



Ethics and Anti -Corruption Commission v Gacanja & 2 others; Machakos County Government (As succession of County Council of Masaku) & another (Intended Defendant) (Environment & Land Case 127 of 2019) [2023] KEELC 396 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 396 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 127 OF 2019
CA OCHIENG, J
FEBRUARY 1, 2023**

BETWEEN

ETHICS AND ANTI -CORRUPTION COMMISSION PLAINTIFF

AND

WILSON GACANJA 1ST DEFENDANT

JOSEPH MUTUKU MUIA 2ND DEFENDANT

FAMILY BANK LIMITED 3RD DEFENDANT

AND

MACHAKOS COUNTY GOVERNMENT (AS SUCCESSION OF COUNTY COUNCIL OF MASAKU INTENDED DEFENDANT

NATIONAL LAND COMMISSION INTENDED DEFENDANT

RULING

1. What is before court for determination is the 2nd Defendant’s Notice of Motion application dated the June 2, 2020 where he seeks the following orders;
 1. Spent
 2. That pending the hearing and determination of this application, the Defendant/Applicant and his agents be allowed access to Land Reference Number Machakos Municipality Block 1/623 for purposes of completing construction, taking possession and use of the same.
 3. That pending the hearing and determination of this suit, the Defendant / Applicant and his agents be allowed access to Land Reference Number Machakos Municipality Block 1/623 for purposes of completing construction, taking possession and use of the same.



4. That pending the hearing and determination of this suit, the Plaintiff/ Respondent be ordered to deposit Kshs 28, 000,000/= in a joint interest earning account as security for costs and current value of the suit premises herein.
 5. That an Order do issue joining Machakos County Government (as successor of County Council of Masaku) and National Land Commission as Defendants herein.
 6. That upon grant of prayer 5 above, the Plaintiff be ordered to amend the Plaintiff with corresponding leave to 2nd Defendant to amend his Defence and Counter Claim to have substantive prayers against the intended Defendants.
 7. That costs of this application be paid by Plaintiff/Respondent.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Joseph Mutuku Muia where he deposes that he is a Lessee of the aforementioned parcel of land and holding a title to the said suit land having legally acquired it, after the initial allottee was allotted the same by the President of the Republic of Kenya under the repealed Constitution. He claims to have applied for a loan of Kshs 8,000,000/= from the 3rd Defendant to develop the suit land but the Plaintiff has been frustrating his efforts to complete the construction through unnecessary court cases. He avers that he is straining to facilitate the loan through his own pocket and this has been occasioned by the Plaintiff's prevention of completion of the warehouse on time. He insists he has continued to suffer losses both for loss of user including income as well as bank charges and interest without lawful excuse. Further, as a result the Plaintiff should deposit security pending determination of this case. He reiterates that there are interim orders in place thus the need for authority of this court to enable him gain access to the suit land.
 3. The Plaintiff opposed the application and filed a replying affidavit sworn by Gideon Rukaria, its Principal Investigator where he deposes that in 2018, the Commission received a complaint of allegation that Joseph Mutuku Muia had been illegally allocated a parcel of land, which was public property. He explains that the Plaintiff exercised its mandate under section 11(1) (j) of the *Ethics and Anti Corruption Act* and investigated the said allegations and established that the Applicant fraudulently acquired a parcel of land particularly described as Machakos Block 1/ 623 (initially part of LR No 909/536). Further, that the said suit land is duly alienated government land and reserved for public purpose namely, Government Housing which land is part of an area set aside for government houses. He referred to the findings of the investigations as captured in the affidavit of Alfred Seroney which was filed in support of the application dated the November 19, 2019. Further, that after the investigations, the Plaintiff instituted a suit for recovery of the aforementioned land in November, 2019 and on September 18, 2020, the Court granted orders of injunction restraining the Defendants from interfering with the said suit land. He insists that the instant application is frivolous, vexatious and an abuse of the court process. Further, that the need for the presence of the intended Defendants as Defendants has not been established and if the application is allowed, it will delay the expeditious determination of the recovery suit. He reiterates that no Appeal was preferred against the Ruling of Justice Angote dated the September 18, 2020 where he granted an injunction while prayers No 1, 2, & 3 have been overtaken by events. Further, that they have no claim against the intended Defendants necessitating their joinder and amendment of the Plaintiff. He reaffirms that the Plaintiff is a Constitutional Commission that draws budget from the exchequer and the application does not meet the threshold for orders for security of costs. Further, the issues raised can be canvassed in the main suit and the prayers for mandatory injunction offends the provisions of section 16 of the *Government Proceedings Act*.
 4. The application was canvassed by way of written submissions.



