



Ethics & Anti Corruption Commission v Lagat & 6 others; Kenya Airports Authority & another (Interested Parties) (Environment & Land Case E111 of 2022) [2023] KEELC 18597 (KLR) (12 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18597 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E111 OF 2022**

SM KIBUNJA, J

JULY 12, 2023

BETWEEN

ETHICS & ANTI CORRUPTION COMMISSION PLAINTIFF

AND

PETER KIPYEGON LAGAT 1ST DEFENDANT

PARK MANSIONS LIMITED 2ND DEFENDANT

THE GAS COMPANY LIMITED 3RD DEFENDANT

THE EAST AFRICAN GAS COMPANY LIMITED 4TH DEFENDANT

WILSON GACANJA 5TH DEFENDANT

SALOME MUNUBI 6TH DEFENDANT

TOM AZIZ CHAVANGI 7TH DEFENDANT

AND

KENYA AIRPORTS AUTHORITY INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

1. The 7th defendant filed the notices of preliminary objection and of motion in Mombasa ELC Nos. E111, E114 to E118 of 2022, all dated the 2nd November 2022, that were placed before the duty judge on the 3rd November 2022. Directions were issued that the 7th defendant's preliminary objections and applications be canvassed together through this file as they were seeking for the same orders and the parties were more or less the same.



2. The preliminary objections raise two grounds that the suit is res judicata and sub judice and should be struck out with costs. The applications seek for the striking out the plaint dated 25th October 2022, dismissing the suits with costs to the 7th defendant, or alternatively having his name struck out from the suits. The applications are based on the seventeen (17) grounds on their face and supported by the affidavits of Tom Aziz Chavangi, sworn on the 2nd November 2022. In summary, the 7th defendant's case is that the suits relate to the legality of the allotments, transfers and compulsory acquisition of subdivisions arising out of LR No. MN/V1/4114. The subdivisions relating to Mombasa ELC Nos. E111, E114 to E118 of 2022 are numbers 3862, 3838, 3906, 3861, 3905 and 3904 respectively, that will herein after be referred to as the suit properties. That upon requests from KeNHA in January 2014, the chairman to the 2nd interested party gazetted the intention to acquire the suit properties among others in G.N. No. 405, and called for inquiries under G.N.No. 406. That upon conclusion of the inquiry, no complaints were raised over the suit properties and the compensations were paid out. That the chairman then gazetted the intention to acquire the suit properties and others for the Standard Gauge Railway vide G.N. No. 2740 and the plaintiff and the 1st interested party asked the 2nd interested party to review the grants in relation to the suit properties. That after the review hearing on the 3rd August 2015, the 2nd interested party upheld the titles and the decision was gazetted vide G.N. No. 6862. That 1st interested party filed Mombasa ELC Misc. Appl. No. 2 of 2018 to quash the 2nd interested party's decision but in the judgement of 22nd February 2019, the application was dismissed, and no appeal or challenge to that decision has been filed. That after reading the court's decision of 22nd February 2019, he learnt of two previous suits being Mombasa ELC No. 50 of 2015 and 298 of 2014 that are pending have similar prayers to the instant suits. That these suit are therefore res judicata and an abuse of the court processes. That though he was an officer of the 2nd interested party that conducted its duties under the leadership of the chairman, he was not its agent and is not liable for its action.
3. The applications are opposed by the plaintiff through the replying affidavit of Abiud Onyango, an investigator with the plaintiff, sworn on the 27th February 2023. It is the plaintiff's case that the subject matter, parties and prayers in Mombasa ELC No. 298 of 2014 and 50 of 2015 are not the same with this suit. That the issues raised in these suits have never been adjudicated and or determined by any court of law and the suits are therefore not res judicata, or sub judice. That Mombasa ELCJ.R. Misc. Appl. No. 2 of 2018 dealt with orders of certiorari and prohibition, and not the issues of legal ownership of the suit properties and compensation as in the present case. That the plaintiff's claim against the 7th defendant in the instant suits concerns economic crime of abuse of office and breach of trust as particularized at paragraph 40 of the plaints filed on the 25th October 2022, which are matters to be determined by this court.
4. During the mention of the 28th February 2023 and 2nd May 2023, the learned counsel for the 2nd interested party, 1st, 3rd, 4th, and 5th defendants, informed the court from the bar that they were not opposed to the applications.
5. The learned counsel for the 7th defendant and the plaintiff filed their submissions dated the 20th February 2023 and 27th February 2023 respectively, which the court has considered.
6. The following are the issues for the court's determinations;
 - a. Whether the 7th defendant has established that the suits against him are sub judice and or res judicata.
 - b. Whether the court is with jurisdiction to hear and determine the suits.
 - c. Whether the suits against the 7th defendant are statute time barred.



- d. Alternatively, whether the 7th defendant is a necessary party in the suits or his name should be struck out.
 - e. Who bears the costs in the suits.
7. The court has carefully considered the grounds on the preliminary objection, grounds on the applications, affidavit evidence, grounds of opposition, submissions by the learned counsel, superior courts decisions cited therein, the pleadings filed so far, and come to the following determinations;
- a. That from the filed pleadings, the suits subject matter of this ruling were commenced through the complaints dated the 25th October 2022, and the plaintiff, 1st, 3rd, 4th, 5th, 6th and 7th defendants herein appear in the same capacity in all the other suits. However, each suit has a different 2nd defendant. The land subject matter in each of the suits is different, though they appear to have originated from a common mother title MN/VI/4114. That among the main grounds raised by the 7th defendant in his application is that this court is without jurisdiction for reasons that there have been previous suits over the same subject matters and between the same parties. That one of the said suits is finalised and the other two are pending and hence these current suits are both res judicata and sub judice. The previous suits are;
 - i. Kenya Airports Authority versus National Land Commission & Others [2019] eKLR, that is finalised;
 - ii. Mombasa ELC No. 298 of 2014, Ethics & Anti-Corruption Commission versus Peter Kipyegon Lagat & 4 others, and Mombasa ELC No. 50 of 2015, Ethics & Anti-Corruption Commission versus Peter Kipyegon Lagat & 5 others, that are pending.

