section 3A of the [Civil Procedure Act](#) seeking the following orders: -
 1. That this honourable court be pleased to strike out the 3rd defendant as party to this suit.
 2. That the costs of this application and costs of defending the suit by the 3rd defendant/ respondent be awarded to the 3rd defendant/ applicant.
2. The application is premised on the grounds inter alia that the 3rd defendant/ applicant has been improperly joined as a party to this suit. The application is further supported by the affidavit of Diana Gatwiri, the Director of the 3rd defendant/ applicant. The 3rd defendant/ applicant deposed that it never existed with rights capable of being sued or owning property when the lease agreement between the plaintiff/ respondent and the 1st defendant was entered in the year 2002 and when the lease expired in the year 2019.
3. The 3rd defendant/ applicant deposed that it was only registered as a legal person on 1st February, 2020, therefore, it was never a party to the lease agreement. Further, that the plaintiff/ respondent



has not established a nexus between the alleged breach of the lease entered back in the year 2002. The 3rd defendant/ applicant further deposed that its core business is in photography in the Maasai Mara National park, and that it has no business trespassing on the plaintiff/ respondent's land. Further, that it has no assets and for this reason, it is a stranger to the plaintiff/ respondent's claim as it was not capable of acquiring any rights.

4. Further, it was deposed that the cause of action arose long before it existed, and there is no relief capable of being sought or that has been pleaded against the 3rd defendant/ applicant. The 3rd defendant/ applicant further deposed that the liability if attributed to the 1st and 2nd defendants cannot be shared with it, and the misjoinder does not defeat the entire suit as its presence has no effect to the adjudication and settlement of the questions involved. Further, that the misjoinder does not go to the root of the suit, and a judgment can still be enforced in its absence. Further, that no action lies against it hence it should not be taken through trial.
5. The application was opposed by Nchoko Bosco, advocate, vide his undated replying affidavit filed in court on 3rd July, 2024. The learned counsel deposed that the application has not been made in good faith since the claim against the 3rd defendant/ applicant is that it is a proxy of the 1st defendant whom he has a prima facie case against, and which requires assessing the evidence. The learned counsel further deposed that the application is premature as evidence can only be tendered at the trial stage. He deposed that whether the 3rd defendant/ applicant is liable for the actions of the 1st defendant, the claim of unlawful alienation by the 3rd defendant/ applicant should essentially be controverted by way of evidence.
6. The learned counsel went on to depose that the 3rd defendant/ applicant and the 1st defendant are joined at the hip with the 1st defendant controlling 95 percent of the 3rd defendant/ applicant's shares. Further, that the power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as it has been invited to do so.
7. The 3rd defendant/ applicant filed its further affidavit sworn on 22nd July, 2024, in response thereto. The 3rd defendant/ applicant deposed that an advocate cannot depone to evidential facts at any stage of the suit, and that the replying affidavit sworn by the learned counsel is fatally defective as it offends Rule 9 of the Advocates (Practice) Rules. Further, it was deposed that the replying affidavit sworn by the learned counsel offends Order 19 Rule 3 (1) of the Civil Procedure Rules, as the same cannot help the court reach a fair decision as it is a biased opinion.
8. The application was canvassed by way of written submissions. The plaintiff/ respondent filed his written submissions dated 5th August, 2024 where he raised one issue for determination which is whether the 3rd defendant is improperly enjoined in these proceedings and if the answer is in the negative, the consequential question as to whether the case against it can be struck off for misjoinder.
9. On this issue, the plaintiff/ respondent submitted that the application as brought is premature as the 3rd defendant/ applicant could not resist the temptation to wade into the merits of the main suit. Further, that the matter before this court is not only whether to allow the application on account of misjoinder of the 3rd defendant/ applicant in these proceedings, but also invites the court to look at the claim as it is and determine on whether the prayers as sought, ought to be granted.
10. While relying on the cases of Werrot & Company Ltd versus Andrew Douglas Gregory & Others [1998] eKLR, Kizito M. Lubano versus Kemri Board of Management & 8 Others [2015] eKLR and Kingori versus Chege & 3 Others [2002] 2 KLR 243, the plaintiff/ respondent submitted that the 3rd defendant/ applicant is properly joined in these proceedings as it is operating in the suit property without any colour of right through the 1st defendant who owns 95 percent of the shares. Further, he



submitted that the 3rd defendant/ applicant carries on the suit property photographic evidence which is run by the 1st defendant, and it is thus immaterial when it was registered.

