



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 2 OF 2019**

**ABDALLA ALI TAIB (Suing as an Administrator of the**

**Estate of SHEIKH ALI TAIB).....PLAINTIFF**

**VERSUS**

**WAKF COMMISSIONER OF KENYA.....DEFENDANT**

**RULING**

1. The Application before me for determination is the Notice of Motion dated 31<sup>st</sup> January, 2019 brought under Order 1 Rule 10 (2), 14, Order 51 of the Civil Procedure Rules, Section 3, 3A and 63(3) of the Civil Procedure Act. The Applicant is seeking leave to be enjoined as a 2<sup>nd</sup> Defendant in the suit and for the pleadings to be amended as necessary.

2. The Application is premised on the grounds on the face of the motion, namely:

**a. The Applicant is now the lessee of the subject matter of this suit more particularly described as TITLE NUMBER 204/II/MN situated in Kisauni within Mombasa County.**

**b. The Applicant has a direct interest in the subject matter of this suit the same having been leased to him by the Defendant on 19<sup>th</sup> December, 2018.**

**c. Enjoining the Applicant as a Defendant in this suit shall go a long way to assisting this Honourable Court to effectively and completely adjudicate and settle all the questions in the suit and thus save time and prevent multiplicity of suit.**

**d. The Plaintiff does not stand to suffer any prejudice if the orders sought are granted.**

3. The Application is supported by the affidavit of Mohamed Abdulkadir Mohamud, the Applicant sworn on 31<sup>st</sup> January, 2019. The Applicant avers that sometime in December 2018, he did approach the Wakf Commission (hereinafter commission) with a request to have the commission lease him any of their available properties. That upon his oral request, the Applicant was informed that there was a property available in Kisauni and that if the Applicant was interested, he should be ready to pay the premium of Kshs.6,000,000.00 which the applicant states he was informed was based on the valuation of the property being kshs.20,000,000.00. The Applicant states that he was further informed that the lease shall be for 99 years and that the annual rent shall be subject to revision after every five years.

4. The Applicant avers that after having discussed the offer with his advocate, upon advice, he went back to the commission after one (1) week wherein he tendered his acceptance verbally and gave out his advocate's details upon request by the commission. He states that his advocate, Mr. Omwenga, informed him that the commission had sent him standard lease forms to enable him prepare a lease agreement between the commission and the applicant. The applicant further states that a lease was prepared and upon meeting the terms of the lease being payment of the premium and the yearly rent to the satisfaction of the commission, the lease was executed on 19<sup>th</sup> December, 2018 by all the parties and witnessed as required. A copy of the executed lease marked "MAM" has been exhibited. The Applicant avers that the lease was registered in the Mombasa District Land Registry on 20<sup>th</sup> December, 2018 and all necessary payments were made and a copy of the registered lease has been exhibited marked "MAM-2". Also exhibited is a copy of search conducted on 20<sup>th</sup> December, 2018 confirming that the applicant is the registered owner of the suit leasehold for a period of 99 years commencing 1<sup>st</sup> January, 2018.

5. The Applicant avers that he was surprised when he went to the suit property on 21<sup>st</sup> January, 2019 with a view of beginning his intended project only to find security officers who informed him that they had specific orders not to allow anyone into the property. The Applicant avers that he proceeded immediately to the commission offices in Mombasa and registered his complaints and that was when he was shown

the documents that had been filed by the plaintiff, hence the basis for filing this application. The applicant states that the plaintiff had rejected the commission's initial offer when he requested for revision of the terms as that amounted to a counter-offer. The Applicant contends that the Plaintiff having rejected the Commission's offer, the commission was at liberty to get another lessee which they did and duly informed the plaintiff of the termination of his lease. The applicant avers that having acquired the suit property from the lessor with no notice of any third parties, this court ought to give effect to his proprietary right as an innocent purchaser for value without notice. The applicant avers that the injunctive orders now in place are prejudicial to his interests as he has invested substantial sums on the suit property, and as such, it is prudent that the same be discharged to enable him take possession and commence his project for which he acquired the suit property. The Applicant avers that it is in the interest of justice that the applicant is enjoined in this suit as a defendant to enable the court effectively and completely adjudicate and settle all the questions in the suit thus avoiding multiplicity of suits and save this court's time.

