



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CAUSE NO. 55 OF 2014

GREEN SQUARE LIMITED.....PLAINTIFF

VERSUS

SHELADIA ASSOCIATES.....1ST DEFENDANT

ABDUL MULLICK ASSOCIATES INC.....2ND DEFENDANT

SBI INTERNATIONAL AG (KENYA).....3RD DEFENDANT

RULING

INTRODUCTION

1. This ruling relates to two applications viz: one, a notice of motion (Hereafter called “first application”) dated 4th July, 2019 filed by the 3rd Defendant – **SBI INTERNATIONAL HOLDINGS AG (KENYA)** – on 8th July, 2019 and, two, another notice of motion (hereafter called “second application”) dated 27th September, 2020 filed by the Plaintiff – **GREEN SQUARE LIMITED** – on 30th September, 2019. The disputing parties in both applications appear conversely as applicant and respondent in the two applications, each having filed the applications under consideration against the other. In order to avoid confusion that may arise due to their interchangeable positions in the applications, I have decided to go by the description or position of each in the suit, with one being the plaintiff while the other is the 3rd defendant.

THE FIRST APPLICATION

2. The first application was filed by the 3rd defendant and is expressed to be brought under Article 159 of the Constitution of Kenya, Sections 1A, 1B, 3A, and 80 of the Civil Procedure Act (Cap 21), Order 45 of the Civil Procedure Rules, 2010 and all other enabling statutes. It seeks, in the main, to review a ruling of this court delivered on 27th June, 2017, which was a determination of an earlier application by the 3rd defendant dated 3rd August, 2016. The ruling dismissed the earlier application. The review sought in the first application herein seeks to have earlier application allowed. And allowing the earlier application means that the 3rd defendant ceases to be a party in these proceedings.

3. More precisely, the following prayers are made in the first application:

(a) The honourable court be pleased to review and vary its ruling and orders made by learned Lady Justice J.M.Onyango delivered on 27/6/2017 in respect of the application dated 3/8/2016.

(b) The honourable court be pleased to allow the 3rd defendant’s notice of motion application dated 3/8/2016 and order that the 3rd defendant be removed from the proceedings herein.

(c) Costs of the application and the suit be awarded to the 3rd defendant.

4. The reasons proffered in support of the first application are contained in the grounds on which the application is anchored and in the substance of the supporting affidavit that came with the application. They include averments that there are sufficient reasons to warrant review; that the plaintiff misled the court by alleging that the defendants were jointly awarded the tender for designing, rehabilitating and construction of the Mau Summit- Kericho- Nyamasaria road; that the 3rd defendant clarified that it was awarded its tender alone and not with the other defendants; that the court made its ruling without making a finding as to the veracity of the averments made by the plaintiff; and that there has been discovery of new evidence which, even after exercise of due diligence, was not within the knowledge of the 3rd defendant and which therefore the 3rd defendant could not have produced earlier.

5. Further, the 3rd defendant averred that it is Kenya National Highways Authority (KeNHA) that was responsible for handing over the land on which the road was to be constructed and the 3rd defendant therefore had no role in determining where it would pass. In any case, 3rd defendant further averred, the construction of the road is now complete and it has not interfered with the plaintiff's ownership, occupation, use and enjoyment of his land. The 3rd defendant emphasized that it is not a necessary party in these proceedings and that the plaintiff has no claim against it.

6. The plaintiff responded to the application via a replying affidavit dated 22nd October, 2019 and filed on 5th December, 2019. According to the plaintiff, the 3rd defendant was jointly involved with the other defendants in the construction of the road and there is a clear nexus in their roles which makes all of them answerable to its claim. The 3rd defendant was faulted for raising exactly what it has raised in its defence to the suit. The plaintiff also averred that there was inordinate delay in filing the first application and that the delay has not been explained. According to the plaintiff, the 3rd defendant is intent on delaying the hearing of the suit. The plaintiff emphasized that it is the 3rd defendant who was seen trespassing into the land and the 3rd defendant is therefore a necessary party.

THE SECOND APPLICATION

7. The second application was filed by the plaintiff and it is expressed to be brought under Sections 1A, 1B, 3, 3A and 63 (e) of Civil Procedure Act (Cap 21), Order 51 rule 1 of Civil Procedure Rules, 2010, Sections 14, 19 (1), (2) and (3) (f) of the Environment and Land Court Act, 2011 and Practice Direction NO 1 under Gazette Notice NO 5178 of 28th July, 2014. It is clear the plaintiff sought to prevent or forestall the filing of the first application and/or to strike it out if already filed.