Analysis and Determination

5. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivaling submissions, the following are the issues for determination: Whether the 2nd Defendant including his agents should be allowed access to Land Reference Number Machakos Municipality Block 1/623 for purposes of taking possession and completing construction. Whether the Machakos County Government and the National Land Commission should be joined in this suit. Whether the Plaintiff should give security for costs.
6. Both the Plaintiff and 2nd Defendant in their respective submissions reiterated their averments as per the affidavits and relied on relevant decisions which I have considered.
7. As to the whether the 2nd Defendant including his agents should be allowed access to Land Reference Number Machakos Municipality Block 1/623 for purposes of taking possession and completing construction.
8. The 2nd Defendant has sought to take possession of the suit land and complete construction thereon which fact is opposed by the Plaintiff. I note as per the orders of Justice Angote dated the September 18, 2020, he had granted an injunction restraining the Defendants from entering the suit land nor interfering with it pending the outcome of this suit. I note the Defendants never appealed against the said orders of injunction and only sought to prosecute the instant application when the suit was set down hearing. Be that as it may, I have perused the impugned Ruling of my brother Judge and I am of the view that the orders sought in this instant application are tantamount to setting aside the injunctive orders in place. I note the fulcrum of the dispute herein revolves around claim for public land and in the interest of justice, I am unable to grant the orders of reentry into the suit land to complete the construction. In the circumstance, prayers No 2, 3 and 4 of the instant Notice of Motion application must fail.
9. As to whether the Machakos County Government and the National Land Commission should be joined in this suit. The 2nd Defendant has sought for joinder of these two parties claiming they are necessary parties. In respect to joinder of a party to a suit, Order 1 Rule 10 of the [*Civil Procedure Rules*](#) provides *inter alia*:

- (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
- (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."



10. Further, the Court of Appeal in the case of *Civicon Limited v Kivuwatt Limited and 2 Others* [2015] eKLR held that:

"The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matters in dispute. For this reason, at any stage of the proceedings, the court may on such terms as it thinks just and either on its own motion or on application, order for the joinder of a party where the party is a person who ought to have been joined as a party or; (a) whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. (b) the party is any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed which in the court's opinion it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."

11. On perusal of the Plaintiff, Defences including Counterclaim and the instant application, including the annexures herein, I note the National Land Commission was formed post 2010 yet the suit land had allegedly been allocated to the 2nd Defendant in the 1990s. Further, in the impugned Ruling by Justice Angote, it emerged that the alleged Deed Plan that was used to register the 2nd Defendant as owner of suit land was not approved by the Director of Survey. Further, the process the 2nd Defendant's father adhered to acquire the suit land was not clearly demonstrated. It is my considered view that the Plaintiff after conducting investigations sued the correct parties and if the 2nd Defendant feels the National Land Commission and Machakos County Government should be part of the proceedings herein, then he is free to take out third party notices. I opine that a Plaintiff cannot be compelled to sue a party in proceedings it has instituted. In the circumstance, while relying on the legal provisions I have quoted as well as associating myself with the decision I have cited, I decline to join the National Land Commission and Machakos County Government to these proceedings.
12. As to whether the Plaintiff should give security for costs.
13. The 2nd Defendant has sought for the Plaintiff to be ordered to deposit Kshs 28, 000,000/= in a joint interest earning account as security for costs being the current value of the suit premises herein. I note the Plaintiff is a Constitutional Commission that draws its resources from the exchequer. Further, the Plaintiff acted within its mandate and instituted this suit to recover public land on behalf of the government.
14. On security for costs, Order 26 Rule 1 of the *Civil Procedure Rules, 2010* provides as follows;
- "In any suit the court may order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any other party".
15. In the case of *Shah V Shah* [1982] KLR 95 the Court stated that; "The general rule is that security is normally required from Plaintiff's resident outside the jurisdiction, but as was agreed in the court below, a court has discretion, to be exercised reasonably and judicially, to refuse to order that security be given".
16. Based on the circumstances at hand, noting that the 2nd Defendant has failed to demonstrate how the Plaintiff that is a Constitutional Commission can fail to pay costs if ordered by the Court, as well as relying on the legal provisions cited above while associating myself with the decisions of *Sakafu Limited v Flowcrete East Africa Limited* 2019] eKLR and *Christopher Musyoka Musau V Katherine*



Brown (2018) eKLR where the Judges declined to grant security for costs, at this juncture , I am not satisfied that the 2nd Defendant has fulfilled the threshold set to compel the Plaintiff to grant it security for costs.

17. It is against the foregoing that I find the Notice of Motion dated the June 2, 2020 unmerited and will proceed to dismiss it with costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 1ST DAY OF FEBRUARY, 2023.

CHRISTINE OCHIENG

JUDGE

