



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

LAND CASE NO. 81 OF 2013

KENYA RAILWAYS CORPORATION.....PLAINTIFF/RESPONDENT

-VERSUS-

KIZINGO APARTMENTS LIMITED.....1ST DEFENDANT

KIZINGO CONDOMINIUM LIMITED.....2ND DEFENDANT/APPLICANT

COMMISSIONER OF LAND.....3RD DEFENDANT

AND

ETHICS AND ANTI-CORRUPTION

COMMISSION.....INTERESTED PARTY/RESPONDENT

RULING

1. The 2nd defendant herein has moved this Court by way of a notice of motion dated 9th March 2018 brought under section 3A of the Civil Procedure Act. The orders sought by the applicant are as follows:

(a) The inclusion of Ethics & Anti-corruption Commission in these proceedings as a Necessary/Interested Party vide the Plaintiff dated 2nd May 2013 is irregular and consequently, that party be struck out of these proceedings.

(b) Any affidavits and all other documents filed in this suit by the Ethics & Anti-corruption Commission as a Necessary/interested Party be expunged from the record of these proceedings.

(c) Costs of this application be provided for.

2. The application is premised on the grounds that order 1 of the Civil Procedure Rules provides for parties who may be joined in a suit as a plaintiff or defendant. That there is no provision in the Act or the Rules that allows for introduction of any other party in a suit commenced by way of plaintiff. As a result the 2nd defendant urged the Court to strike out the name of Ethics & Anti-corruption Commission joined as an interested party to these proceedings.

3. The application is opposed by the Ethics & Anti-corruption Commission who is sued as the Interested Party and the plaintiff. The 3rd defendant did not file any response to the application. The plaintiff filed grounds of opposition dated 4th May 2018 stating that the 2nd defendant's application is res judicata. Secondly that there has been no review application 4 ½ years after the order of Mukunya J made on 23rd August 2013.

4. The Interested Party on its part states that the application offends the provisions of article 159 of the Constitution as it is raising technical issues. The Ethics & Anti-corruption Commission pleads that the orders being sought are oppressive and statutorily pre judicial to the discharge of its mandate under section 11 (1) (d) & (j) of the Ethics & Anti-corruption Act. That their participation to these proceedings are necessary by virtue of the facts set out in the affidavit of George Kariuki Njamitha.

5. The parties filed written submissions which I have read and considered. From the pleadings, the 2nd defendant/Applicant has not set out any prejudice it is likely to suffer if the Interested Party participates in the current proceedings. It is also not worthy from the previous

proceedings in this suit that the application for joinder of the Interested Party to the suit as a plaintiff and or necessary party had been heard and determined on 23.8.2013.

6. During the hearing of the application dated 2nd May 2013 in which the issue of joinder of the Interested Party was one of the prayers at No 4 of that motion, the 2nd defendant/applicant did not file any pleading in opposition to that motion. Prayer 4 of the motion dated 2.5.13 was worded thus;

“That the Ethics & Anti-corruption Commission be joined in this suit as a plaintiff or Interested Party/necessary party with an order that the commission investigates and report to the Court the legitimacy of the circumstances under which the defendant without a sale from the Kenya Railways Corporation or following the GLA and the Public Procurement Act became the registered owner of the property as trustee of the plaintiff’s property actually owned and occupied by Kenya Railways from 1950s to date”.

7. The trial Judge after hearing that application granted the orders sought and directed that the Ethics & Anti-corruption Commission be joined as a necessary/Interested Party. On account of this decision delivered on 23.8.2013, the present application bringing up the same issue is automatically res judicata. The said order of 23.8.13 can only be varied if the 2nd defendant/applicant filed an application to set aside or review it or if it appealed the earlier decision. I am therefore in agreement with the plaintiff that the present application is res judicata and for this reason I strike it out.

8. Going further on the presumption that the 2nd defendant/applicant’s is not res judicata, Order 1 of the Civil Procedure Rules sets out who parties to suit are. I have no dispute on the provisions of Order 1 rule 1, 3 and 15 of the Rules. The 2nd defendant/applicant however is obligated in law to look at the provisions of the entire Order 1 especially that he brought this application under section 3A of the Act which deals with the overriding objectives of the Court whose purpose is to ensure justice is served to all parties in a suit or those who may be affected by the outcome of a suit.

9. Order 1 Rule 10 (2) of the Civil Procedure Rules reads thus:

“The Court may at any stage of the proceedings either upon or without the application of either party order the name of any party ... whose presence before the Court may be necessary to effectually and completely to adjudicate upon and settle all questions involved in the suit be added.”

10. The reading of this order means in my understanding that other than plaintiffs, defendants or third parties to a suit any other party may be added if deemed necessary. The 2nd defendant is being rigid in pleading that in a suit commenced by plaintiff, Order 1 provides only for the 3 parties (plaintiff, defendant & 3rd parties). For this reason, I find the application self-defeating based on the provisions of the order under which it is premised. In light of the clear provisions of Order 1 rule 10 (2) of the Civil Procedure Rules, I find the application to be without merit and a candidate for dismissal. I hereby proceed to dismiss it with costs to the plaintiff and the Interested Party.

Dated, signed & delivered at Mombasa this 15th February 2019

A. OMOLLO

JUDGE