



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 64 OF 2009**

**AWADH SWALEH BATHEIF.....PLAINTIFF**

**VERSUS**

**1. HASSAN SAID RASHI.....1<sup>ST</sup> DEFENDANT**

**2. COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT**

**3. ROSHANBHANU SALIMKHAN KAMANI.....3<sup>RD</sup> DEFENDANT**

**AND**

**1. AHMED ABDULRAHIAN ABDALLA.....1<sup>ST</sup> THIRD PARTY**

**2. SALEH ALI MIRZA.....2<sup>ND</sup> THIRD PARTY**

**3. NATIONAL LAND COMMISSION.....3<sup>RD</sup> THIRD PARTY**

**4. THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> THIRD PARY**

**AND**

**ETHICS AND ANTI-CORRUPTION**

**COMMISSION....APPLICANT/PROPOSED INTERESTED PARTY**

**RULING**

1. I have before me for determination a Notice of Motion application dated 1<sup>st</sup> November 2019. By the said application, the Ethics and Anti-Corruption Commission(the Applicant/Proposed Interested Party) prays for orders that:-

***3. The Applicant be enjoined as an Interested Party in these proceedings henceforth;***

***4. The applicant be afforded a period of three months or such other period as this Court may deem appropriate within which to investigate Land Portion No. 10842 situate in Malindi Town and Conveyancing transactions undertaken in relation thereto***

***5. The Applicant be afforded a period of three months or such other period as this Court may deem appropriate within which to investigate Land Portion No. 10842 and ascertain whether it constitutes public land in the context of Article 61 (2) and Article 62(1) of the Constitution of Kenya;***

***6. The Applicant be afforded a period of three months or such other period as this Court may deem appropriate within which to investigate the ownership and proprietorship (of) Land Portion No. 10842 situate in Malindi Town.***

***7. The Applicant be afforded a period of three months or such period as this Court may deem appropriate within which to investigate the validity, legitimacy and authenticity of Grant No. CR 35203 as issued to the 1<sup>st</sup> Third Party on or about***

30.01.2002;

**8. The Applicant be afforded a period of three months or such period as this Court may deem appropriate within which to investigate the validity and legitimacy of the process that culminated in the issuance of Grant No. 35203 to the 1<sup>st</sup> Third Party on or about 30.01.2002;**

**9. The hearing of the main suit be stayed pending the conclusion of the Applicant's investigations.**

2. The application which is supported by an affidavit sworn by Tabu Charles Lwanga, an Investigator of the Applicant Commission is premised on the grounds inter alia, that:-

**i) The Applicant has Constitutional and statutory authority to conduct investigations into allegations of corruption and economic crime;**

**ii) By a letter dated 6<sup>th</sup> August 2019, the Plaintiff herein wrote to the Applicant alleging that Land Portion No. 10842 is public property whose ownership has been illegally acquired;**

**iii) The Applicant is mandated to institute and conduct proceedings in Court for recovery or protection of Public Property or for the freezing or confiscation of proceeds of or related to corruption;**

**iv) Based on the complaint and in the exercise of its statutory authority the Applicant is conducting comprehensive investigations into the property or otherwise of the adjudication, alienation and conveyance in relation to the subject property;**

**v) The results of the Applicant's investigations are bound to assist this Court to comprehensively determine the matters in issue in a manner that ensures the realization of the overriding objective prescribed under Section 3 of the Environment and Land Court Act, 2011;**

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 15<sup>th</sup> November 2019, Hassan Said Rashid (the 1<sup>st</sup> Defendant) avers that the application as filed is baseless, misconceived, unmeritorious, legally defective and a total abuse of the Court process in that it does not raise any legal or factual issues to warrant the grant of the orders sought.

4. The 1<sup>st</sup> Defendant asserts that the Applicant has failed to demonstrate, that it has any known legal interest and/or stake in the proceedings to warrant being enjoined herein. The 1<sup>st</sup> Defendant avers that the Applicant is a busy body as it does not seek any reliefs against the 1<sup>st</sup> Defendant nor does it have any cause of action against any of the Defendants herein.

5. The 1<sup>st</sup> Defendant avers that the Applicant is not barred from carrying out investigations while these proceedings are on-going. He accuses the Applicant of working in cahoots with the Plaintiff to further delay this matter which has been pending in Court since the year 2009 and urges the Court to dismiss the same.

6. I have perused and considered the application and the response thereto by the 1<sup>st</sup> Defendant. I have equally perused and considered the oral submissions as made before me by the Learned Advocates for the parties. As would be expected, the Plaintiff did not object to the application while the Honourable the Attorney General for the Chief Land Registrar (4<sup>th</sup> Third Party) supported the application.

7. The Ethics and Anti-Corruption Commission wants to be enjoined in these proceedings as an Interested Party and for these proceedings to be stayed for a minimum period of three (3) months to enable the Commission to investigate whether or not the suit property is public land and the circumstances in which the 1<sup>st</sup> Third Party herein acquired title thereto.

