



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maciazinex Africa Company Limited v Mugo & 3 others (Environment & Land Case 440 of 2014) [2023] KEELC 459 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 459 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 440 OF 2014  
JO OLOLA, J  
FEBRUARY 2, 2023**

**BETWEEN**

**MACIAZINEX AFRICA COMPANY LIMITED ..... PLAINTIFF**

**AND**

**MICHAEL MUGO ..... 1<sup>ST</sup> RESPONDENT**

**DAVID GITHAMBO ..... 2<sup>ND</sup> RESPONDENT**

**KENYA FARMERS ASSOCIATION LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. By the Chamber Summons dated and filed herein on March 24, 2022, the Ethics and Anti-Corruption Commission (the applicant) prays for orders:
  1. That this honourable court be pleased to add the Proposed 4<sup>th</sup> defendant/applicant (Ethics and Anti-Corruption Commission) as a Party to this suit;
  2. That upon joinder of the 4<sup>th</sup> defendant/applicant as a party to this suit, this honourable court be pleased to order that the 4<sup>th</sup> defendant/applicant be served with all the pleadings filed in this suit within such reasonable time as this honourable court may deem appropriate;
  3. That this honourable court be pleased to make such other order(s) as may be just and expedient in the circumstances of this case;
  4. That the costs of this application be in the cause.



2. The application is supported by an affidavit sworn by the applicant's Investigator Simeon Lei and is premised on the grounds:
  - (i) That the applicant is a statutory body established under section 3 of the *Ethics and Anti-Corruption Commission Act*, 2011;
  - (ii) That under section 11 of the Act as read with section 56B of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003 (ACECA), the Applicant has power to carry out investigations and depending on the outcome, to inter alia institute and conduct proceedings in court for purposes of recovery or protection of public property;
  - (iii) That in discharge of its investigative mandate, under article 252 of the *Constitution* and the statutes referred to in (ii) above, the Applicant has carried investigation into the circumstances surrounding the alienation of the subject matter of this suit, to wit, Nyeri Municipality Block 11/370 and inter alia established that it constitutes public land that was irregularly and unlawfully alienated in favour of private individuals;
  - (iv) That in exercise of its statutory mandate under the statutes referred to in Paragraph (ii) above, the applicant intends to recover the suit property;
  - (v) That in order to avoid a multiplicity of suits and save on judicial time, it is fair and convenient that the applicant be added to this suit so that all issues concerning the subject matter of the suit, ownership of the suit property, can effectively be dealt with; and
  - (vi) That in the interest of justice as well as the public interest that the Applicant be enjoined in this suit.
3. Maciazinex African Company Limited (the plaintiff) is opposed to the application. In a shortreplying affidavit sworn on its behalf by its Managing Director Joseph Machira Mugweru and filed herein on May 16, 2022, the plaintiff avers that it is opposed to the application as the same is meant to circumvent the process of the court which gave a last adjournment to the 3<sup>rd</sup> defendant in a case that should have been concluded.
4. The plaintiff further avers that there is no specific interest that has been disclosed by the applicant to warrant the joinder and that it is discernible from the correspondence that the 3<sup>rd</sup> defendant had a hand in the application in an attempt to further delay and scuttle the conclusion of the matter.
5. I have carefully perused and considered the application together with the response thereto. I have similarly perused the written submissions placed before me by the Learned Advocates acting for the parties. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants swore an affidavit in support of the application.
6. By this application before me the applicant Commission has urged the court to enjoin it to this suit as the 4<sup>th</sup> defendant and to order upon being enjoined that it be served with all the pleadings so filed herein within such reasonable time as the court may deem appropriate.
7. The application is premised on the grounds that the applicant has carried out investigations into the subject matter of this suit and it has established that it constitutes public land which was irregularly and unlawfully alienated in favour of private individuals. It is the applicant's case that it intends to



recover the suit property and that in order to avoid a multiplicity of suits and save on judicial time it is fair and convenient that it be enjoined as a party in the suit.

