



Ndege v Lake Basin Development Authority; Kisumu County Land Registrar (Third party) (Environment & Land Case 866 of 2015) [2023] KEELC 21255 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21255 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 866 OF 2015
SO OKONG'O, J
NOVEMBER 2, 2023**

BETWEEN

ELIAS OBURA NDEGE PLAINTIFF

AND

LAKE BASIN DEVELOPMENT AUTHORITY DEFENDANT

AND

KISUMU COUNTY LAND REGISTRAR THIRD PARTY

RULING

1. The Plaintiff instituted this suit on 20th December 2005. The plaint was amended on 8th July 2014. In his amended plaint, the Plaintiff averred that he was the registered proprietor of all that parcel of land known as Kisumu/Tonde/135 (hereinafter referred to as "the suit property") and that on 24th November 2005, the Defendant's employees went to the suit property and removed the beacons showing the demarcations of the said parcel of land making the Plaintiff to incur extra expenses in engaging the services of a surveyor to place new beacons on the property.
2. The Plaintiff averred that on or about 30th November 2005, the Plaintiff hired a tractor to plough the said parcel of land but was barred from ploughing by the Defendant's employees without any colour of right. The Plaintiff averred that on 7th December 2005, he again hired a tractor to plough the suit property but the Defendant's employees led by one, Joshua Obade stopped the tractor from ploughing the land making the Plaintiff incur extra expenses. The Plaintiff averred that he incurred a total of Kshs. 10,000/- on hiring the tractor which was prevented from ploughing the suit property by the Defendant's employees. The Plaintiff prayed for judgment against the Defendant for:



- a. An order of a temporary injunction restraining the Defendant by itself, its agents and/or servants from interfering with the Plaintiff's quiet possession and enjoyment of land parcel number Kisumu/Tonde/135.
 - b. An order of a permanent injunction restraining the Defendant by itself, its agents and/or servants from interfering with the Plaintiff's quiet possession and enjoyment of land parcel number Kisumu/Tonde/135.
 - c. General damages for trespass.
 - d. Costs and interests.
 - e. Mesne profits from the date of filing of the suit until the suit is determined.
3. The Defendant entered appearance and filed a defence and a counterclaim on 17th March 2006. The Defendant averred that the registration of the Plaintiff as the proprietor of the suit property was procured illegally and that the register of the suit property should be rectified to cancel the same. The Defendant averred that at the time of registration of the Plaintiff as the owner of the property, the Plaintiff had actual and constructive knowledge of the Defendant's actual and constructive use and occupation of the property and that the Plaintiff was in law under a duty to make inquiry of the rights of the Defendant in respect thereof. The Defendant averred that the registration of the Plaintiff as the owner of the suit property was obtained through fraud and/or collusion and/or misrepresentation. The Defendant averred that it was justified in preventing the Plaintiff from using the suit property since the property was irregularly and illegally excised from a parcel of land belonging to the Defendant.
 4. The Defendant averred that at all material times, there existed in the immediate neighborhood of Muhoroni Township a parcel of land described only as "Refinery Holding Ground" measuring about 324 acres belonging to the Government of the Republic of Kenya. The Defendant averred that it is a state corporation established under the *Lake Basin Development Authority Act*. The Defendant averred that on or about 1986, Kisumu District Development Committee recommended to the Government of Kenya that the said parcel of land be given to the Defendant to establish a research center for livestock development whose principal objective was to produce high-quality grade livestock for farmers in the locality at a subsidized price.
 5. The Defendant averred that acting on the said recommendation, the Ministry for the time being in charge of livestock development surrendered the said parcel of land to the Defendant which proceeded to establish a livestock multiplication center thereon. The Defendant averred that it had occupied and used the said parcel of land since 1986.
 6. The Defendant averred that the Provincial Administration and local leaders then approached the Defendant to agree to the excision of about 80 acres of the Defendant's said parcel of land to facilitate the settlement of squatters. The Defendant averred that subsequent to that request, the Provincial Administration made another request that while the squatters were being settled, certain persons who had been displaced by the construction of the District Headquarters at Awasi be also settled on the Defendant's said land.
 7. The Defendant averred that it agreed in principle to allow about 80 acres to be excised from its said parcel of land but insisted that the Defendant had to be involved at every stage to ensure that only deserving persons benefit from the Defendant's concession. The Defendant averred that it also insisted that the excision of the said 80 acres must not interfere with its activities on the said parcel of land.
 8. The Defendant averred that without involving the Defendant, the Provincial Administration and the Ministry of Land officials colluded with several undeserving persons the Plaintiff included and excised



