



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC CASE NO. 69 OF 2018

KHALID OMAR SWALEH.....PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY.....DEFENDANT/APPLICANT

AND

KENYA RAILWAYS CORPORATION.....INTENDED 2ND DEFENDANT

RULING

1. The application before me for consideration and determination is the defendant's Notice of Motion dated 10th February 2021 brought under Order 8 Rule 1, 10 (2) of the Civil Procedure Rules, Section 1A, 1B, 3A and 63 of the Civil Procedure Act and seeks the following orders:-

- a. That this Honourable court be pleased to grant leave for joinder of the Kenya Railways Corporation as the 2nd defendant.**
- b. That this Honourable court be pleased to grant the applicant leave to amend its Amended Statement of Defence dated 2nd November 2020 to include the counterclaim as against the plaintiff herein and the intended 2nd defendant as per the draft Further Amended Defence and Counterclaim attached hereto and upon the grant of leave the Draft Further Amended Defence and Counterclaim be deemed as dully filed upon payment of the requisite court filing fees.**
- c. That the plaintiff and the intended defendant be at liberty to respond to the Further Amended Defence and Counterclaim within 14 days from the date of service of the Further Amended Defence and counterclaim.**
- d. That this court be pleased to make any such or further orders as it deems expedient to meet the ends of justice.**

2. The application is premised on the grounds on the face of the application and supported by the affidavit of Margaret Munene. The applicant avers that the plaintiff in his plaint has pleaded that the suit property is owned by the Kenya Railway Corporation, who leased the suit property to him. The applicant further avers that the suit property is a flight path adjacent to Moi International Airport- Mombasa under the management of the defendant and Kenya Civil Aviation Authority and thus restricted from development and use by any other person. The applicant states that it is necessary that the said Kenya Railways Corporation to be enjoined to these proceedings as the 2nd defendant in order for the dispute over the suit property be fully and finally determined by court. The applicant argues that not only does the court need to admit Kenya Railways Corporation as an intended 2nd defendant but grant leave to the applicant to file a counterclaim against it.

3. Ms. Margaret Munene the applicant's acting corporation secretary swore the supporting affidavit. She stated that the suit property MN/V/239 situated at Kwa Jomvu Railway Station in Changamwe falls within the flight path of Moi International Airport. She further stated that the Kenya Railways Corporation has no authority to lease the suit property which is within a restricted area. She stated that for the court to have a full determination of the suit property, Kenya Railways Corporation needs to be added as a defendant in the instant suit. The deponent annexed a draft Further Amended Defence and Counterclaim which she claimed will enable court effectively and completely adjudicate upon and settle all questions that may arise in the amended plaint and the amended defence and counterclaim.

4. The plaintiff opposed the application vide his own replying affidavit dated 14th June 2021. He stated that he is the registered lessee of Kenya Railways on Plot MN/V/239 annexed a registered lease agreement dated 14th November 2008. He further stated that his claim is solely against the defendant/applicant who demolished his workshop shade situated within the suit property, following a court order in **ELC MISC APP NO 35 of 2016, Kenya Airports Authority V Elezar Kamau Thiongo & Others**. The plaintiff/respondent urged court not to

allow the application as the inclusion of the intended defendant would create many issues and steer away from the main issue, which he claimed to be inter alia that he is not a party to ELC MISC APP NO.35 of 2016. He further argued that the defendant should file a fresh suit against the intended 2nd defendant instead of filing a counterclaim herein.

5. When the application came up for hearing on 15th June 2021, Ms. Baraza advocate for the defendant/applicant informed the court that the applicant will rely on the grounds set out thereon. Ms. Baraza submitted to the court that the application will be advancing the overriding objective to avoid multiplicity of suits and to bring in all relevant issues and relevant parties before the court to make a final determination. She urged court to allow the application. Mr. Mohamed, counsel for the plaintiff submitted that the plaintiff opposes the application and relies on the relying affidavit on record. He argued that the issues raised in the counterclaim should be raised in a separate suit since the instant suit raises a cause of action strictly against the defendant. He prayed to court to dismiss the application with costs.

