



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 754 OF 2017

JIM NJUGUNA MUTHAMA.....PLAINTIFF

VERSUS

VERONICA WAIRIMU NJUGUNA.....1ST DEFENDANT

PUBLIC HEALTH OFFICER (KAJIADO).....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

What is before Court for determination is the 2nd Defendant's application dated 26th July, 2018 brought pursuant to Order 1 Rule 10 (2) of the Civil Procedure Rules. The Applicant seeks that his name be struck off this suit. It is premised on the grounds that the 2nd Defendant was erroneously enjoined in this case. The Plaintiff's proceedings as against the 2nd Defendant lacks merit and the Court should strike it out of this suit. The 2nd Defendant has no proprietary interest in the ownership of the disputed plot.

The application is supported by the affidavit of JACOB OIDI AMAKE the Public Health Officer attached to Kajiado North Sub County where he avers that in 2016 he brought public health proceedings against the Plaintiff herein under section 118 of the Public Health Act but he denied ownership of the said property hence the proceedings were withdrawn. He claims he conducted a search which showed the 1st Defendant as the registered owner of the property and he proceeded to institute proceedings against her in Ngong PM Criminal Case No. 26 of 2016 where the Court found existence of a nuisance and ordered the tenants therein to vacate. He confirms that the said orders were effected and the tenants moved out of the premises. He insists the 2nd Defendant has no interest in the ownership of the disputed plot save for the purpose of abating nuisance which case has already been determined. He reiterates that the 2nd Defendant has been erroneously enjoined in this case and should be struck out.

The Plaintiff opposed the application and filed a replying affidavit sworn by JIM NJUGUNA MUTHAMA where he deposes that the application is in bad taste. He insists the 2nd Defendant is properly enjoined in the suit herein due to his participation in the adverse actions that led to the filing of this matter. He claims to be the beneficial and registered owner of plot No. 723 Ongata Rongai hereinafter referred to as the 'suit plot'. He contends that the 1st Defendant proceeded to acquire a parallel allotment letter on the suit land through deceit. He explains that on 15th January, 2015, the 1st and 2nd Defendants colluded and came up with a health report citing that the suit plot was inhabitable and issued a notice to the tenants to vacate the same. Further, that the 1st Defendant was purportedly charged in Criminal Case Misc Application No. 26 of 2016 (Ngong Law Courts) by the 2nd Respondent/ Applicant citing that the premises were inhabitable and thus an eviction notice was issued. He avers that he attempted to enjoin the said criminal proceedings as the legal owner of suit plot but was denied due to technicality in procedures within the Civil and Criminal Procedure. He states that the 2nd Defendant wants to use intimidatory methods through his office to dispossess him of suit plot, has trespassed on his property and issued eviction notices to the tenants. Further, that the 2nd Defendant has purportedly carried out an inspection on the suit plot and rendered it inhabitable yet the same has been renovated. He further avers that with the ongoing tussle, it led to the tenants vacating the suit plot. He further claims to have taken a Bank loan to renovate as well as repair the suit plot and has been having difficulty in collecting rent so as to service the said loan due to constant harassment of the tenants by the 1st and 2nd Defendants' agents. Further, that the 1st and 2nd Defendants supervised the demolition of the building on the suit plot. He reiterates that the damages he is seeking in the Amended Plaintiff are directly attributed to the 1st and 2nd Defendants', hence making the 2nd Defendant a necessary party in this suit. Further, that he has been receiving rental income of Kshs. 230,000/= per month which has not been forthcoming since December, 2017 due to the illegal acts of the 1st and 2nd Defendants. He confirms that the Court gave an order for the eviction of the tenants but not for demolition of his building by the 2nd Defendant outside his official duties.

The Applicant filed a further affidavit sworn by JACOB OIDI AMAKE where he reiterates his claim above and insists his only concern was

to enforce the Public Health Act which has since been complied with as the suit plot was vacated. He avers that the issues raised in the replying affidavit were dealt with in this Court's Ruling dated the 4th December, 2017 and Hon. L. D Ogombe (SRM)'s Ruling dated 30th May, 2017. He contends that the Plaintiff has not demonstrated what prejudice he stands to suffer if he is struck off the suit. Further, that he served him in good faith with the notice to abate the nuisance as the proprietor of the suit plot but he willingly divulged the ownership of the said plot to be 1st Defendant vide the Criminal Case No. 900 of 2016.