a substantial chunk of the Defendant's land leaving the defendant with only 38.5 acres. The Defendant reiterated that the registration of the Plaintiff as the owner of the suit property was illegal and should be cancelled. The Defendant sought judgment by way of counterclaim against the Plaintiff for;

- a. A declaration that the plaintiff's registration as proprietor of kisumu/tonde/135 was illegal, null and void.
 - b. Rectification of the register.
9. The Plaintiff filed a reply to defence and defence to counterclaim in which he denied the Defendant's claim. The original Plaintiff passed away on 7th June 2021 and was substituted with Roland Odiwuor and Jaqueline Osawa Obura as the Plaintiffs through a further amended plaint filed on 15th March 2023.
10. What is now before the court for determination is the Defendant's application dated 25th July 2023 brought under Order 1 Rule 10(2), Order 8 Rule 3 and Order 51 of the Civil Procedure Rules seeking the following orders:
1. This Honourable Court be pleased to join the Ethics and Anti-Corruption Commission as an Interested Party in this suit;
 2. This Honourable Court be pleased to allow the amendment and service of pleadings already filed by the parties herein on the proposed Interested Party; and
 3. Cost of the application be in the cause.
11. The application that was supported by the affidavit of michael okuk, the defendant's deputy director legal services was brought on the grounds that the defendant had lodged a complaint with the Ethics and Anti-Corruption Commission (the Commission) concerning the encroachment and illegal allotment of its parcels of land known as Title Nos. Kisumu/Tonde/59,58, Nos. 91 to 143 and Nos. 119 to 163. The Defendant averred that the Commission embarked on investigations over the matter and made a report of its findings. The Defendant averred that the findings of the Commission with respect to the transactions involving the suit property will help the court to effectively determine all the issues in dispute in the suit with finality. The Defendant averred that the Commission had a constitutional and statutory mandate to investigate acts of corruption and recommend appropriate action against the perpetrators of such unethical conduct including prosecution, recovery and protection of public property.
12. The Defendant averred that it was necessary to join the Commission to the suit otherwise the Commission's constitutional mandate in ensuring the recovery or protection of public property would be hampered. The Defendant averred that it would be in the interest of justice that the application be allowed.
13. The application was served upon the Plaintiff and the Commission. Both did not respond to the same. When the application came up for hearing on 3rd October 2023, the Defendant's advocate reiterated that the Commission conducted investigations on the irregular encroachment on the Defendant's land and prepared a report that disclosed irregularities in the allocation of the Defendant's land including the land claimed by the Plaintiff. The Defendant's advocate cited Francis K. Muruatetu and another v. Republic & 5 others [2016] eKLR and Communications Commission of Kenya and 4 Others v. Royal Media Services Limited & 7 Others [2014] eKLR on the joinder of interested parties to a suit. The Defendant also cited section 11(1) (j) of the Ethics and Anticorruption Act and Articles 79 and 252 (1) of the Constitution in support of the application. The Defendant's advocate drew the attention of the



court to the fact that the Defendant was not merely defending the suit but also had a counterclaim against the Plaintiff.

14. The advocate for the Plaintiff submitted in reply that the Commission could participate in the suit as witnesses. The Plaintiff's advocate submitted that it was not necessary to join the Commission in the suit as an interested party.

Analysis and determination

15. I have considered the Defendant's application together with the supporting affidavit. I have also considered the submissions by the advocates for the parties. Joinder of parties to a suit either as a plaintiff or as a defendant is provided for under Order 1 rules 1, 3 and 10 of the Civil Procedure Rules. There is no express rule providing for the joinder of a party to a suit as an interested party. The court however has an inherent power to join a party to a suit as an interested party for the ends of justice to be met.