6. In opposing the Application the plaintiff filed grounds of opposition dated 13<sup>th</sup> February 2019 on the following grounds:

- 1. That the Application is misconceived and is bad in law.**
- 2. There is neither a factual nor legal basis established and/or demonstrated by the Applicant and upon which the court may make the order to grant leave to the Applicant to be enjoined as the 2<sup>nd</sup> Defendant in this suit.**
- 3. The Applicant does not meet the criteria set by the law for the grant of the orders that he seeks nor does he achieve the threshold required for the success of his Application;**
- 4. The Applicant's presence before the court as a 2<sup>nd</sup> Defendant is not necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit;**
- 5. The said Application is made mala fides;**
- 6. The said Application is made to circumvent and defeat the cause of justice and to make the court act in vain;**
- 7. That the plaintiff/applicant's application has no merit and should be dismissed with costs.**

7. Both parties filed written submissions through their respective advocates in support of their opposing positions.

Ms. Mogaka Omwenga & Mabeya Advocates for the Applicant submitted that the Applicant has demonstrated that he meets the threshold for joining a party to the suit in order to uphold justice and allow him pursue his interests. They cited the case of **Hair & Beauty Studios Limited –v- Deposit Protection Fund Board (as liquidator of Prudential Building) & 2 Others (2017)eKLR** and **Andy Forwarders Service Limited & Another –v- Price Waterhouse Coopers Limited & Another (2012)eKLR**. They submitted that addition of the Applicant will enable the court to effectively and completely adjudicate all the issues in this suit and prevent multiplicity of suits. They also relied on the case of **Anthony Mwanzia Mulei & Another –v – Jeremiah Mutika Ndulu & Another (2018)eKLR** where Angote, J stated: "As was correctly submitted by the Plaintiff's counsel, the circumstances which warrant the grant for leave to enjoin a party to proceedings is: where the presence of the party will result in the complete settlement of all the questions involved in the proceedings; where the joinder will provide protection for the rights of a party who would otherwise be adversely affected; and where the joinder will prevent a likely course of proliferated litigation." Counsel also cited the case of **Libya Oil Kenya Limited –v- Joel Kipkorir Siele & Another (2019)eKLR**, which quoted the Court of Appeal decision in the case of **Central Kenya Limited -v- Trust Bank & 5 Others (2000) eKLR** in which it held "The guiding principle in application for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot be compensated for in costs."

8. M/s Taib A. Taib Advocates for the Plaintiff submitted that the application has not disclosed any new information that is not either in the Plaintiff or defendant's knowledge; that the applicant has not disclosed any facts or in what way he will assist the court and the parties herein to settle the issue of breach of contract between the plaintiff and the defendant; that the applicant has not established that without his presence before this court, the issue of breach of contract before court cannot be resolved; and has not shown what prejudice he will suffer if he is not joined to this suit; and that the applicant is not privy to the contract between the plaintiff and the defendant. Counsel relied on the case of **Skov Estate Limited & 5 Others –v- Agricultural Development Corporation & Another (2015)eKLR** and submitted that joining the interested party to this suit will not only delay the hearing of the suit but will add no value, adding that the interested party is not a necessary party. The plaintiff's advocates also relied on the case of **Moses Wachira –v- Niels Bruel & 2 Others (2015)eKLR** and **Doris Auma & Another (Suing as the Administrators of the Estate of Joshua Ochieng Odongo Kisian)-v- Hitan C. Majedvdia (2014)eKLR**, and submitted that the Applicant is not a necessary party and that no prejudice will be suffered if the application is not allowed.

9. The defendant through Mr. Magolo advocate supported the application although he did not file any submissions.

10. I have considered the application. The prayer sought in the application by the applicant is for leave to be enjoined as 2<sup>nd</sup> defendant in this suit. Order 1 Rule 10 (2) of the Procedure Rules provides as follows:

*(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 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 effectively and completely to adjudicate upon and settle all the questions involved in the suit, be added.*

*(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise direct 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.”*

11. The court has discretion to order the name of a person who ought to be enjoined whether as plaintiff or defendant, or whose presence before the court may be necessary, to enable the court effectually and completely adjudicate upon and settle all questions involved in the said suit. The question herein is whether the Applicant ought to be enjoined as a defendant.

