



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 544 OF 2017

(FORMERLY HCCC NO.1059 OF 2000)

THE MARKET PLAZA LIMITED.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

CHINA ROAD & BRIDGE

CORPORATION LTD.....2ND DEFENDANT

RULING

The plaintiff brought this suit against the defendants on 7th July, 2000 seeking the following reliefs;

- a) A permanent injunction restraining the defendants from entering, trespassing on, building and/or constructing and/or erecting on, remaining on, wasting and/or conducting any business or any other form of interference with the plaintiff's quiet possession of all that parcel of land known as L.R No. 209/1855/2 (hereinafter referred to as "the suit property").
- b) General damages for trespass.
- c) Costs of the suit.

In its plaint, the plaintiff averred that it was the registered proprietor of the suit property which is situated at the junction of Koinange Street and Market Street in the Nairobi city center. The plaintiff averred that on or about 14th June, 2000, the 1st defendant at the request of the 2nd defendant allowed the 2nd defendant to dump its waste material on an excavated area on the suit property. The plaintiff averred that the purported authorization that was given by the 1st defendant to the 2nd defendant to dump waste of the suit property was given in bad faith and was actuated by malice since the suit property was transferred by the 1st defendant to the 2nd defendant on or about 22nd December, 1992. The plaintiff averred that on or about 3rd July, 2000, the 2nd defendant started dumping waste on the suit property which activity continued on 4th July, 2000. The plaintiff averred that the defendants had no legal right to enter the suit property and/or interfere with the plaintiff's quiet possession of the property. The plaintiff averred that the defendants' actions aforesaid were aimed at defeating the plaintiff's proprietary rights over the suit property. The plaintiff averred that its title to the suit property was indefeasible and that unless the defendants were restrained by the court, they were likely to continue with the activities complained of thereby subjecting the plaintiff to loss and damage.

The plaintiff amended the plaint on 23rd October, 2007. In the amended plaint, the plaintiff averred that the 1st defendant had converted the suit property into parking bays after filling the pits that the plaintiff had excavated for the purposes of construction it had intended to undertake thereon and that the 1st defendant was collecting parking fees from the motorists who were parking on the suit property. The plaintiff sought an order for accounts against the 1st defendant in respect of the parking fees that it had collected from the suit property and payment of the amount found due to the plaintiff and a mandatory injunction compelling the defendants to vacate the suit property. The plaintiff also sought special damages.

The 1st defendant filed a statement of defence on 29th November, 2000. The 1st defendant averred that it had allowed the 2nd defendant to dispose of the excavated material on the suit property because the plaintiff had let water to accumulate on the suit property thereby creating a nuisance. The 1st defendant filed amended defence and counter-claim against the plaintiff dated 4th February, 2008. I have not seen a copy of the said amended defence and counter-claim in the court file. From the plaintiff's application dated 13th February, 2008 in which it sought to strike out the said amended defence and counter-claim and the plaintiff's reply to defence and defence to counter-claim filed on 12th

February, 2008, it appears that the 1st defendant had contended in its amended defence and counter-claim that the plaintiff had acquired the suit property fraudulently and illegally, and that the suit property still belonged to the 1st defendant. I have not seen on record a copy of the 2nd defendant's defence. It is not clear whether it was filed.

What I now have before me are two applications for joinder. The first application was brought by Kenya Anti-Corruption Commission by way of Chamber Summons application dated 2nd April, 2008. In the application, Kenya Anti-Corruption Commission (hereinafter referred to only as "the 1st applicant") sought to be joined in the suit as a defendant and for leave to file pleadings and defend the suit together with the 1st defendant. The 1st applicant also prayed for the necessary directions to be given for amendments of pleadings and service of the same upon the 1st applicant. The application was brought on the grounds that the 1st applicant was mandated to investigate the extent of liability for loss of or damage to public property and to institute civil proceedings against any person for the recovery of such property or restitution for and/or compensation. The 1st applicant averred that pursuant to that mandate, it undertook investigations on the propriety or otherwise of the subdivision of L.R No. 209/1855 into two portions namely, L.R No. 209/1855/1 and L.R No. 1855/2 and the subsequent alienation of L.R No. 1855/2 (the suit property) to the plaintiff. The 1st applicant averred that its preliminary findings following the said investigations were that the 1st defendant had no authority to deal with the suit property and as such the transfer of the suit property by the 1st defendant to the plaintiff was null and void.

