



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO.402 OF 2015**

**ANGELO COSTABIR.....PLAINTIFF**

**=VERSUS=**

**ROBERT OTACH KIBAGENDI.....1<sup>ST</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**MOUNTAIN MALL LIMITED...PROPOSED INTERESTED PARTY**

**RULING**

1. This is the notice of motion dated 17<sup>th</sup> February 2020 brought under Order 8 Rule 3 of the Civil Procedure Rules 2010 and Section 3A and 63(e) of the Civil Procedure Act.
2. It seeks orders:-
  - a) *That the Applicant, Mountain Mall Limited be enjoined in the suit as an interested Party.*
  - b) *That upon grant of Prayer 1, the Honourable Court do grant the Interested Party leave to file all such other documents as may be necessary to protect its interests in the matter.*
3. The grounds are on the face of the application and are set out in paragraphs 1-6 of the application.
4. The application is supported by the affidavit of James Kiiiiya Gachiri; the Managing director of the Applicant sworn on 17<sup>th</sup> February 2020.
5. He deponed that by a lease dated 4<sup>th</sup> September 2019, the 1<sup>st</sup> Defendant let out all that premises known as **Land Reference Number 330/357** to the Interested Party for a period of 20 years at an agreed rent of Kshs.1,000,000/= monthly for the specific use in the development of a commercial center comprising of a supermarket and attendant convenience stores.
6. He further deponed that the Applicant has so far paid the 1st Defendant Kshs.9,500,000/= but it has not enjoyed peaceful enjoyment of the premises as the 1<sup>st</sup> Defendant has been clogging it with all manner of demands, threats ,disruptions and intimidation to its workers prompting it to file **Nairobi ELC Case no.369 of 2019** to protect its interest and it obtained injunction orders to restrain further interference.
7. He also deponed that the Applicant has already incurred costs in submitting and processing for approval building plans, in sourcing for and obtaining development funds from its partners on loan and any attempts to stop the projects will have a negative financial impact to the Applicant therefore there is need to be enjoined in this suit to Defend the Applicants massive financial interests.
8. The application is opposed by the Plaintiff/Respondent.

**The Applicant's submissions**

9. They are dated 4<sup>th</sup> August 2021. The Applicant submitted on the following issue.

a) Whether the Applicant should be enjoined as an interested party.

10. It submitted that it fits the definition of an interested Party as defined in the case of **Trusted society of Human Rights Alliance v Mumo Matemu & 5 others [2014] e KLR** cited in **Cyprian Andama v Director of Public Prosecution & Another [2018] e KLR** which described an Interested Party as: *“An interested Party is one who has a stake in the proceedings, though he or she was not a 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 himself or herself appears in the proceedings, and champions his or her cause...”*

11. It also relied on the case of **Kenya Medical Laboratory Technicians & Technologies Board & 6 Others v The Attorney General & 4 others [2017] e KLR** where the court enunciated elements to be satisfied where a party seeks to be enjoined in proceedings as an interested party to submit that it had satisfied the requirements since it had demonstrated that it has a legal and identifiable interest in the matter, a stake in it and a duty to assist the court to resolve the issues raised in the suit.

12. It added that from 2019 to date, it has been in occupation of the suit property and by a lease entered into between it and the 1<sup>st</sup> Defendant, it has established a mini shopping mall complete with restaurants, chemists, tire center, grocery shopping, clothes stores, wines and spirits, dry cleaner etc. It also relied on the case of **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others & Michael Wainaina Mwaura (as amicus curae) [2017]e KLR** where the court highlighted the case of **Francis Kriokor Muruatetu & Another v Republic & 5 Others Petition 15 as consolidated with 16 of 2013 [2016] e KLR**.

