



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 62A OF 2020

ENGEN KENYA LIMITED

now known as **VIVO MARKETING**

KENYA LIMITED.....PLAINTIFF/1ST RESPONDENT

VERSUS

TINEK LIMITED.....DEFENDANT/APPLICANT

AND

NATIONAL LAND COMMISSION.....PROPOSED 2ND DEFENDANT

PETER NZUKI.....PROPOSED 3RD DEFENDANT

CHIEF LAND REGISTRAR.....PROPOSED 4TH DEFENDANT

THE REGISTRAR OF TITLES.....PROPOSED 5TH DEFENDANT

RULING

1. In the Chamber Summons dated 26th January, 2021, the Defendant has sought for the following orders:

a. That this Honourable Court be pleased to issue an order directing the addition of the Proposed Defendants to this suit.

b. This Honourable Court be pleased to grant leave to the Defendant/Applicant to amend their pleadings.

c. That costs for this Application be borne by the Plaintiff/Respondent.

2. The Application is supported by the Affidavit for the Defendant's Director who has deponed that the Proposed Defendants are crucial to the proper determination of this matter as their actions led to the current suit and that the 1st Proposed Defendant led the Defendant to believe in the legitimacy of the title over the suit property and which was leased to the Defendant.

3. The Defendant's Director deponed that the Defendant was unaware of any defects or claims on the suit property until the year 2016 when the Proposed 2nd Defendant issued them with a notification dated 21st January, 2016 for a hearing and that the 3rd Proposed Defendant lodged a complaint to the 2nd Proposed Defendant in respect to the suit property.

4. It was deponed that the Proposed 3rd and 4th Defendants all in their official capacity approved the sub-division of the suit property and issuance of new titles and that the 2nd Proposed Defendant awarded the Plaintiff Kshs. 128,760,766, a fact well known to the Plaintiff.

5. The Plaintiff filed the Grounds of Opposition in which it averred that the Defendant/Applicant has not disclosed any ground to merit the granting of the orders sought in the Application and that the proceedings herein seeks to enforce rights in personam accruing to the Plaintiff against the Defendant in respect of the Lease dated 22nd February, 2011 between the two parties.

6. It was deponed that the Plaintiff has no claim against the Proposed Defendants that would warrant their joinder and that the suit by the Plaintiff is against the Defendant who cannot impose on the Plaintiff a party against whom it would have no relief against.

7. According to the Plaintiff, the ownership of the suit property is not an issue for determination by this court; that the Defendant is seeking to introduce a new cause of action and that the grant for the orders will amount to an abuse of the court process by delaying the expeditious determination of the suit. The submissions on record have been considered by this court.

8. This suit was commenced by way of a Plaint dated 7th August, 2020. In the Plaint, the Plaintiff averred that the Defendant represented to it, which representation it acted upon, that it was the Grantee of property known as L.R. No. 337/3838 measuring 0.4521 (*the suit property*) and that by way of a Lease dated 22nd February, 2011, the Defendant leased to the Plaintiff the suit property.

9. It is the Plaintiff's case that on the basis of the Defendant's representation as to the legality of its title, it heavily invested in the Lease premises and fully complied with all the obligations placed upon it by the Lease.

10. According to the Plaintiff's Plaint, before the end of the terms reserved under the Lease and Deed of Variation of the Lease, the National Land Commission issued a Notice and in fact commenced the process of acquiring portions of immovable property earmarked for compulsory acquisition, which process was sanctioned by the Defendant.

11. The Plaintiff averred that by an Award dated 23rd January, 2018, it was found that the sum that was due to the Plaintiff for breach of the Lease was Kshs. 129,760,676 and that before the said sums that were due under the Award were paid to the Plaintiff, an inquiry was commenced as to the legitimacy of the Defendant's title document which culminated in revocation of the said title document, and the refusal by the National Land Commission in honouring the Award.

12. The Plaintiff has prayed to be awarded the sum of Kshs. 126,760,676 or in the alternative, an award of Kshs. 252,500,000 with interest. The Defendant is seeking to enjoin the proposed Defendants as Defendants in the suit.

13. Order 1 Rule 10(2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon an application by either party or *suo moto*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.

14. In *Sarkar's Code of Civil Procedure (11th Edition Reprint, 2011. Vol. 1, page 887)*, the authors stated as follows:

“The Section (on joinder) should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

15. The Court of Appeal of Tanzania, in *Tanga Gas Distributors Ltd vs. Said & Others (2014) E.A 448*, while considering the equivalent of our Order 1 Rule 10(2) of the Civil Procedure Rules stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after Judgment where damages are yet to be assessed; that it is only when a suit or proceedings has been fully disposed off and there is nothing more to be done that the rule becomes inapplicable and that a party can be added even at the appellate stage. This position was adopted by the Court of Appeal in *J M K vs. M W M (2015) eKLR*.

16. The basis of the Plaintiff's claim is that the National Land Commission had initially made an Award to compulsorily acquired the land that it (*the Plaintiff*) had leased from the Defendant. According to the Plaintiff, having entered into a ten (10) year Lease with the Defendant, it was awarded Kshs. 129,760,676 for the acquisition of a portion the suit property that it had leased and developed.

17. It is the Plaintiff's case that the Award of Kshs. 129,760,676 was cancelled by the National Land Commission because it later on transpired that the Defendant was not in possession of a valid title document for the land that it had leased to the Plaintiff.

18. That being the case, and in view of the central position of the National Land Commission in the Award of compensation for the suit land, and the subsequent cancelling of the Award, the Proposed Defendants are necessary parties in these proceedings.

19. The Proposed Defendants were directly involved in the chain of transactions, and especially in respect to the legality of the title document which is the basis of the Plaintiff's claim for damages.

20. The common question of whether the title document held by the Defendant in respect to the suit property is valid can only be holistically addressed if the Proposed Defendants are enjoined in these proceedings. The answers that will arise from the question on the legality of the Defendant's title document will dictate the orders that the court will grant in respect to the Plaintiff's prayers for damages.

21. For those reasons, it is my finding that the Defendant's Application dated 26th January, 2021 is meritorious. The Application is allowed as follows:

a. The Proposed 2nd- 5th Defendants to be enjoined in this suit as the 2nd – 5th Defendants.

b. Leave is granted to the Defendant to amend its Defence to enjoin the 2nd – 5th Defendants in this suit.

c. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 16TH DAY OF JULY, 2021.

O. A. ANGOTE

JUDGE