



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E071 OF 2021

MOHAMED SHARIFF ALLI.....1ST PLAINTIFF

JAMAL SALEBAN KARIYE.....2ND PLAINTIFF

VERSUS

ISMAIL IBRAHIM DUROW.....1ST DEFENDANT

ISMAIL HOLDINGS COMPANY LIMITED.....2ND DEFENDANT

AND

ABDULLAHI WARAME ALI T/A

NADHIA AUCTIONEERS.....1ST INTERESTED PARTY

GOLD CITY PALACE LIMITED.....2ND INTERESTED PARTY

INTERMIDDLE ENTERPRISES LIMITED.....3RD INTERESTED PARTY

GALAFA TRADING COMPANY LIMITED.....4TH INTERESTED PARTY

RULING

The applicants brought the application dated 19/3/2021 seeking leave to join this suit as Interested Parties on the ground that they were currently tenants in parts of the premises erected on land reference number 36/VII/467 subdivision number 467 (original 57/4) commonly known as Ismarriot Hotel and Resort (“the Suit Property”) which they claimed to have leased from the 2nd Defendant. They contended that their presence and participation in these proceedings was necessary to enable the court effectually and completely adjudicate upon and settle all questions and matters in dispute between the Plaintiffs, the Defendants and the Interested Parties regarding the Suit Property.

The application was supported by the affidavit of Abdullahi Warsame Ali, who deponed that he had the authority of the 2nd, 3rd and 4th Interested Parties to swear the affidavit. He stated that he occupied the 8th floor of the Suit Property and annexed a copy of the lease dated 10/2/2020. He also attached leases relating to the 2nd, 3rd and 4th Interested Parties who he claimed had leased parts of the Suit Property. He averred that the dispute between the Plaintiffs and the Defendants related to the Suit Property and that the Interested Parties and other tenants were in exclusive possession and occupation of the Suit Property. He maintained that the outcome of the Plaintiffs’ application dated 23/2/2021 and this suit would impact on their lives as the current tenants in the Suit Property. He averred that the Interested Parties had made significant investments in the Suit Property in order to carry out their respective businesses hence it was necessary for them to participate in the suit to protect their interest.

The 1st Plaintiff, Mr. Mohamed Sharif Ali swore the affidavit in opposition to the Interested Parties’ application. He averred that the subject matter of the suit was a lease agreement which the Plaintiffs entered into with the Defendants over the whole property known as Ismarriot Hotel and Resort Limited. He attached a copy of the lease which they entered into on 10/7/2018, and which was for a term of 10 years. He denied that the 1st Interested Party was a tenant on the 8th floor of the Suit Property which he claimed housed a boardroom, conference hall, washroom, store and four offices. He attached photographs of the facilities on the 8th floor of the Suit Property. He pointed out that the lease which the Interested Parties relied on referred to a different property described as Ismarriot Hotel Plaza and that the date on the lease had been altered to read 2020 in place of 2021 as originally typed. He claimed that the lease agreements which the Interested Parties were relying on were fraudulent and fallacious. He denied that any of the Intended Interested Parties had a valid lease agreement over any part of Ismarriot Hotel and Resort nor were they in occupation or possession of any part of the building.

Mr. Ali relied on the searches conducted at the Companies' Registry on 22/3/2021 which he claimed revealed that the 1st Defendant was a director and shareholder of the 2nd and 3rd Interested Parties while his wife Rukia Yarrow Kharey, was a shareholder and director of the 4th Interested Party. He further claimed that the 1st Defendant's telephone number was the one given as the contact number for the 3rd and 4th Interested Parties. He averred that the lease agreements annexed to the supporting affidavit had been witnessed by relatives and associates of the 1st Defendant and urged that the leases were essentially between the Defendants and were therefore not valid. He averred that he had made report at the Shauri Moyo Police Station that the alleged signature of the lessor on the lease agreement relating to the Intended 3rd Interested Party was forged. He claimed that it was the Plaintiffs who had invested in the Suit Property by drilling a borehole which serves the whole building and by installing an electric power generator together with a solar panel system and denied that the Interested Parties had invested in the Suit Property.

He maintained that the Intended Interested Parties were an extension of the Defendants and were not therefore necessary parties for the determination of the suit. He was of the opinion that the joinder of the Interested Parties was only meant to convolute and delay the determination of this dispute so that the Defendants can continue their unlawful occupation of the Suit Property while the lease between the Plaintiffs and the Defendants over the Suit Property was still subsisting. He maintained that the application by the Interested Parties did not meet the threshold set by Order 1 Rule 10 of the Civil Procedure Rules and urged the court to dismiss that application.

