

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND COURT AT KAKAMEGA
ELCC CASE NO. E007 OF 2023

ETHICS AND ANTI-CORRUPTION COMMISSION...
PLAINTIFF

VERSUS

ROSE MUGITA MIDEVA..... 1ST
DEFENDANT

SAMMY KOMEN MWAITA.....2ND
DEFENDANT

RULING

1. Before court is a notice of motion dated 4th June 2024 filed by the 2nd defendant seeking the following orders;

a) That the name of the 2nd defendant/applicant herein namely Sammy Komen Mwaita be struck out from the suit.

b) That in the alternative the 2nd defendant be granted leave to file his defence dated 30th May 2024 out of time

c) That the costs of this application be awarded to the 1st defendant/applicant

2. The application is predicated on the grounds on its face as well as the supporting affidavit sworn by the applicant dated 4th June 2024. The applicant's case is that he was appointed commissioner of Lands on 3rd December 1999 vide Gazette Notice No. 6784, hence when the 1st defendant was allocated the suit property, he was not in office. That this suit has been brought 20 years after he had left office and that it is discriminatory for having excluded other officers involved in the allocation process.
3. He further stated that whatever he did in regard to the suit property including preparation, issuance and registration of the land title/lease for L.R No. KAKAMEGA MUNICIPALITY in respect to the 1st defendant was statutory and on behalf of the principal who was the President of the Republic of Kenya. That other offices that took part in the allocation of the suit property included Kakamega Municipal Council; District Kakamega Land Office; Kakamega Physical Planning office, Kakamega District Commissioner, Kakamega Public Works Office

and Kakamega District Surveyor. That he does not know the allottee of the suit property

4. That land allocation is a process done by the Land Administration department in the Ministry of Lands & Physical Planning and involves several steps. According to him, the issue of fraud and collusion raised by the plaintiff is in bad faith so as to injure his reputation. That in the alternative his name be substituted with the current office holder. That it is the title that confers conclusive ownership and not the signed lease. He relied on the decision of the Supreme Court in Petition No. 41 of 2018 GITONGA MWANGI MURITHI V ZEHRABANU JANMOHAMMED arguing that there is misjoinder in this matter. That the suit seeks to review the grant/lease which is the preserve of the National Land Commission. That the suit against him is misconceived, vexatious and an abuse of the due process and therefore as there is misjoinder, his name should be struck out from the suit *ex dibito justitiae*.

5. The application was opposed. Eric Mabeta, the Forensic Investigator working at the plaintiff, swore a replying

affidavit dated 9th August 2024 opposing the application. He stated that the suit property was public land and that the 2nd defendant knowingly alienated it in favour of the 1st defendant when the same was in possession of the State Department of Housing and in contravention of section 3 of the repealed Government Lands Act and contrary to allocation procedures which were meant to avoid arbitrary dishing out of public land fraudulently. That the 2nd defendant is a necessary party in these proceedings and if his name is struck out from the suit, the same will prejudice public interest.

6. Parties filed submissions in support of their respective positions; which the court has duly considered. The court has considered the application, response thereto and submissions. The only issue that arises is whether the 2nd defendant deserves the orders sought.
7. Order 1 Rule 10 of the Civil Procedure Rules grants the court the power either on its own motion or on an application, to order the striking out of the name of a plaintiff or defendant, if the same was improperly joined to the proceedings before court.

8. The applicant herein argues that this suit is in bad faith and that all he did was execute his statutory duties and that he was not alone. I take the view that what is raised in the application, are matters that are contested which have not been tested by cross examination. Therefore, this court cannot strike out the applicant's name from this suit on the basis of contested allegations in an application, as that will amount to dismissal of a suit against him without due process. The applicant can put all his allegations herein in his statement of defence and defend this suit if he so wishes. The issues raised in this suit by both sides are weighty and deserve to be interrogated at the trial and cannot be conclusively and fairly determined in an application. Therefore, I decline the applicant's invitation to strike out the suit against him. In the interests of justice, I however grant him leave to file and serve defence, witness statements and documents within 21 days of this ruling. I make no order as to costs.

9. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 15TH DAY OF OCTOBER, 2025**

**A. NYUKURI
JUDGE**

In the presence of;

Mr. Kibet holding brief for Ms Arunga for the
plaintiff/respondent

Mr. Wambany for the 1st defendant.

No appearance for the 2nd defendant/applicant

Court Assistant: Delphine