The 1st applicant averred that its investigations revealed that the suit property was granted to the 1st defendant to be used for public purposes and as such it could not be alienated for private use. The 1st applicant averred further that the suit property was transferred to the plaintiff in breach of the provisions of the Local Government Act and the special conditions of the grant in favour of the 1st defendant. The 1st applicant averred that it could only share the findings of its investigations after being made a party to the suit. The 1st applicant averred that its joinder to the suit would help the court to arrive at an effective and complete adjudication of the issues before the court. The 1st applicant averred that it was better placed to agitate and put forward a case for public interest in the matter in light of the evidence of corruption that it had unearthed in the aforesaid investigations. In his affidavit in support of the application, Edward Rinkanya who investigated the dealings with the suit property on behalf of the 1st applicant averred that City Market is situated on L.R No. 209/1855 from which the suit property was carved out. He stated that the suit property was part of the said market and as such was reserved for public utility. Edward Rinkanya stated that the 1st applicant's joinder in the suit will obviate the need for the 1st applicant to file a separate suit against the plaintiff in respect of the same subject matter.

The second application for joinder was brought by the officials of City Market Stall Holders Association (hereinafter referred to only as "the 2nd applicant"). The 2nd applicant's application was brought by way of Chamber Summons dated 15th November, 2010. The 2nd applicant sought an order that it be joined in the suit as 3rd defendant. The 2nd applicant contended that it was an association of traders who conduct business at the City Market in Nairobi. The 2nd applicant averred that the suit property was illegally excised from the City Market and alienated to a private developer. The 2nd applicant averred that the said alienation would defeat the interest of its members. The 2nd applicant averred that it had a direct interest in the suit property because the same was being used by its members, shoppers and the general public for parking. The 2nd applicant averred that since it was the 1st defendant which alienated the suit property to the plaintiff, the 1st defendant was not well placed to protect the interest of the members of the 2nd applicant.

The 1st applicant's application was opposed by the plaintiff only while the 2nd applicant's application was opposed by the plaintiff and the 1st defendant. The plaintiff opposed the 1st applicant's application through a replying affidavit sworn by its director, Njoroge Ngatia on 18th April, 2008. The plaintiff contended that the 1st applicant's application was frivolous and that the same was intended to delay the prosecution of the suit. The plaintiff contended further that the 1st applicant was not a necessary party to the suit and that its joinder to the suit would amount to a breach of the law and the plaintiff's constitutional rights. The plaintiff averred that the 1st applicant should file a separate suit for the determination of the issues that it had raised in its application. The plaintiff averred that the reliefs sought by the plaintiff had nothing to do with the 1st applicant and that the 1st applicant had not given good reason why it should be joined in the suit. The plaintiff averred that what it has sought in this suit is damages for trespass and that ownership of the suit property is not in issue. The plaintiff averred that the issue of ownership of the suit property was determined in HCCC No. 72 of 1994 and as such the cause of action based on the ownership of the suit property sought to be introduced by the 1st applicant was *res judicata* and prejudicial to the plaintiff. The plaintiff averred that the 1st applicant's application was based on unsubstantiated allegations intended to portray the plaintiff as corrupt and dishonest.

The plaintiff opposed the 2nd applicant's joinder application through Notice of Preliminary Objection and Grounds of opposition both dated 22nd November, 2010. In its Notice of Preliminary Objection, the plaintiff averred that the application was bad in law and an abuse of the process of the court. The plaintiff averred further that the 2nd applicant had no *locus standi* to file the application and that the application was *res judicata*. The plaintiff averred further that the application was brought in bad faith with the sole intention of scuttling the hearing of the suit. In its grounds of opposition, the plaintiff contended that the application offended the provisions of the law and as such was fatally defective. The plaintiff averred further that the plaintiff would be gravely prejudiced if the application was allowed.