Abdullahi Warsame Ali swore a further affidavit in which he reiterated that he was in occupation of part of the Suit Property and that at the time he took possession the premises were vacant and the Plaintiffs were not in possession of any part of the Suit Property. He averred that they had occupied the spaces they had leased for over a year and added that there was no dispute between the Intended Interested Parties and the Defendants regarding the date the leases were executed and when the Interested Parties took possession of the Suit Property. He deponed that he had redesigned the premises for use as office premises with the authority of the Defendants and exhibited photographs of the premises. He averred that the Plaintiffs had confirmed in their supporting affidavit that they only retained exclusive access to the restaurant located on the 2nd floor of the Suit Property from April 2020. He averred that the Interested Parties had met the rental obligations to the Defendants and attached some banking slips. He attached copies of documents showing the shareholders and directors of the 2nd, 3rd and 4th Interested Parties. He averred that there were other tenants in the premises including SMB Bank Limited and Safaricom Limited. He maintained that the Interested Parties were necessary parties to the suit.

The Plaintiffs and the Intended Interested Parties filed submissions. The Intended Interested Parties submitted that any orders which the court may grant and the outcome of the application dated 23/2/2021 would directly impact and affect their tenancy over the Suit Property. They argued that their presence and participation in the proceedings was necessary to enable the court to effectually and completely adjudicate upon and settle all questions and matters between the parties regarding the Suit Property. They urged that the court had the discretion to join parties who have an interest in the subject matter that is clearly identifiable and who stood to suffer prejudice if they were not joined to the suit. They submitted that since they are the tenants in occupation of parts of the Suit Property, if the court were to make an order restoring the Plaintiffs to the Suit Property it would adversely affect their interest in their Suit Property. They relied on the decision in **Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v Attorney General & 4 Others [2017]eKLR** on the elements to be satisfied where a party seeks to be joined to proceedings.

The Plaintiffs submitted that the Interested Parties were neither parties to nor were they privy to the lease agreement dated 10/7/2018 between the Plaintiffs and the Defendants. They submitted that any determination over a separate and distinct claim would have to await the determination of the Plaintiffs' claim. They submitted that the application for joinder was brought in bad faith because the applicants did not seek to join the proceedings either as Defendants or Plaintiffs and that from the averments made the Interested Parties seek to argue the Defendants' case.

The Plaintiffs submitted that in civil proceedings there was no place for Interested Parties whose only role was akin to watching brief. The Plaintiffs relied on **Occra Realtors Limited v Abdul Ghani Kipkemboi Komen & 4 Others [2016] eKLR** where the court held that in such applications the court needed to weigh whether or not a person had a mere interest or wished to make a claim. The court observed that if a person who wished to be joined to the suit appeared to have a claim to agitate then he ought to be joined either as a Plaintiff or Defendant or a party *sui generis* who is entitled to make a claim within the suit and his right would be determined as between the existing Plaintiff and the Defendant. Further, that if the claim of the parties could be heard and determined without the input of the persons sought to be joined, then it was not necessary for such a person to get into the suit.

The Plaintiffs submitted that in determining whether a person was a necessary party the court must carefully examine the facts of the case, the relief sought and the nature and extent of the interest of the absent parties in the controversy raised in the suit. Further, they submitted that the place of Interested Parties was in different kinds of proceedings such as constitutional petitions. The Plaintiffs submitted that the Interested Parties claim could only be pursued against the Defendants in a separate suit and that it did not arise out of the same act or transaction as that claimed by the Plaintiffs. The Plaintiffs maintained that the dispute between them and the Defendants could be settled without the presence of the Interested Parties and they urged the court to decline to grant the orders sought by the Interested Parties.

The issue for determination in this application is whether the court should allow the Interested Parties to join this suit. The reliefs the Plaintiffs claim in the plaint is for the Defendants to be restrained from accessing the Plaintiffs' business running in the name of Ismarriot Hotel and Resort on the Suit Property and to stop the Defendants from interfering with the Plaintiffs' business. In the application dated 23/2/2021, the Plaintiffs seek among other orders, an injunction to restrain the Defendants from accessing the Plaintiffs' business premises situated on the Suit Property. On their part, the proposed Interested Parties claim that they are in occupation of the Suit property after entering into leases with the Defendants over a year ago. Presumably, this happened after the Plaintiffs left those portions of the Suit Property. The proposed Interested Parties claimed that the Plaintiffs only retained exclusive access to the restaurant located on the 2nd floor of the Suit Property from April 2020. Some of the issues that the court will have to determine is whether the Plaintiffs should be restored to the entire building comprising the Suit Property. Third parties such as the Interested Parties and others will definitely be affected by whatever orders the court may make both in the application dated 23/2/2021 and the suit.

Both the lease which the Plaintiffs seek to enforce and the one the proposed Interested Parties claim to have in place relate to the same Suit Property. In this court's view the Interested Parties' claim and interest over parts of the Suit Property would need to be determined as

between the existing Plaintiffs and the Defendants and not in a separate suit. The proposed Interested Parties are necessary parties to this suit for the court to effectually and completely adjudicate upon and to settle all questions involved in this suit as well as the rights of the parties to the Suit Property.

The court allows the application dated 19/3/2021. The costs of the application shall be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JULY 2021.

K. BOR

JUDGE

In the presence of: -

Ms. Julie Soweto holding brief for Mr. James Orengo, SC for the Plaintiffs

Ms. Wangui Mungai holding brief for Mr. Ahmednassir SC for the Defendants

Mr. V. Owuor- Court Assistant

No appearance for the Interested Parties