6. I have considered the application, the response to it as well as the oral submissions made in court.

7. Order 1 Rule 10 (1), read together with Order 8 of the Civil Procedure Rules, empowers court to allow a party to the suit at any stage of the proceedings to amend its pleadings in order to join another as a plaintiff or defendant. The court will allow a party to be joined if the intended defendant/plaintiff's presence would be necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. The court allows all amendments at any stage of the proceedings, provided that the amendment sought for will not prejudice or cause injustice to the other parties in the suit.

8. In the case of **Joseph Ochieng & 2 others Aquiline Agencies V First National Bank of Chicago (1995) eKLR the Court of Appeal** had this to say about amendment:-

“Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot be measured in terms of money and in my view a judge is entitled to weigh in balance the strain the litigation imposes on the litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues one way or the other.

9. In the instant suit, the applicant seeks leave to amend its Amended Defence and Counterclaim to join Kenya Railways Corporation as a 2nd defendant. The applicant has stated that Kenya Railways Corporation is a vital party in the Counterclaim for the reason that, the plaintiff has claimed in his plaint that Kenya Railways Corporation owned the suit property and that he had an existing lease agreement with the Corporation. The applicant argues that for the court to effectively and completely adjudicate upon and settle all questions that may arise in its claim, Kenya Railways Corporation needs to be joined as a 2nd defendant.

10. The applicant has annexed a draft Further Amended Defence and Counterclaim and stated that the suit property is within the restricted area reserved for the exclusive use by the applicant and Kenya Civil Aviation Authority. The applicant has further stated that the Kenya Railways Corporation has no claim over the suit property and the lease agreement between them and the plaintiff is null and void.

11. The plaintiff/respondent has opposed the amendment for joinder of Kenya Railways Corporation as the 2nd defendant. He stated that the issues before court for determination are strictly between the plaintiff and the defendant, and the addition of the 2nd defendant would steer the court away from the main issue. However neither in his replying affidavit nor in the oral submissions made by Mr. Mohamed his advocate, has the plaintiff established the prejudice or injustice likely to face if Kenya Railway Corporation is joined as the 2nd defendant.

12. The applicant has demonstrated that the presence of the intended 2nd defendant is necessary for the court to make a determination on ownership of suit property. One of the main issues that has arisen from the pleadings is the question of the lease agreement between the plaintiff and Kenya Railways Corporation. On one hand, the plaintiff claims the suit property belongs to Kenya Railways Corporation while on the other hand, the defendant avers that the suit property is within the flight path and restricted area. By joining Kenya Railways Corporation as the 2nd defendant, the court will be able make an inquiry into ownership of the suit property.

13. All amendments at any stage of the proceedings will be allowed by the court, provided the amendment and joinder, as in this case, will not prejudice or cause injustice to the plaintiff. The respondent in his replying affidavit stated that the defendant has an option of filing a fresh suit against the intended 2nd defendant. Both the defendant and the intended 2nd defendant are public corporations created by statute and bound by **Article 232 of the Constitution of Kenya, 2010**, which provide the values and principles of public service. **Sub-Article 1 (b) of Article 232**, provides that there shall be efficient, effective and economic use of resources. In my view, economic use of public funds means that the costs incurred in seeking legal services should be at minimal. Joining the intended 2nd defendant into this suit instead of filing a fresh suit will not only save court's time but will also be effectively using public funds.

14. In the case of **Joseph Ochieng & 2 others Aquiline Agencies V First National Bank of Chicago (supra)** court held that:

“Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase of litigation and the consequent necessity that in the interest of the whole community, legal business should be conducted efficiently. I can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late state of proceedings”

15. The applicant herein has made a case for amendment at the early stages of litigation and thus no prejudice will be suffered by the respondent/plaintiff herein. Justice works both ways and the plaintiff too is entitled to amend his plaintiff if he deems it necessary. I find that

the defendant's application dated 10th February 2021 has merit and is hereby allowed. Consequently, I give the following orders:

- i. Leave is granted to join Kenya Railways Corporation in these proceedings as the 2nd defendant.**
- ii. The applicant is granted leave to amend its Amended Statement of Defence within 14 days from the date of this ruling.**
- iii. The corresponding parties have 14 days from the date of service to file their responses or replies.**
- iv. Costs will be in the cause.**

16. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF JULY 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna - Court Assistant

Kongore – for the applicant

Mohamed – for the plaintiff

Ms. Baraza - for the defendant