The 1st Defendant did not oppose the application.

Both the Plaintiff and the 2nd Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the instant application, parties' affidavits as well as submissions, the only issue for consideration is whether the 2nd Defendant should be struck off the suit. The 2nd Defendant seeks to be struck off the suit and insists as the Public Health Officer he has no useful role to play. He has relied on the case of **Machakos HCCC No. 64 of 2011; Simon Njii Mwangi Vs Utumishi Investment Limited** to support this argument. The Plaintiff has vehemently opposed the application and insists the 2nd Defendant is a necessary party to the suit. He has relied on the cases of **Civil Suit 895 of 2012; Pizza Harvest V Felix Midigi; Apex International Ltd & Anglo Leasing & Finance International Limited V Kenya Anti Corruption Commission (2912) eKLR; and Jan Bolden Nielsen Vs Herman Philipus Steyn & 2 Others (2012) eKLR** to buttress his argument.

I note in the Amended Plaint, the Plaintiff seeks for an order of permanent injunction restraining the 1st and 2nd Defendants from trespassing on the suit plot; compensation and damages arising from the illegal trespass and demolition as well as eviction of tenants from suit plot which amount to Kshs. 1, 271, 100/=; order that the 1st and 2nd Defendants pay him rental income of Kshs. 230, 000 monthly; and declaration that he is the owner of the suit plot.

Order 1 Rule 10 (2) of the Civil Procedure Rules provides that: **'(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.'**

In the case of **Amon v Raphael Tuck & Sons Ltd (1956) 1 All ER 273**, cited in **Pizza Harvest Limited v Felix Midigo [2013] eKLR** sought to establish who a necessary party is. **Devlin, J** held at p. 286-287:

"What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."

In the current case, the 2nd Defendant is the Public Health Officer who served a Notice dated the 15th January, 2016 to the Plaintiff in respect of the suit plot. In the said Statutory Notice, which was issued pursuant to Section 118 of the Public Health Act, the Plaintiff was directed to abate the nuisance in the suit plot by undertaking various actions. I note the 1st Defendant was later charged in Criminal Case No. 26 of 2016 Ngong for failing to comply with the said notice contrary to section 120 as read with section 164 of the Public Health Act., after which the Court ordered the tenants therein to vacate the premises in the suit plot. The Court further ordered the OCS Ongata Rongai to assist with the eviction of the tenants.

To me a reading of the Plaint reveals that the fulcrum of the dispute herein revolves around ownership of the suit plot which is also in dispute in Nairobi HCCC No. 51 of 2016 (OS) between the Plaintiff and 1st Defendant where he is seeking division of matrimonial property. I note the dispute herein in respect to eviction of the tenants had already been determined by a court of competent jurisdiction, which directed that the tenants on the suit land were to be evicted as it was inhabitable. It is this eviction which the Plaintiff blames the 2nd Defendant for and insists it is a necessary party as he made the tenants therein vacate hence losing income. I find that the 2nd Defendant was simply acting in accordance with the Public Health Act and not in his personal capacity.

Since the fulcrum of the suit herein revolves around determination of ownership of the suit plot which is still pending in Court. In associating myself with the aforementioned decision as well as the legal provisions cited above, I find that the 2nd Defendant as a Public Health Officer mandated to undertake implementation of the Public Health Act in the County which in this instance he did. He is however not a necessary party to the suit as he has no proprietary interest in the ownership of the disputed plot. Insofar as the Plaintiff is seeking damages in respect of suit plot, I opine that the same can only be determined once the Court has established the true owner of the said plot.

In the circumstance, I find the application merited and will proceed to strike out the 2nd Defendant from this suit.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 16th day of October, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Court assistant – Mpoye

Both parties absent