8. Order 1 Rule 10(2) of the *Civil Procedure Rules* under which the application is brought provides as hereunder:

“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.”

9. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of *King'ori v Chege & 3 others* (2002) 2KLR 243 where the Learned Judge stated that the guiding principles when an intending party is to be joined are that:

- (i) He must be a necessary party;
- (ii) He must be a proper party;
- (iii) In the case of the defendant there must be a relief flowing from that defendant to the plaintiff;
- (iv) The ultimate order or decree cannot be enforced without his presence in the matter; and
- (v) His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

10. The suit herein was initially instituted against Michael Mugo and David Githambo (the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively) as Nyeri HCCC No. 33 of 2011. By its Plaint dated April 4, 2011, the plaintiff accused the two individuals of illegally occupying the suit property and sought their eviction therefrom together with mesne profits from December 3, 2007 when they were said to have encroached on the land.

11. In their joint Statement of Defence dated and filed in court on May 24, 2011, the two defendants denied having trespassed onto the Plaintiff's land. Subsequently and by an application dated February 27, 2013, the 1<sup>st</sup> and 2<sup>nd</sup> defendants sought leave to issue a third party notice to the Kenya Farmers Association Limited (now the 3<sup>rd</sup> defendant) on account that they were tenants of the Association operating garages under a tenancy agreement with the Association.

12. While that application was disallowed by the court, the Kenya Farmers Association Limited vide an application dated May 3, 2013 sought to be added as a defendant in the suit on account that it had been allocated the suit property by the Commissioner of Lands in 1981 and that it had leased the same to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

13. That application was allowed and the Association was enjoined as the 3<sup>rd</sup> defendant herein. In its Statement of Defence and Counter claim dated October 2, 2013, the 3<sup>rd</sup> defendant accused the plaintiff of fraudulently acquiring the suit land and causing the same to be registered in its name. By way of its Counter claim the 3<sup>rd</sup> defendant prays for cancellation of the plaintiff's title and a declaration that the 3<sup>rd</sup> defendant is the lawful owner of the said property.

14. From the record herein, the plaintiff took the witness stand and concluded its case on May 25, 2016. The Defence case commenced on March 14, 2017 but their witness was stood down to enable the Defence obtain witness summons against the National Land Commission. The matter has



subsequently not proceeded and on March 14, 2022 when the suit came up for further hearing, the Defence were granted a last adjournment with the suit fixed for further hearing on May 23, 2022.

15. Some 10 days later however the Applicant Commission instituted the present application seeking to be enjoined in the suit. I have looked at both the supporting and supplementary affidavits of Investigator Simeon Lei filed in support of the application. The Applicant does not indicate when it learnt of these proceedings and or when it commenced and or finished its investigations. While the Affidavits mention that the parcel of land was in the Ndung'u Land Reports of 2004, it does not explain the delay in seeking to enjoin this suit which has been in the Court corridors for more than 10 years.
16. I have looked at the nature of the claim by the present parties to the dispute vis-à-vis those of the applicant and it was clear to me that the two are quite at variance with each other. It was also clear to me that there would be nothing to stop the Applicant from recovering the suit property from either party at any stage if indeed the same was the subject of an irregular or unlawful allocation. The ratio for joinder as it were is to allow a party to be enjoined on grounds that it is necessary to bring a matter to complete adjudication. In this matter that has not been substantiated and I did not think the Applicant would suffer any prejudice if it were not enjoined herein.
17. On the other hand, the grant of the orders would be highly prejudicial to the plaintiff in particular. The concluded proceedings would have to be re-opened and the plaintiff which testified and concluded its case in the year 2016 would be required to plead afresh against the Counter-claim that would be instituted by the Applicant Commission. That in my view would not augur well for justice given the applicant's failure to disclose the reasons for the delay.
18. It follows that I did not find any merit in the Chamber Summons dated March 24, 2022. The same is dismissed with no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2023.**

In the presence of:

Mr. Nderi for the Plaintiff

No appearance for Ms Mwai for the Defendants

Court assistant - Kendi

**J. O. Olola**

**JUDGE**

