



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC SUIT NO.39 OF 2018

(as consolidated with elc 35, 36, 37, 38, 40, 41, 42, 43, 44, 45 & 48 of 2018)

(formerly Machakos hccc No. 33 of 2008)

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF/RESPONDENT

-VERSUS-

- 1. WILSON GACANJA.....DEFENDANT**
- 2. SIMON MBWIKA.....DEFENDANT**
- 3. JONES KAVIVYA NZAU.....DEFENDANT/APPLICANT**
- 4. JOHN WABOI MWANGI.....DEFENDANT/APPLICANT**
- 5. MARTHA WANJUMBI WABOIDEFENDANT/APPLICANT**
- 6. GEOFFREY KIRIHADEFENDANT/APPLICANT**
- 7. DAMARIS FATHITI..... DEFENDANT/APPLICANT**
- 8. ROSE MWONGELI.....DEFENDANT/APPLICANT**
- 9. MONICA MUTHOKADEFENDANT/APPLICANT**

AND

**THE ASSISTANT COMMISSIONER OF PRISONS AND/OR IN CHARGE MACHAKOS MALE AND
FEMALE GK REMAND AND/OR PRISONINTERESTED PARTY**

RULING

1. What is before court for ruling are the two Notices of preliminary Objection by the Plaintiff/Respondent and the Attorney General on behalf of the party both dated 06th April, 2020 and filed in court on even date. As for the Preliminary Objection by the Plaintiff/Respondent, the following grounds are raised: -

- 1. That the Applicant's Notice of Motion Application is fatally defective and a nullity as leave to join the named Interested Party, a Government Department, was not obtained from this Honourable Court.**
- 2. These proceedings, in so far as they are against a Government Department, offends the provisions of Section 12 and 13 of the Government Proceedings Act, Cap 40.**
- 3. Further, in so far as these proceedings are against Government, no leave was obtained pursuant to the provisions of Section 13A of Government Proceedings Act Cap 40.**

4. Furthermore, in so far as these proceedings are against Government, the Court cannot grant an injunction, mandatory or otherwise and hence the application is misconceived.

5. The application is not premised on a substantive suit against Government by the Applicants and as such lacks foundation and the court has no jurisdiction to entertain it.

6. No permanent prayers of injunction are sought by the Applicants by way of claim, counterclaim or otherwise to warrant the grant of temporary orders of injunction as sought.

7. The entire Notice of Motion application is incompetent, misconceived, defective and a blatant abuse of the process of this Honourable Court and the same ought to be struck out with costs to the Plaintiff/Respondent.

2. The Preliminary Objection by the Attorney General raises one ground to the effect that the Interested Party has wrongly been enjoined in the application herein without leave of the court contrary to Order I Rule 10 (2) of Civil Procedure Rules.

3. The two Notices of Preliminary Objection were disposed off by way of oral submissions.

4. It has been submitted on behalf of the Plaintiff/Respondent that the Applicants have unilaterally added the Interested Party without leave of the Court, that the application fails to comply with sections 12 and 13 of the Government Proceedings Act Chapter 40 of the laws of Kenya which describes the proper Defendant as the Attorney General and as such, the Applicants ought to have sought leave to enjoin him, that the application offends the provision of section 13 A of the aforementioned Government Proceedings Act in that the Applicants did not give the Attorney General 30 days' notice before suing, that the application is not premised on any substantive suit and hence it hangs nowhere. The Plaintiff/Respondent relies on the case of **Abraham Lenauia Lenkeu vs. Charles Katekeyo Nkaru [2016] eKLR**.

5. The Interested Party contends that he has not been properly enjoined in that there were only nine (9) defendants in this suit and that he was not sued by the Plaintiff/Respondent. He further contends that there was no application for leave to enjoin him in the suit and hence the application is fatally defective as since no order sought cannot be granted against a party who is not properly enjoined. The Interested Party relies on **Order I Rule 10 (2) of the Civil Procedure Rules**.

6. Both the Plaintiff/Respondent and the Interested Party have urged the Court to uphold their respective Preliminary Objections.