The 1st defendant opposed the 2nd applicant's application through a replying affidavit sworn by Aduma J. Owuor on 22nd November, 2010. The 1st defendant contended that the 2nd applicant had not established any interest in the suit property. The 1st defendant contended further that the officials of the 2nd applicant who brought the application had not shown that they were elected officials of the 2nd applicant and that they were duly authorized to file the application on behalf of the 2nd applicant. The 1st defendant contended further that there was no evidence that the 2nd applicant was a registered organization. Finally, the 1st defendant averred that the members of the 2nd applicant were its tenants and as such the 1st defendant would protect their interests in the suit.

The two applications were heard on 20th November, 2018 and 27th January, 2020. In her submissions in support of the 1st applicant's application, Ms. Litoro reiterated the grounds set out on the face of the application and in the supporting affidavit of Edward Rinkanya. She submitted that the 1st applicant wished to defend the application together with the 1st defendant. Ms Litoro submitted that the joinder of the

1st applicant to the suit would enable the court to fully and finally determine all the issues arising between the parties. She submitted that the 1st applicant was a necessary party to the suit and that it had established its interest in the subject matter of the suit. Ms. Litoro submitted that the plaintiff's title to the suit property had been revoked by the Land Registrar on 26th November, 2010 and that in the plaintiff's judicial review application challenging the revocation, the 1st applicant was joined as an interested party. She submitted that the plaintiff's judicial review application was dismissed on 22nd September, 2016. Ms. Litoro submitted that while dismissing the plaintiff's application, the court directed that the issue of ownership of the suit property be determined in this suit. She submitted that on the basis of that decision, the 1st applicant was a necessary party to the suit.

In her submission in support of the 2nd applicant's application, Ms. Mutuku submitted that the suit property was carved out of L.R No. 209/1855. She submitted that L.R No. 209/1855 was set aside for public use as a market. She submitted that the suit property was created by subdividing L.R No. 209/1855 into two portions namely, L.R 209/1855/1 and L.R No. 209/1855/2 (the suit property). Ms. Mutuku submitted that the City Market is situated on L.R 209/1855/1 while the suit property, L.R No. 209/1855/2 that was alienated to the plaintiff by the 1st defendant was reserved for the expansion of the City Market. Ms. Mutuku submitted that the 2nd applicant's members were traders in the City Market and as such they were interested in the suit property that was set apart for the expansion of the said market. She submitted that the alienation of the suit property to the plaintiff was illegal and that the plaintiff's title was revoked by the Registrar of Titles. Ms. Mutuku submitted that the 2nd applicant was a party to the judicial review application in which the plaintiff had challenged the revocation of its title to the suit property. Ms. Mutuku submitted that in the judgment that was made in the plaintiff's judicial review application aforesaid, the court had directed that the parties do ventilate the issues that had been raised in that application in matters that were pending in court between the parties and that this is one of such matters. She submitted that the 2nd applicant should be granted leave to join this suit so that it can ventilate the grievances that it has against the plaintiff as directed in the said judicial review application.

Mr. Masila who appeared for the 2nd defendant supported the 2nd applicant's application. He submitted that the 2nd applicant's application should be allowed because in the judicial review application that was filed by the plaintiff to challenge the revocation of its title to the suit property, the court had directed the parties to that application to canvass the issues that they had raised in the application in this case. Mr. Masila submitted that the court had observed that the real dispute between the parties revolved around the ownership of the suit property which could not be determined through judicial review.

In his submissions in opposition to the 1st applicant's application, Mr. Muriuki who appeared for the plaintiff relied entirely on the replying affidavit of the plaintiff's director, Njoroge Ngatia sworn on 18th April, 2008. Mr. Muriuki submitted that the 1st applicant was not a necessary party to the suit in that the plaintiff's cause of action against the defendants was based on trespass to land and that the plaintiff had no complaint against the 1st applicant that would warrant it being made a defendant in the suit. Mr. Muriuki submitted further that the orders sought by the plaintiff against the defendants would not affect the 1st applicant in any way. He submitted further that the issue relating to the ownership of the suit property was not up for determination in this suit and that what the 1st applicant was seeking to do was to introduce a new cause of action in the suit. With regard to the 2nd applicant's application, Mr. Muriuki submitted that the 2nd applicant had no interest in the suit property and that the interest of its members could be taken care of by the 1st defendant.

