



Kamau & another v Kenya Railways Corporation & 2 others (Environment & Land Case 23 of 2022) [2023] KEELC 17985 (KLR) (7 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17985 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 23 OF 2022
FM NJOROGE, J
JUNE 7, 2023**

BETWEEN

CHRISTOPHER KANAI KAMAU 1ST PLAINTIFF

MARY WANGARI KANAI 2ND PLAINTIFF

AND

KENYA RAILWAYS CORPORATION 1ST DEFENDANT

CONSTRUCTION COMPANY LIMITED 2ND DEFENDANT

KENYA POWER AND LIGHTING COMPANY 3RD DEFENDANT

RULING

1. This ruling is in respect of the 3rd defendant's Notice of Motion application dated 20/05/2022 which is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 1 Rule 10 (2) and Order 2 Rule 15(1) of the *Civil Procedure Rules* which seeks the following orders:
 - a. That the 3rd defendant/applicant herein be struck out from the suit herein for misjoinder.
 - b. That the cost of this application be provided for.
2. The application is supported by the supporting affidavit of Justus Ododa the 3rd defendant's Legal Officer. The grounds on the face of the application and the supporting affidavit are that the plaintiff's suit as against the 3rd defendant raises no reasonable cause of action and should therefore be struck out; that the 3rd defendant is a public company that is tasked with distribution electric power to electricity consumers country wide and is authorized to erect poles and/or lay supply power lines; that whereas the 3rd defendant is occasionally involved in the construction of power lines, not all the electricity transmission lines are done by it; that there are other players in the electricity transmission sector that is guided by the Energy Act 2019; that the electricity poles erected on the suit property as claimed in the plaintiffs' plaint dated 4/05/2022 is under the purview of the 1st defendant as it is a private line



following the standard gauge railway and maintained by the 1st defendant; that the plaintiffs in their plaint admit that the 3rd defendant duly notified them that the actions complained off were conducted by the 1st defendant herein through the letter dated 21/11/2021; that the plaintiffs blatant ignorance of the 3rd defendant's letter will prejudice the 3rd defendant in terms of unnecessary costs of litigation.

3. In response to the said application, the plaintiffs filed a replying affidavit that is sworn by the 1st plaintiff on 15/03/2023 on 16/03/2023. He deposed that the 3rd defendant is the body with the primary mandate in the provision and distribution of electric power country wide and is authorized to erect poles; that the 3rd defendant had written the letter dated 12/11/2021 advising the plaintiffs that the power lines that are subject of trespass in this suit were erected by the 1st and 2nd defendants; that despite the said letter by the 3rd defendant, the 1st and 2nd defendants have distanced themselves from the impugned power lines; that the participation of the 3rd defendant in this matter is important as it will assist the court to make a sound determination on that issue and it is in the interest of justice that the 3rd defendant's application be dismissed with costs.

Submissions

4. The 3rd defendant filed its submissions dated 5/05/2023 on 09/05/2023 while the plaintiffs opted not to file any submissions and relied on their replying affidavit.
5. The 3rd defendant in its submissions set out the facts of the case and submitted on whether there is a cause of action raised against it. The 3rd defendant relied on Order 2 Rule 15 of the [Civil Procedure Rules](#) and submitted that the rules state that one can apply for the court to strike out pleadings if they do not raise a reasonable cause of action and in the present case, the cause of action is not against the 3rd defendant but against the 1st and 2nd defendant.
6. The 3rd defendant relied on the case of [DT Dobie & Co. \(K\) Ltd v Muchina](#) [1982] KLR and submitted that it was not responsible for the way leaves acquisition or the powerline on the suit land as it is not the sole entity tasked with transmission of electricity. The 3rd defendant relied on Order 1 Rules 10 and 14 of the [Civil Procedure Rules](#), the case of [Diamond Trust Bank Kenya Limited v Richard Mwangi Kamotho & 2 Others](#) [2017]eKLR and reiterated that before the institution of this suit, the 3rd defendant's personnel went to the suit property and determined that the power line that is subject of this suit was constructed and managed by the 1st defendant and yet the plaintiffs still joined them in the present suit. The 3rd defendant submitted that the 1st defendant admitted in his amended statement of defence that it had entered into an agreement with the 2nd defendant for the construction of the Nairobi – Naivasha Standard Gauge Railway project.
7. The 3rd defendant also relied on the cases of [Werrot & Co. Ltd & 3 Others vs Andrew Douglas Gregory & 2 Others](#) [1998] eKLR, [Amon Raphael Tuck & Sons Ltd](#) [1956] 1 ALL ER 273 and sought that the prayers sought in its application be allowed. On who should bear the costs of the application, the 3rd defendant relied on Section 27(1) of the [Civil Procedure Act](#) and among other cases, the case of [Kenya Sugar Board vs Ndungu Gathini](#) [2013] eKLR and sought that they be awarded costs.

Analysis and Determination

8. After considering the application, the response thereto and the submissions the only issue that arises for determination is whether the 3rd defendant should be struck out from this suit for misjoinder.
9. Order 2 Rule 15 of the [Civil Procedure Rules](#) provides as follows:

“ 15.



- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

10. Madan JA in the case of *DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina & Another* (1982) KLR 1 stated as follows:

“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 this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

11. The 3rd defendant in this matter is seeking to be struck out from the present suit for misjoinder. The 3rd defendant argues that it was joined to this matter on the ground that it had collaborated with the 1st and 2nd defendants to illegally install electricity poles and yet it had communicated to the plaintiffs through the letter dated 21/11/2021 that the electricity poles complained of were installed by the 1st defendant.
12. The plaintiff on the other hand argued that the 1st defendant denied in its statement of defence that it had put up the power lines and that the participation of the 3rd defendant at the hearing of the case will enable the court make a determination on this issue. A perusal of the 1st defendant’s amended statement of defence indicated that the 1st defendant admitted to have entered into an EPC Turnkey Commercial Project with the 2nd defendant for the construction of the Nairobi-Naivasha Standard Gauge Railway (SGR) project. The 1st defendant indicated that it engaged the 2nd defendant as a contractor to construct the said railway and that it does not exercise control over the 2nd defendant in the event that it connected power lines across the plaintiffs’ property.
13. The power to strike out a party from a suit should be approached with caution. The court has to assess whether or not there is a *prima facie* case against the 3rd defendant while being careful not to go into the merits of the case at this stage. It is my view that in the present matter, it is not disputed that there are power lines on the plaintiffs’ property. What is disputed is who put up the said power lines. The 3rd defendant claims it was the 1st defendant and the 1st defendant now seems to claim it is the 2nd defendant. There is quite some fog regarding who bears liability for erecting the power lines over the suit land. Consequently, it is my view therefore that the 3rd defendant is a necessary party to this suit as its presence shall enable the court determine the issues in controversy in this matter. Consequently, the 3rd defendant’s application dated 20/05/2022 lacks merit and it is hereby dismissed with costs. This matter will be mentioned on 20/6/2023 for issuance of a hearing date.



**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 7TH DAY
OF JUNE 2023.**

MWANGI NJOROGE

JUDGE, ELC, NAKURU