8. The application came with four (4) prayers but prayer 1 is already spent, having been meant for consideration at the *exparte* stage. The prayers for consideration are therefore three (3) – prayers 2,3 and 4 – and they are as follows:

Prayer 2: That the honourable court do set aside the order/ruling and/or directions that granted leave to the 3rd defendant to make an application for review of the ruling that was delivered by the court on 27/01/2017 thus setting a date for hearing of the plaintiff's suit.

Prayer 3: That in the alternative, and without prejudice to prayer 2 above, if by the time this application is filed, the 3rd defendant will have filed any kind of application, the same be struck out thus fixing a date for hearing of the plaintiff's suit.

Prayer 4: That the costs of this application be borne by the 3rd defendant.

9. According to the plaintiff, when the court allowed the 3rd defendant to file the first application on 19th June, 2019 it veered off the purpose for which the matter had come up in court, which purpose was for the 3rd defendant to provide new designs for the road. The plaintiff alleged that the 3rd defendant is frustrating the hearing of the suit allegedly for the reason that it knows it will loose in the end. Counsel for the 3rd defendant was particularly accused of being hell bent on ensuring that the main suit is not heard.

10. The 3rd defendant responded to the application by means of a replying affidavit dated 20th December, 2019 and filed on 21st January, 2020. It accused the plaintiff of “*falsehoods, misrepresentations, and malice*” intended to mislead the court and delay the hearing of the first application. The application was said to be a kneejerk reaction to the directions made by the judge on 19th June, 2019. The 3rd defendant was said to have been merely working under instructions of KeNHA and was therefore an agent and a “*peripheral party.*” It was deposed that the court can still make its determination without the participation of the 3rd defendant.

3RD DEFENDANT'S SUBMISSIONS

11. The two applications were canvassed by way of written submission. The 3rd defendant's submissions were filed on 29th January, 2020. The submissions give an overview and background of both the suit and the two applications under consideration. Then the issues for determination were crystallised thus:

(a) Whether the 3rd defendant discloses grounds for review to warrant this court to vary its ruling delivered on 27/06/2019.

(b) Whether the 3rd defendant's Notice of Motion dated 3/8/2016 be allowed and consequently whether the 3rd defendant should be removed from the proceedings herein.

(c) Whether the plaintiff's application merits the orders sought.

12. On the first issue, the 3rd defendant gave a highlight of statutory law relating to review and cited some decided cases that augment that law. In that regard, the 3rd defendant quoted Section 80 of Civil Procedure Act (cap 21) and parts of Order 45 of Civil Procedure Rules, 2010. Then the cases of **JOSEPH NJENGA NJOROGE VS KABIRI MBITI (1986)eKLR**, **FRANCIS ORIGU & ANOTHER VS JACOB KUMALI MUNGALA (2005)eKLR**, **DANIEL LUWAMBI & 2 OTHERS VS PENGUIN HOLDINGS LIMITED (2017)eKLR**, **PANCRAS T. SWAI VS KENYA BREWERIES LIMITED (2014)eKLR** AND **AFPACK ENTERPRISES LIMITED VS RUNITA JAYANT ACHARYA (2018)eKLR** were cited to demonstrate, inter alia, who an aggrieved party is, what constitute discovery of new and important matter or evidence, the need to bring application without undue delay, and the wide discretion given to the court in deciding whether to grant an application for review.

13. It was then submitted that in the matter at hand, the averment by the plaintiff that the 1st, 2nd and 3rd defendant were jointly awarded the tender for construction was key to the outcome of the ruling delivered in the earlier application. The 3rd defendant emphasized that the correct position was that each party had a distinctive role to play and it was itself awarded a separate contract.

14. Further, the 3rd defendant submitted that there was discovery of new evidence, which comprised of what was called Conditional Notification of Award sent by KeNHA to which the 3rd defendant responded by sending Unconditional Acceptance of Award. The other two defendants were not involved at all as they were not part of the contractual agreement between the 3rd defendant and KeNHA. According to the 3rd defendant, had the court earlier been furnished with this evidence, the outcome of the ruling of the court would have been different.