In his submissions in opposition to the 2nd applicant's application, Mr. Oange who appeared for the 1st defendant reiterated the contents of the replying affidavit sworn by Aduma J. Owuor on 22nd November, 2010 that I have highlighted earlier in this ruling. He submitted that the 2nd applicant had no interest in the suit property that would warrant its joinder to the suit. Mr. Oange submitted that the 2nd applicant's interest in the suit property could be protected by the 1st defendant as its members were the 1st defendant's tenants.

In her submissions in reply, Ms. Mutuku submitted that the 1st defendant had admitted that the members of the 2nd applicant were its tenants and that this admission brought out the 2nd applicant's interest in the suit property. Ms. Mutuku reiterated that having alienated the suit property illegally to the plaintiff, the 1st defendant was not suited to protect the interest of the 2nd applicant in the suit.

I have considered the two joinder applications together with the affidavits that were filed in support thereof. I have also considered the replying affidavits, grounds of opposition and notice of preliminary objection that was filed by the plaintiff and the 1st defendant in opposition to the applications. Finally, I have considered the submissions by the respective advocates for the parties and the authorities that were cited in support thereof. Order 1 rule 3 of the Civil Procedure Rules provides as follows:

All persons may be joined as defendants against 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 separate suits were brought against such persons any common question of law or fact would arise.

Order 1 rule 10 (1) to (4) of the Civil Procedure Rules on the other hand provides as follows:

(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) 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.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

Order 1 rule 3 of the Civil Procedure Rules provides for the persons who may be joined as defendants in a suit while Order 1 rule 10 empowers the court to substitute or add parties to an existing suit like in the present case. In my view, under Order 1 rule 10(2) of the Civil Procedure Rules, the court can only join a person as a defendant to an existing suit in two instances, first, where such person ought to have been joined as a defendant under Order 1 rule 3 of the Civil Procedure Rules aforesaid and was not so joined and secondly, where the presence of such person before the court may be necessary in order to enable the court to adjudicate and settle all questions involved in the suit. The onus was upon the applicants to bring themselves within the provisions of Order 1 rule 10 of the Civil Procedure Rules. In Kingori v Chege & 3 others [2002] 2 KLR 243, it was held that:

“An applicant seeking to be joined in a suit must demonstrate that he is a necessary and proper party and in the case of a defendant, there must exist a relief flowing from that defendant to the plaintiff.”

In the same case, the court stated that a proper party to a suit,

“.. is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation. An interest which will be cognizable in the court of law. That is an interest which the law recognizes and in which the court will enforce”.

The 1st applicant sought to be joined to this suit on the ground that it was a necessary party whose presence before the court would assist the court to effectually and completely adjudicate upon and settle all questions involved in the suit. The 2nd applicant on the other hand sought joinder on the ground that it had a direct interest in the suit property. In Deported Asians Property Custodian Board v Jaffer Brothers Limited (1999) 1 E. A 55 (SCU) that was cited with approval in Pravin Bowry v John Ward and another (2015) eKLR, the court stated among others that:

“For a person to be joined 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 interest of that person, and that it is desirable, for avoidance of 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 application by 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.”

From the material before me, I am satisfied that the applicants have laid a proper basis for the reliefs sought. The 1st applicant was established under section 6(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The 1st applicant which is now known as Ethics and Anti-Corruption Commission was established as a body corporate with power to sue and be sued in its corporate name. Among the functions that were given to the 1st applicant were; to investigate any matter, that in the opinion of the commission raised suspicion that conduct constituting corruption or economic crime or conduct liable to allow, encourage or cause conduct constituting corruption or economic crime had occurred, to investigate the conduct of any person that in the opinion of the commission was conducive to corruption or economic crime, to investigate the extent of liability for loss or damage to any public property, to institute civil proceedings against any person for the recovery of such property or for compensation, to recover such property or enforce an order for compensation even if the property was outside Kenya or the assets that could be used to satisfy the order were outside Kenya. The 1st applicant has contended that pursuant to the said mandate conferred upon it by law, it carried out investigations on how the suit property was created and subsequently alienated to the plaintiff. The 1st applicant has contended that its investigations revealed that the alienation of the suit property to the plaintiff was unlawful since the property was reserved for public use as a market.