11. The plaintiff/ respondent further submitted that there are allegations of wrong doing on the part of the 3rd defendant/ applicant in the plaint and witness statements with a specific remedy sought against it. The plaintiff/ respondent further submitted that it matters not whether there is a contractual relationship or otherwise or an agreement executed between the 3rd defendant/ applicant and himself, as it is a third party who benefits from the 1st defendant's oral agreement with the plaintiff/ respondent for its benefit.
12. The plaintiff/ respondent submitted that this court cannot hear and determine his claim without the inclusion of the 3rd defendant/ applicant with whom the 1st defendant operates in the suit property as proxies and no effective judgment or decree can be executed without its inclusion. Further, he submitted that the joinder of the 3rd defendant/ applicant is necessary in this suit for the effective determination of the issues before the court, and for the wrong done as a result of the 1st defendant's occupation of the suit property. Reliance was placed in the case of *Departed Asians Property Custodian Board versus Jaffer Brothers Ltd* [1999] 1 EA 55.
13. The 3rd defendant/ applicant did not file its written submissions. Be that as it may, I have considered the application, replies thereof and the written submissions filed by the plaintiff/ respondent. The issue for determination is whether the 3rd defendant/ applicant is a necessary party in these proceedings.
14. Before I delve into the merits of the application before the court, in the further affidavit sworn by the Director of the 3rd defendant/ applicant, the question as to the validity of the learned counsel to depone to the facts of the case was raised. The 3rd defendant/ applicant argued that the replying affidavit sworn by the learned counsel is fatally defective, and offends Rule 9 of the Advocates (Practice) Rules and Order 19 Rule 3 (1) of the Civil Procedure Rules.
15. Order 19 Rule 3 (1) of the Civil Procedure Rules, provides that:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”
16. Further, Rule 9 of the Advocates (Practice) Rules states:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”
17. From the above cited rules, it can be seen that an advocate is prohibited from intervening in disputes involving his clients and other parties. The rules in my view provide the confines of issues which advocates may depone to. As such, an advocate ought to restrain himself from deponing to facts and



issues which he can be cross examined to test his credibility. In *Hakika Transporters Services Ltd versus Albert Chulah Wamimitaire* [2016] eKLR, the Court of Appeal stated

“As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the high court and in this court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See *Pattni v. Ali & 2 Others*, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.”

18. From the replying affidavit sworn by Nchoko Bosco, the learned counsel on behalf of the plaintiff/respondent, the 3rd defendant/ applicant’s relationship with the 1st defendant has been brought forth, a fact which has not been controverted. The issue in contention is that no nexus has been established between the plaintiff/ respondent and the 3rd defendant/ applicant. The learned counsel sought to rely on evidence which is akin to involving himself in a matter which is not in his premise. In other words, it appears as though the learned counsel is prosecuting his own case. In my view, I find the replying affidavit to be defective.

19. On whether the 3rd defendant/ applicant is a necessary party to these proceedings, Order 1 Rule 10 (2) of the Civil Procedure Rules, states as follows: -

“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.”

20. In this case, the 3rd defendant/ applicant argued that it was not in existence at the time when the lease agreement was entered into between the plaintiff/ respondent and the 1st defendant in the year 2002 and neither was it in existence when the same expired in the year 2019. In support thereof, the 3rd defendant/ applicant annexed a copy of its certificate of incorporation dated 1st February, 2020 as well as a copy of the records indicating its directorship. The 3rd defendant/ applicant further argued that if there is any liability, the same lies with the 1st and 2nd defendant, and that no nexus has been established. I have perused the plaint as well as the documents accompanied thereto. I note that the plaintiff/respondent lays claim as to the utilization of the suit property as against the defendants including allegations of fraud. Whether the 3rd defendant/ applicant is liable or not or to whichever extent, is not an issue to be determined at this stage.

21. In *Marwaha versus Pandit Dwarka Nath* [1952] 25 LRK 45 it was held that:

“This application under Order 1, rule 10(2) to strike out the second defendant is misconceived as the ground on which he seeks to be struck out amounts in substance to a defence on a point of law, namely his non-liability upon actions in tort at the time when the cause of action arose. That being so, the proper course would have been to file a defence and to plead this point in it, under Order 6, rule 27.”



22. From the above, it is my finding that the 3rd defendant/ applicant is a necessary party in these proceedings, the notice of motion dated 10th June, 2024 lacks merit and it is thus dismissed. Costs in the cause. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 14TH DAY OF OCTOBER, 2024.

HON. MBOGO C.G.

JUDGE

14/10/2024.

In the presence of: -

Mr. Meyoki Pere – C. A