15. On the second issue, which is about the application for review and removing the 3rd defendant from proceedings, the 3rd defendant submitted that it was contracted by KeNHA. The stretch of the road complained of was said to be complete. The plaintiff's right of ownership, occupation, use, and/or enjoyment of his property was said not to have been interfered with and there is therefore no loss or damage suffered by the plaintiff. That being the position, the plaintiff was said to have no cause of action against the 3rd defendant.

16. The 3rd defendant cited cases of **JOSEPH NJAU KINGORI VS ROBERT MAINA CHEGE & 3 OTHERS (2002)eKLR**, **CECILIA MUDONDO WANDERA VS MATILDA WANDERA(2015)eKLR** and **PITHON WAWERU VS THUKU MUGIRIA (1983)eKLR** to emphasise the fact that the court has wide discretion to allow or disallow an application for review.

17. The final issue related to the plaintiff's application under consideration. The concern here was whether it has merits. Which it doesn't, according to the 3rd defendant. It was pointed out that the order to file an application for review was granted in presence of both sides and no protest was made. According to the 3rd defendant, this court is being invited to interfere with the judicial independence of another judge. The application was also said to be an afterthought. The 3rd defendant averred that the issues raised in the application should have been raised in the 3rd defendant's response to the application for review. The court was asked to dismiss the plaintiff's application.

PLAINTIFF'S SUBMISSIONS

18. The plaintiff's submissions were filed on 9th March, 2020. The plaintiff submitted that there was inordinate delay attending the filing of the 3rd defendant's application for review and that, in any case, the application is overtaken by events as the plaintiff has since amended its plaint. The plaintiff's application was said to be brought in good faith as it is aimed at ensuring that the main suit is heard on merits.

19. The 3rd defendant was said to be a necessary party to the suit, the claim against the other defendants being well intertwined with the relief sought against the 3rd defendant. The 3rd defendant's presence was said to be necessary for full and complete settlement of all the questions involved in the proceedings.

20. Further, the plaintiff submitted that it sued those who encroached on its land, the 3rd defendant being one of them. The 3rd defendant was accused of asking the court to employ the draconian move of striking out proceedings without hearing the suit and deciding it on the merits. Such a move was said to be likely to result in incomplete settlement of the issues surrounding the plaintiff's suit.

ANALYSIS AND DECISION

21. I have had a look at the suit as filed. I have also read the application which gave rise to the ruling sought to be reviewed. I have considered the two applications now under consideration, the responses to the applications, and the rival submissions. I deem it enlightening first to give some background. The dispute between the parties, which include two other defendants who are not part of the applications, revolve around the design and subsequent construction of Mau Summit-Kericho-Nyamasaria road. The pre-construction stage seems to have involved the first two defendants while the central actor in the construction stage was the 3rd defendant. The others seem to have only played a supervisory and/or inspectorial role in the construction stage.

22. The plaintiff complains that his land was encroached upon or trespassed into and all the defendants were part of what happened. This is more particularly manifest in prayer 1 (a) in the plaintiff's amended plaint. The 3rd defendant on the other hand pleads that there was no joint contract involving itself and the other defendants. This is to be seen well at paragraph 3 of the 3rd defendant's amended defence. It is the 3rd defendant's position that it had no role in determining where and on which land the road had to be build (see paragraph 4 of its amended defence).

23. I now come to the determination of the two applications and I will begin with the plaintiff's application, which is the second one, for the simple reason that it sought to prevent filing of 3rd defendant's application, which is the first one herein, or to strike it out outright if filed. It appears clear to me that when the 3rd defendant was allowed to file application for review, the plaintiff's side was represented in court and no protest or objection was raised. This point is well made by the 3rd defendant in its submissions. About three months later, the plaintiff filed this application. The 3rd defendant calls it an "afterthought" and I agree. There is no reason proffered why the reasons raised in the application could not be placed before court when the 3rd defendant asked to be allowed to file the application for review.

24. The plaintiff's application as filed is also pre-emptive, pre-judging, presumptive, and/or anticipatory. Pre-emptive because it sought to ensure that an application already allowed to be filed was not filed, pre-judging because it was prematurely judgemental and it supposed that an application not yet filed did not have possible merits, presumptive for the same reasons that it can be said to be pre-judging and for its pre-supposed worthlessness of the application to be filed, and anticipatory because it's clear that at the time it was filed, the plaintiff was not aware that the 3rd defendant had filed its application and was only anticipating its filing. All this is wrong approach. You cannot treat as useless something you have not even seen.