7. In response, the Counsel for the Applicants submitted that there is a substantive order requiring the Plaintiff/Respondent to amend its pleadings so as to add the Applicants and pointed out that the Counsel for the Plaintiff/Respondent did not apologise for material non-disclosure, that there is substantive counter claim by the Applicants which is on record and which was served upon the Plaintiff/Respondent. Regarding section 13A of the Government Proceedings Act, the Counsel pointed out that the same was declared unconstitutional by the High Court in the case of **Kenya Bus Service Limited & another vs. Minister for Transport & 2 others [2012] eKLR** and as such, there is no requirement for notice to issue to the Attorney General.

8. The Counsel went on to submit that the Interested Party is enjoined for purposes of preserving the subject matter of the suit, that there were several suits filed by the Plaintiff/Respondent one of which was determined at Machakos and the titles to the Applicants were reinstated pending the determination of the substantive suit herein. The Counsel termed the two Preliminary Objections as ones that are meant to scuttle the hearing of the Defendants/Applicants' application.

9. The Applicants have further submitted that the Plaintiff/Respondent came to court to recover land on behalf of the public because he believed that the Court had jurisdiction, that the land in question is where the Applicants sit and the Interested Party was called upon by this Court to answer to the Notice of Motion application thus the Plaintiff/Respondent cannot be heard to deny jurisdiction and accept it when it is convenient for him to do so.

10. The Applicants' Counsel pointed out that the Interested Parties have been named because they have been known to interfere with the subject matter of this suit. The Counsel went on to add that since the eventual claim is fully catered by the Plaintiff/Respondent, it was not necessary to file a separate claim against the Interested Party.

11. The Applicants further contend that the Court on its own motion has powers to enjoin a party and thus no leave was necessary to enjoin the Interested Party.

12. The Counsel for the Plaintiff/Respondent in rebuttal submitted that the application is by the 4th to 9th Defendants/Applicants and was not aware that the said Applicants had filed a counterclaim. Regarding the order to enjoin the 4th to 9th Applicants, the Counsel submitted that the same does not stop the Applicants from filing a suit arising from the cause of action complained of.

13. The Counsel further submitted that the fact that the prison officers are witnesses in this matter does not make them parties to the suit.

14. The Counsel for the Interested Party have pointed out that the Applicants have admitted that no leave was granted for the Interested Party to be enjoined in this suit.

15. Arising from the above, I am of the view that the only issues for determination are whether the Interested Party was wrongly enjoined and whether or not in so far as the proceedings are against a Government department, they offend the provisions of section 12 and 13 of the aforementioned Government Proceedings Act.

16. Pursuant to the consent order that was recorded on the 17th June, 2019 following the Defendants'/Applicants' Notice of Motion application dated 26th April, 2019, the Plaintiff/Respondent was required to amend his pleadings so as to include the Defendants/Applicants herein and thus it is improper to try to impugn their presence in these proceedings since it is the Plaintiff/Respondent who is yet to comply with the aforementioned consent order. It is not lost on me that the Defendants/Applicants together with others have filed an amended defence and counterclaim and thus it cannot be said that the application hangs nowhere.

17. It is clear that the Defendants/Applicants have purported to sue the Assistant Commissioner of Prisons and/or the In-charge of Machakos Male and Female GK Remand and/or Prison. Needless to say, the proposed Interested Party is a Government Officer. **Section 12 (1) of the Government Proceedings Act Chapter 40 Revised Edition 2015 [1981]** provides as follows: -

“Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.”

18. My reading of the above quoted section is that it is couched in mandatory terms and therefore it follows that the Defendants/Applicants ought to have sued the Attorney-General. The Defendants/Applicants herein have no right to purport to sue the Interested Parties notwithstanding the allegation that the acts complained of were committed by the said Interested Party. Suffice it to say, the person the Defendants/Applicants have sued or purported to sue is a person who is non suited either as the defendant or as an interested party. In light of the fact that the person who has been sued is not the Attorney-General as is required by section 12 (1) of the Government Proceedings Act, I will reserve my comments regarding the applicability of section 13A of the Act.

19. The upshot of the foregoing is that it is clear to me that the two notices of the Preliminary Objection filed by the Plaintiff/Respondent and the proposed Interested Party are meritorious. In the circumstances, I hereby proceed to strike out with costs to the Plaintiff/Respondent & the Interested Party the Notice of Motion application dated 1st April, 2020 and filed in court on even date.

Dated and delivered at Lavington in Nairobi this 16th day of April, 2020.

MBOGO C. G.,

JUDGE.

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March, 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of section 18 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MBOGO C. G.,

JUDGE.

Court Assistant- Mr. G. Kwemboi

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