The court has perused the ruling in the case of Kenya Airports Authority versus National Land Commission & Others [supra], that is annexed to the supporting and replying affidavits and noted it was a judicial review matter for orders of certiorari and prohibition to quash the decision of the National Land Commission in respect of land parcel MN/VI/4114. The court held inter alia that;

- 22. judicial review is concerned with decision making process....
 - 25. In my view if the applicant wishes to challenge those illegalities then the process of judicial review which they have opted for herein is not the appropriate forum to bring up issues of those illegalities. The same applies to their claim of ownership over land.....
 - 27. In conclusion, I reach a similar finding in the holding in the decision of Republic versus National Transport & Safety Authority & 10 others ex parte James Maina Mugo [2015] eKLR, thus, “That where the resolution of the dispute before the court requires the court to make a determination on disputed issues of fact that is not suitable for judicial review and where an applicant brings judicial review proceedings with a view to determine the contested facts, the court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”
8. The court declined the invitation to quash the decision and issue prohibition order and dismissed the application. That decision therefore did not in any way decide or determine the issues of whether or not the land in question had been illegally allocated or acquired and the question of ownership of the same, as it was only concerned with the process of the National Land Commission’s decision making. The court therefore finds that the 7th defendant has failed to establish the essential elements required



under section 7 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya for a finding of res judicata to be made in his favour.

b. The court has also perused the copies of the plaint dated 27th November 2014 and amended plaint dated the 11th April 2018 filed in Mombasa ELC No. 298 of 2014 that are annexed to the supporting and replying affidavits and noted the subject matter is land parcel MN/V1/3854. The court has likewise considered the copies of plaint dated the 11th April 2015 filed in Mombasa ELC No, 50 of 2015 attached to the said affidavits and it is clear the subject matter is land parcel MN/V1/3860. The court has made the following observations; The prayers in the said suits are generally for declaratory orders in respect of the mentioned subject matters. The 2nd defendants in those suits are not parties in the current suits, while the 2nd defendants in the current suits are not parties in those suits filed earlier. The 7th defendant in the current suits is not a party in those two suits and the allegations of negligence and breach of fiduciary duty raised in the current suits, for example at paragraphs 39 to 41 of the plaint herein, and prayers against him are not in those other suits. That the instant suits deal with different parcels of land from those in the two matters filed earlier.

9. That having considered the foregoing and the provision of section 6 of the [Civil Procedure Act](#) the court is of the view that the current suits are not sub judice.

c. That learned counsel have submitted on whether or not the suit is statute time barred in view of the provisions of section 4 of the [Limitation of Action Act](#) chapter 22 of Laws of Kenya. The relevant part of that section provides that;

“4.(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued;”

10. The counsel for the 7th defendant has submitted that whether the time of the cause of action is taken to be 1996, when the suit land is said to have been illegally allocated or 2014 when compulsory acquisition of the lands acquired for the SGR commenced, then this suit filed on 25th October 2022 is time barred. The counsel for the plaintiff has on their part submitted that the suit is not time barred in view of the provision of section 42(1)(d) of the [Limitation of Actions Act](#) that provides that;

“This Act does not apply to a proceedings by the Government to recover possession of Government land, or to recover any tax or duty, or the interest on any tax or duty, or any penalty for non-payment or late payment of any tax or duty, or any costs or expense in connection with any such recovery.”

11. That having considered the rival submissions and the law, and noting that this suit is inter alia for both recovery of public land and compensation paid out during the compulsory acquisition, the court is in agreement with the counsel for the plaintiff that the 7th defendant has failed to show that the suits against him are statute time barred.

d. On whether or not the 7th defendant is a necessary party in this suit, the parties are in agreement in their submissions that under Order 1 Rule 10(2) of the [Civil Procedure Rules](#), the court has the discretion to order the joinder or striking out of a party as a plaintiff or defendant at any stage of the proceedings on its own motion or on application. That Rule provides that;

“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



defendants, 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.”

12. That having considered the allegations and prayers raised against the 7th defendant in the suits herein, the court is of the view that from the facts so far presented, he is a necessary party in the proceedings.

e. It is trite that costs follow the event. That position is confirmed under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya. The counsel for the 7th defendant referred the court to the case of *Jabir Singh Rai & Others* Petition No. 4 of 2012 [2014] eKLR, where the Supreme Court stated that;

“(18) It emerges that the award of costs would normally be guided by the principle that ‘costs follow the event’: the effect being that the party who calls forth the event by instituting suit will bear the costs if the suit fails;”

13. The 7th defendant is the one who filed the preliminary objections and the applications subject matter of this ruling. That now that the court has concluded that the said preliminary objections and applications have no merits, and noting that it is the plaintiff only that filed reply and submissions in opposition thereto, then the 7th defendant should pay the plaintiff’s costs.

14. The upshot of the foregoing is that the 7th defendant’s preliminary objections and notices of motion dated the 2nd November 2022 are without merit and are hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 12th DAY OF JULY 2023.

S.M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

Plaintiff : M/s Songole Advocate

DEFENDANTS : Mr. Diro for 2nd and 3rd Defendants.

Mr. Ochieng for 7th Defendant/ Applicant

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