16. The Civil Procedure Rules have no definition of an interested party. Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as:

a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”.

17. The court's power to join a party to a suit as an interested party is discretionary and as such must be exercised judiciously. That means that an applicant seeking to join a party to a suit as an interested party must satisfy the court that the party has a stake or an interest in the subject matter of the suit.

18. In *Communications Commission of Kenya and 4 Others v. Royal Media Services Limited & 7 Others*(supra), the Supreme Court stated as follows:

- (22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:

“[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

- (23) Similarly, in the case of *Meme v. Republic* [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”



(24) We ask ourselves the following questions: (a) what is the intended interested party's stake and relevance in the proceedings; and (b) will the intended interested party suffer any prejudice if denied joinder."

19. In *Francis K. Muruatetu and another v. Republic & 5 others* (supra), the court stated as follows on the joinder of an interested party to a suit:

(37) From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court."

20. In *Fidei Holdings Limited v. Kenya Railways Corporation & another; Ethics & Anti-Corruption Commission (Interested Party) (Environment & Land* Case 263 of 2019) [2022] KEELC 2207 (KLR) (16 June 2022) (Ruling) the court stated as follows while dealing with an application seeking the joinder of the Commission to a suit as an interested party:

21. In any event, it is worthy to recall that the EACC is an Independent constitutional commission established pursuant to the provisions of Articles 79, 248 and 249 of *the Constitution*, 2010 and therefore her Constitutional mandate is well provided for and circumscribed.

22. Nevertheless, as concerns the subject matter and in particular the intended joinder, it is imperative to take cognizance of the provisions of Article 249 (2) of *the Constitution* 2010, which provides as hereunder; (2)The commissions and the holders of independent offices—(a) are subject only to this Constitution and the law; and (b)are independent and not subject to direction or control by any person or authority are subject only to this Constitution and the law;

By dint of the foregoing provisions, it is apparent that by virtue of being an independent constitutional commission, the EACC is not subject to the directions or control by any person or authority. For clarity, by seeking to make the decision for the commission to be joined in the subject matter, the 1st Defendant/Applicant is seeking to direct and/or control the commission, albeit contrary to the provisions of *the constitution*.

In a nutshell, it is my finding and holding that irrespective of the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules 2010, the decisions on whether or not to join the commission as an Interested Party can only be taken by the commission and not by the 1st Defendant/Applicant."



23. The Defendant has sought to join the Commission as an Interested Party to this suit solely on the ground that it had lodged a complaint with the Commission regarding illegal allotment and encroachment on its land including the suit property and that the Commission carried out investigations and made a report. The Defendant has contended that the report by the Commission will assist the court in effectively determining the issues in controversy in this suit. It is not in dispute that the Commission was only requested by the Defendant to carry out investigations on its complaint aforesaid. The outcome of the Commission's investigations was for the consumption of the Defendant and the Commission. The Commission has a statutory and Constitutional mandate to deal with corruption and unethical conduct. The Commission is aware of the existence of this suit. It has not seen or felt the need to join the suit. I am of the view that the Commission is better placed to determine whether its participation in this suit would be in furtherance of its mandate. It is not for the Defendant to make a decision for it. I am not satisfied that the Defendant has demonstrated that the Commission has an interest or a stake in these proceedings that would warrant its joinder to the suit. I am also not persuaded by the Defendant that the report in the possession of the Commission which according to the Defendant is likely to assist the court in determining the dispute herein can only be made available to the court through the joinder of the Commission as an interested party to the suit.

Conclusion

24. In the final analysis, I find no merit in the Notice of Motion application dated 25th July 2023. The application is dismissed with costs to be in the cause.

DATED AND DELIVERED AT KISUMU ON THIS 2ND DAY OF NOVEMBER 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

N/A for the Plaintiff

Ms. Kirimi h/b for Mr.Mwangi for the Defendant

N/A for the 3rd Party

Ms. J. Omondi-Court Assistant