#### The Plaintiff/Respondents submissions

13. They are dated 4<sup>th</sup> October 2021 and address the following issues:-

a) *Whether the Applicant should be enjoined as an interested Party.*

b) *Who bears the cost of this application?*

14. The Plaintiff submitted that Order 8 Rule 3 of the Civil Procedure Rules and Section 63 (e) of the Civil Procedure Act invoked by the Applicant are irrelevant as the relevant provision is Order 1 Rule 10 (2) of the Civil Procedure Rules which provides that a person seeking to be enjoined as an interested Party ought to demonstrate that its presence is necessary and its presence will enable the Honourable Court adjudicate the dispute before court.

15. He submitted that the suit was filed in 2015 and the dispute in this suit is on ownership of the suit property yet the Applicant allegedly entered into a tenancy agreement with the 1<sup>st</sup> Defendant/Respondent on 15<sup>th</sup> July 2019 in breach of this Honourable Court's orders prohibiting such agreement. He added that the Applicant has no clear role in this suit since as held in **Shivling Supermarket Limited V Jimmy Ondicho Nyabuti & 2 others [2018] e KLR**, you are either a Plaintiff or a Defendant.

16. He submitted further that in the event that this court finds that the suit property belongs to the Plaintiff, the option available to the Interested Party is to seek compensation from the 1<sup>st</sup> Defendant which was the same dilemma faced by the intended Interested in **Kenya Railway Co-operation v Kizingo Apartments Limited & 2 Others [2016]e KLR** where the court stated; *“ the Applicant's participation as an Interested Party will be superfluous because she will not have room to lay her own pleadings setting out a cause of action for compensation”*

17. He also submitted that the applications to be enjoined as an Interested Party are only feasible in Judicial review and Constitutional petitions under Rule 2,7 (2) of the Constitution of Kenya (protection of Rights and Fundamental Freedoms) practice and procedure Rules 2013.

18. He cited the Supreme court's decision in the case of **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others [2015] e KLR** where in dismissing a similar application, they described who can be an interested party as; *“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 champion his or her cause.”*

19. He called on the court to note that the Applicant has filed **ELC Case No.369 of 2019** against the 1<sup>st</sup> Defendant to safeguard its interest and the plaintiff herein is not party in that suit.

20. I have considered the notice of motion and the affidavit in support. I have considered the grounds of opposition, the submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether the Applicant should be joined to these proceedings as an interested party.

21. Under order 1 Rule 10 of the Civil Procedure Rules, this court has discretion to order any party to be joined whose presence before the court may be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in the suit.

22. The dispute herein relates to ownership of the suit property known as **Land Reference Number 330/357**.The Applicant has a lease dated 4<sup>th</sup> September 2019 between it and the 1<sup>st</sup> Defendant. According to the Applicant; it has an interest to defend its financial interest in the suit property. Being a tenant, the Applicant fits the definition of an interested Party as was held in **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others (supra)**.

23. In **Marigat Group Ranch & 3 others v Wesley Chepkemoiment & 19 others [2014] e KLR**, Justice Sila Munyao remarked as follows regarding this issue:-

*where the tenant comes to court seeking to be enjoined as Interested Party. In such instance, he/she is not strictly a party in the sense that he/she does not wish to agitate any rights of ownership of the property in dispute; but is interested in the subject matter for the reason that he/she does not know to whom rent should be paid to...”*

24. The Applicant does not seek to agitate rights of ownership thus it is neither a Defendant nor a Plaintiff, it therefore fits to be an interested party. It will be affected by the outcome of this case.

25. The Applicant disclosed that it filed **ELC Case No.369 of 2019** to assert its rights over the lease. As a party herein, its presence will help the court determine all the issues to avoid multiplicity of suits.

26. In conclusion, I find merit in this application and the same is allowed. The Interested Party is hereby directed to file any documents/witness statements within 21 days from the date of this ruling with corresponding leave to the Plaintiff/Defendants to file any additional documents if need be. Costs of this application shall be borne by the Interested Party.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF DECEMBER 2021.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Andolo for the Plaintiff

No appearance for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

No appearance for the Interested Party

Steve - Court Assistant