The 1st applicant has contended that it is desirous of joining this suit so as to defend the same alongside the 1st defendant. As I have stated earlier, the 1st defendant has also contended that the suit property was alienated to the plaintiff unlawfully and has filed a counter-claim against the plaintiff for the recovery of the property. There is no dispute that the suit property was public property before it was alienated to the plaintiff. From the functions of the 1st applicant that I have outlined above, the 1st applicant has power to file a separate suit against the plaintiff for the recovery of the suit property if it has evidence that the property was acquired by the plaintiff unlawfully. Such action would be avoided if the 1st applicant is granted leave to join this suit as a defendant alongside the 1st defendant so that its claim against the plaintiff in relation to the suit property can be heard together with that of the 1st defendant. I am not in agreement with the plaintiff that the joinder of the 1st applicant to the suit would introduce a new cause of action. The issue as to whether or not the plaintiff acquired the suit property lawfully has already been raised by the 1st defendant. I am also not in agreement with the plaintiff that the issue regarding the validity of its title had already been determined. The plaintiff did not place any evidence before the court showing that such issue had been raised in a suit between the parties before the court, heard and conclusively determined. I am satisfied that the 1st applicant is a necessary party to this suit whose presence before the court would assist the court to fully and effectually determine all the issues surrounding the acquisition of the suit property by the plaintiff and the defendants' alleged trespass thereon. I am also satisfied that the joinder of the 1st applicant to this suit would obviate the necessity of the 1st applicant filing a separate suit against the plaintiff over the same subject matter thereby avoiding multiplicity of suits.

My view that the 1st applicant is a necessary party to this suit is fortified by the fact that in the judicial review proceedings in the High Court (J.R MISC. APPLICATION NO. 18 OF 2011) in which the plaintiff unsuccessfully challenged the revocation of its title to the suit property,

the 1st applicant was allowed to join the application as an interested party and participated fully in the proceedings before that court and in the Court of Appeal. I wonder why the plaintiff is resisting the joinder of the 1st applicant as a party to this suit while it did not raise any objection to its joinder to the judicial review application. Due to the foregoing, it is my finding that the 1st applicant's application is well founded and is for granting.

With regard to the 2nd applicant's application, again, I am satisfied that the 2nd applicant has laid a proper basis for its joinder as a party to this suit. I find no merit in the objections raised by the 1st defendant and the plaintiff to the joinder of the 2nd applicant to the suit based on lack of evidence relating to its registration and the authority of its officials to act on its behalf. I have noted that the 2nd applicant was a party to the plaintiff's judicial review application up to the Court of Appeal and no objection was raised against its appearance in the matter. The 2nd applicant's averment that its members are traders at the Nairobi City Market was not disputed by the plaintiff and the 1st defendant. In fact, the 1st defendant admitted that the members of the 2nd applicant were its tenants at the said market. The 2nd applicant has contended that the suit property was reserved for use by those visiting the market for parking and that the alienation of the same by the 1st defendant to the plaintiff would affect the interests of their members. The 2nd applicant's claim that the 1st defendant cannot be trusted to protect its interest in the suit being the one which disposed of the property to the plaintiff is not far-fetched. For the foregoing reasons, I also find merit in the 2nd applicant's application.

In the final analysis and for the reasons set out above, I hereby allow the application by Kenya Anti-Corruption Commission dated 2nd April, 2008 in terms of prayers (ii) and (iii) thereof. Kenya Anti-Corruption Commission shall be added to the suit as the 3rd defendant under its new name, Ethics and Anti-Corruption Commission. I also allow the application by City Market Stall Holders Association dated 15th November, 2010. City Market Stall Holders Association is added to the suit as 4th defendant through its Chairman, Vice-Chairlady/man and Patron. The plaintiff shall amend the plaint within 21 days from the date hereof to effect the joinder of Ethics and Anti-Corruption Commission and City Market Stall Holders Association to the suit. Ethics and Anti-Corruption Commission and City Market Stall Holders Association shall file their pleadings, witness statements and indexed and paginated bundle of documents within 21 days from the date of service of the amended plaint upon them. The costs of the two applications shall be in the cause.

Delivered and Dated at Nairobi this 16th day of July 2020

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Njenga for the Plaintiff

N/A for the 1st Applicant(KACC)

Ms. Mutuku for the 2nd Applicant(CMSHA)

Mr. Oange for the 1st Defendant

Mr. Masila for the 2nd Defendant

Ms. C. Nyokabi-Court Assistant