8. It is the Applicant's case that it has a Constitutional and Statutory mandate to conduct investigations into allegations of corruption and economic crime and that to that effect, the Plaintiff herein has by a letter dated 6<sup>th</sup> August 2019 written to it alleging that the suit property is public property whose ownership has been illegally procured by an individual. Based on that complaint, the Applicant avers that it is now in the process of conducting a comprehensive investigation into the propriety or otherwise of the adjudication, alienation and conveyance of the subject property to a private individual and hence this suit ought to be stayed pending such investigation.

9. Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

10. Indeed, the Court may even on its own motion add a party to the suit if such a party is necessary for the determination of the real matter in dispute or is one whose presence is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit.

11. Accordingly, joinder of parties is permitted by law and it may be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder will lead into practical problems of handling the existing cause of action together with the one of the party being joined where it is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit.

12. In other words, joinder of parties will be declined where the cause of action being proposed or the relief being sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor as it were is whether a common question of fact or

law would arise between the existing and the intended parties.

13. In **Pravin Bowry –vs- John Ward & Another (2015) eKLR**, the Court of Appeal considered the applicable principles for an application such as the one before me. Citing with approval the decision by the Supreme Court of Uganda in **Deported Asians Property Custodian Board –vs- Jaffer Brothers Ltd (199)1 EA 55 (SCU)**, the Court observed that:-

***“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the cause or matter....***

***For a person to be enjoined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seeks in the suit, would legally affect the interests of that person and that it is desirable, for avoidance of a multiplicity of suits, to have such person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the Defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.” (Emphasis added).***

14. The Plaintiff filed the suit before me on 23<sup>rd</sup> June 2009 against the 1<sup>st</sup> Defendant and the Commissioner of Lands (2<sup>nd</sup> Defendant) seeking an injunction to restrain the 1<sup>st</sup> Defendant from taking possession of and using the suit property as private property. He also sought a declaration that the 2<sup>nd</sup> Defendant had no power to allocate the suit property to anyone and urged the Court to recall, cancel and deregister the property from the 1<sup>st</sup> Defendant’s name.

15. At paragraph 11 of the Plaint, the Plaintiff asserts that the allocation of the suit property by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant was unlawful, illegal and contrary to public policy on account that the same had been surrendered by a private individual for purposes of public use.

16. According to the Applicant Commission, the same Plaintiff has now prompted the application before me by a complaint lodged with the Commission dated 6<sup>th</sup> August 2019 wherein he states that the suitland is public property and that the same has been acquired illegally by private individuals.

17. I was not told why it took the Plaintiff ten(10) years from the date he filed this suit to lodge a complaint with the Applicant Commission. As it is, the Applicant does not state that the suitland is public property. They are asking this Court to give them time to go and find out if indeed the suitland is public property. That is in fact the same inquiry that the Plaintiff had asked this Court to make when he instituted these proceedings on 23<sup>rd</sup> June 2009.

18. While it was not clear to me why the Plaintiff chose to refer the same dispute pending before the Court to the Applicant Commission so late in the day, it was clear in my mind, more so upon consideration of the provisions of Section 193A of the Criminal Procedure Code that there was absolutely nothing barring the Applicant Commission from conduction bona fide investigations into the complaint lodged by the Plaintiff.

19. Accordingly I was not persuaded that the Applicant Commission required to be first enjoined in these proceedings before they can conduct investigations into the complaint. Indeed in the application before me, they already assert that they are conducting comprehensive investigations. As it were, in the matter herein they merely apply to be enjoined as an Interested Party. I have perused the Civil Procedure Rules at length but I did not find any provision that would allow for the Applicant to be enjoined as an Interested Party in a suit of this nature.

20. In my considered view, a party in the kind of Civil Proceedings before me must either be a Plaintiff or a defendant. If a party is joined as a Plaintiff, such a party must of necessity be seeking some form of relief from the defendant(s). Where one is enjoined as a defendant, there ought to be a Plaintiff(s) seeking some relief from that party or a defendant who desires such party to be enjoined as a co-defendant to enable them to plead their defence.

21. In other words, the Applicant ought to have demonstrated that it has an interest in the subject matter of the suit and that it stands to be affected by any orders that may be made in the suit regarding the subject matter. Alternatively, the Applicant Commission ought to have shown that it is a necessary party and that its presence would enable the Court to effectually and completely adjudicate and settle all the issues in the suit.

22. In the premises, I was not satisfied that the Applicant has demonstrated that it has sufficient interest in the subject matter of the dispute and/or that it is liable to be affected by any order that this Court may make at the conclusion of the trial. Having held that the Applicant is not a necessary party in these proceedings, it follows that the prayer for stay of these proceedings is equally unsustainable and must fail.

23. The net effect is that I did not find any merit in the application dated 1<sup>st</sup> November 2019. The same is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 13<sup>TH</sup> DAY OF MAY, 2020.**

**J.O. OLOLA**

**JUDGE**