



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

E & L CASE NO. 66 OF 2014

GREEN SQUARE LIMITED.....1ST PLAINTIFF/RESPONDENT

DANGAD KIBET KORIR.....2ND PLAINTIFF/RESPONDENT

-VERSUS-

DAVY KIPROTICH KOECH.....1ST DEFENDANT/RESPONDENT

NATIONAL LAND COMMISSION.....2ND DEFENDANT/RESPONDENT

-AND-

ETHICS AND ANTI CORRUPTION

COMMISSION.....PROPOSED INTERESTED PARTY/APPLICANT

RULING

INTRODUCTION

1. This ruling is in respect of the Notice of Motion application dated 20th May 2019, brought pursuant to the provisions of sections 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 of the laws of Kenya, Order 1 rule 10 (2) and Order 51 rule 1 of the Civil Procedure Rules in which the Applicant seeks the following orders:

(a) That the Honourable Court be pleased to enjoin the Ethics and Anti-Corruption Commission (applicant herein) as an interested party herein.

(b) That upon joinder the interested party be granted leave to file its responses and /or pleadings as may be necessary for the purpose of effectively adjudicating upon the issues in controversy.

2. The application is anchored on the grounds stated on the face of the Notice of Motion and the affidavit of Abdulhamid Farooque Low an Investigator in the employ of the Applicant, sworn on 20th May 2019 in which he sets out the reasons why the applicant should be enjoined in the suit. The main reason is that the Plaintiff has an interest in Land Parcel No. KERICHO MUNICIPALITY/ BLOCK 4/2 which is the subject matter of this suit. The applicant entered into a consent judgment with the 1st Defendant in Nairobi HCCC No. 280 of 2010 18 whereby it was agreed that a prohibition be placed upon the suit property prohibiting any transfers, mortgaging and disposal of the suit property pending finalization of negotiations or final determination of the suit. The applicant contends that it seeks to realize the said consent through the sale of the suit property by public auction. It has also been disclosed that there is on-going litigation in various courts touching on the suit property between the applicant and the 1st Defendant.

3. The plaintiffs and second defendants did not oppose the application. However, the application is strenuously opposed by the 1st defendant through his Replying Affidavit sworn on the 1st July 2019 in which he dismisses the reasons advanced by the applicant and states that the same are misleading and of no relevance to the instant suit. He deposes that the application is merely intended to scuttle the 1st defendant's application for contempt of court against the plaintiff and other contemnors. He further contends that the applicant's mandate only extends to public property and the applicant's application is therefore misconceived. He states that the consent order has been challenged through an application which is still pending in court. He concludes by stating that the applicant has failed to demonstrate that its joinder in the suit will aid the court in determining the issues controversy.

4. The application was canvassed by way of written submissions and the applicant and 1st defendant filed their submissions which I have considered.

ISSUE FOR DETERMINATION.

5. Having considered the pleadings, Notice of Motion and rival submissions, the singular issue for determination is whether the application for leave to enjoin the 1st defendant as an interested party should be allowed.

ANALYSIS AND DETERMINATION

6. With regard to the first issue, the law governing joinder of parties is set out in Order 1 Rule 10 of the Civil Procedure Rules, 2010 which provides as follows:

“ The Court may at any stage of the proceedings , either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added”

7. The court therefore has a discretion to enjoin a party whose presence is necessary to assist the court in adjudicating all the questions involved in the suit, even in the absence of an application by either of the parties. The emphasis here is whether that party will enable the court adjudicate all the issues in the suit. See **Pius Mbugua Ngugi & 2 others v Chief Land Registrar & 7 others [2018] eKLR**. It is therefore important for the court to evaluate the pleadings and discern the issues that need to be determined.

8. In the case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v Attorney General (2017) eKLR** the court held as follows:

“The elements to be satisfied where a party seeks to be enjoined in proceeding as an interested party are that:

a) The intended interested party must have an identifiable stake

b) Or legal interest

c) Or duty in the proceedings

...A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally, that is by curtailing his legal rights. In determining whether or not an applicant has legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party, the true test lies not so much in an analysis of what are the constituents of the applicant’s rights, but rather in what would be the result on the subject matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty in the proceedings directly identifiable by examining the questions involved in the suit”

9. Similarly, the court in **Benjamin K. Kipkulei v County Government of Mombasa & another [2015] eKLR** held thus:

“...The test for joinder of a party as an interested party is not that the applicant must show a stake or interest that must prevail in the suit, as that is not possible before the full hearing of the matter; the applicant should demonstrate a legal interest that calls for hearing before a decision on the dispute before the court is adjudicated. In common judicial parlance, I would say that the applicant ought to show on ‘an arguable case’ basis that he has an interest recognized in the law and capable of protection. As a registered proprietor of the suit property upon public auction which is subject of challenge in these proceedings, the proposed party has an identifiable stake and legal interest in the property the subject of, and therefore an interest in, the proceedings before the Court.

10. Furthermore, in the case of **Shivling Supermarket Limited Vs Jimmy Ondicho Nyabuti and 2 others (2018) eKLR** the court observed as follows:

“The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit....”

11. In the instant suit, the 1st defendant has been sued by the plaintiffs for fencing off and annexing a portion of the public access road reserve between the suit property and the plaintiffs’ property and blocking the public access road reserve from the plaintiff and other members of the public. The plaintiffs’ seek an order directing the defendant to open up the access road and a permanent injunction to restrain him from fencing off, putting up structures or in any other interfering with the plaintiff’s right of way.

12. Even though the case appears to be one touching on the boundary between the suit property and the neighbouring plot, the value of the suit property largely depends on whether or not it includes the alleged road reserve. Furthermore, contrary to what counsel for the applicant

has submitted that the suit property is private property which does not fall within the mandate of the applicant, the alleged road reserve is public land whose alienation is of concern to the applicant.

13. To that extent, the applicant who seeks to sell the suit property in execution of the consent judgment would be interested to see how the case is decided. The said interest is legal and identifiable as the outcome of the case would affect the price the applicant fetches for the suit property. I can appreciate the 1st defendant's counsel's sentiments regarding what appears to be an inconvenience to his client, who is faced with various cases touching on his properties but the 1st defendant cannot run away from the consent judgment which is yet to be executed and in which the applicant has a direct interest. For that reason, I allow the applicant to participate in the proceedings as an interested party and direct that the plaint be amended within 21 days to enjoin the interested party. The Applicant shall then file and serve its pleadings within 21 days from the date of service.

The costs of this application shall be in the cause.

Dated and signed this day of January, 2020.

J.M ONYANGO

JUDGE

Dated, signed and delivered at Kericho this 10th day of February,2020.

ANTONY KANIARU

JUDGE