25. Such an application is not one that a court of law should gladly entertain in my view. And this is particularly so where, as in this case, the court has allowed filing of the application. My considered view is that the plaintiff should have waited until the application was filed and then file a response that includes all the issues raised in the application. The 3rd defendant made this point in its submissions and I agree. As things stand now, the court is handling two applications which ideally can be handled as one single application and single response. That would have ensured easy and effective adjudication and would have saved on time and costs.

26. For all these reasons, I find the plaintiff's application lacking in merits and I hereby dismiss it with costs.

27. I now come to the 3rd defendant's application. The main reason proffered as to why it was filed was an alleged discovery of new and important evidence which could not be produced and/or was not available at the time the application dated 3rd August, 2016 was filed. My understanding of what the new evidence is comprised of is that the 3rd defendant received what it called "*Conditional Notification of Award*" to which it responded by sending "*Unconditional Acceptance of Award*". The court was asked to make reference to an annexure labelled PL-I annexed to the application for review.

28. I need to point out that the two documents are dated 26th October, 2009 and 28th October, 2009 respectively. The Conditional Notification of Award was sent to the 3rd defendant. The 3rd defendant must have received it for it responded to it by sending Unconditional Acceptance Award. According to the 3rd defendant, the Conditional Notification of Award is dated 26th October, 2019 and the Unconditional Acceptance of Award is dated 28th October, 2019. The 3rd defendant is lying through the teeth. The two documents are year 2009 documents, not 2019 documents, and must have been in 3rd defendant's possession. The first one was sent to it from Ministry of Lands. It became received and possessed communication. The other one was sent by it. Didn't it retain its copy?

29. The contract document also provided in the annexures is also old, infact as old as 10 years now. Didn't the 3rd defendant have its copy? I have looked at the application dated 3rd August, 2016. It was filed in court on 6th September, 2016. There were no annexures brought together with that application. Yet everything suggests that in all likelihood, the 3rd defendant was in possession of the documents it now wants the court to treat as new evidence. I must point out that I find it hard to believe the 3rd defendant.

30. But there is more. The 3rd defendant has emphasized that it was awarded its contract separately. It was making the point that its work was not a joint task with the other defendants. But the plaintiff has pointed out that it is the 3rd defendant that it saw trespassing on its land. As a court charged with the responsibility of deciding the matter, two points emerge as useful for consideration. The first one is the substance of the contracts, including the way they were awarded. This is what the 3rd defendant has largely dwelt on. But there is another aspect, which is equally crucial. And that aspect is the implementation and execution of the contract. And what I understand the plaintiff to be saying is that the 3rd defendant was the visible and physical instrumentality through which construction took place. And it is in construction that the plaintiff noticed trespass.

31. When one considers all this, it is not difficult to appreciate why the plaintiff insists that the 3rd defendant is a necessary party. The court itself agrees with the plaintiff because it is in the act of construction that trespass was said to arise. And the party doing construction was none other than the 3rd defendant. If you remove the 3rd defendant from the case, you make it impossible for the plaintiff to provide the necessary connection between the act complained of and the construction that took place. Yet had construction not taken place, the alleged trespass would not probably have occurred.

32. Additionally, it is important to appreciate that in civil matters, many defendants are sued who ultimately turn out not to be liable for what is claimed against them. Such defendants end up being awarded costs. If the 3rd defendant herein feels strongly that it's not liable, then all is not lost. It will be treated the way other defendants are usually treated. The court must reject the invitation to curtail the plaintiff's right to prosecute its case the way it pleases, particularly given the fact that nothing frivolous or vexatious is shown in the inclusion of the 3rd defendant as a party. I need to emphasise here that where the presence of a party is necessary for complete and effectual determination of a case, the court cannot allow removal of such party. That seems to be the case here.

33. It can be seen that I have not paid much attention to the exposition of law as given by the defendant. The reason for this is simple. Law arises from facts and is in turn always applied to demonstrated or proven facts. When, as in this matter, the facts are misrepresented or based on lies, the law, even when presented with indubitable elegance, becomes an unhelpful tool.

34. The upshot, in light of all the foregoing, is that the application for review is found unmeritorious and I hereby dismiss it with costs.

Dated, signed and delivered at Kericho this 30th day of June, 2020.

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A. K. KANIARU

JUDGE