12. In the case of **Joseph Leboo & 2 Others –v- Director of Forest Services & Another (2013)eKLR** Munyao stated as follows: “Where there is an application for a person to be joined as defendant, and the plaintiff objects to such joinder, the court should ever be more cautious before making an order of such joinder. It ought to be clear that the remedy sought by the plaintiff in the proceedings, actually ought to be directed against the party sought to be enjoined, or that the remedy the plaintiff seeks cannot be granted, or the proceedings cannot be properly conducted without the person sought to be enjoined being a party. ”

13. The circumstances which warrant the grant for leave to enjoin a party to proceedings were also considered by Angote, J in the case of **Anthony Mwanzia Mulei & Another –v- Jeremiah Mutika Ndululu & Another (2018)eKLR** where he stated: “the circumstances which warrant the grant for leave to enjoin a party to proceedings is: where the presence of the party will result in the complete settlement of all the questions involved in the proceedings; where the joinder will provide protection for the rights of a party who would otherwise be adversely affected; and where the joinder will prevent a likely course of proliferated litigation.”

14. The test in application for joinder is first, whether an applicant can demonstrate he has an identifiable interest in the subject in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. The question that arises is whether the applicant herein has demonstrated that he has sufficient interest in the subject matter of the suit or that he is a necessary party whose presence is necessary to enable the court to effectually and completely adjudicate upon all the issues in the suit.

15. In the suit, it is the plaintiff’s case that the defendant in breach of lease agreement entered into between the plaintiff and the defendant has revoked the said agreement and revoked the renewal clause and as a result purported to prematurely terminate the lease. Further, the plaintiff states that the defendant has arbitrarily sought to deprive the plaintiff of the suit premises. The Plaintiff therefore seeks an injunction restraining the defendant from terminating the said lease agreement and specific performance of the terms of the Lease agreement and specifically an order directing the defendant to renew the lease to the plaintiff in respect of the suit premises. On its part, the defendant in their defence and counter-claim aver that there has been no breach of contract and that the lease just came to an end and there has been no agreement with the plaintiff for renewal. The defendant further avers that the suit property has now been alienated and let out to 3<sup>rd</sup> Party and is not available for lease to the plaintiff. I presume the 3<sup>rd</sup> party referred to by the defendant is the applicant. In the counter-claim, the defendant seeks an order of vacant possession.

16. The proposed defendant/applicant herein avers that he has leased the suit premises from the defendant and that the lease was registered on 20<sup>th</sup> December, 2018. The applicant has applied to be enjoined as a defendant, not as an interested party as submitted by the plaintiff.

17. In the case of the **Pravin Bowry –v- John Ward & Another (2015)eKLR**, the Court of Appeal considered the applicable principles, or test in an application for joinder. The court adopted with approval the holding in the case of **Deported Asians Property Custodian Board –v- Jaffer Brothers Ltd (1999)IEA. 55 (SCU)** where the court stated:

*“A clear distinction is called for between joining a party who ought to be joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter.....*

*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 interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound to by the decision of the court in that suit. Alternatively, a person qualifies (on an application of 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. ”*

18. The court further in the Bowry case (supra) referred to court’s decision in Mombasa in the case of **Civicon Limited-v- Kivuwatt Limited & 2 Others (2015)eKLR** where the court while observing that exercise of discretion is called for in application for joinder stated as follows:

*“Again the power given under the rules is discretionary which discretion must of necessity be exercised judicially. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party and should be enjoined. From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 Rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party, in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the orders sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit, and the interest need not be the kind that must succeed at the end of the trial.”*

19. Being guided by the decisions stated above, I find that the applicant is a proper party to be enjoined in this suit as a defendant. The applicant has demonstrated that he has an interest in the subject matter of this suit which is also claimed by the plaintiff. The Applicant has stated that he has leased the suit property and the lease has even been registered.

20. For the reasons set out above, I allow the Applicant's application dated 31<sup>st</sup> January, 2019. Pursuant to the provisions of Order 1 Rule 10 (4), the plaintiff is directed to amend the plaint in such manner as may be necessary within 14 days and thereafter the amended copies of the summons and of the plaint be served on the new defendant and the original defendant within 14 days of filing. The defendants shall within 14 days of service of the amended plaint file their amended defence and counter claim or defence as the case may be, after which the matter will proceed for pre-trial directions. The costs of the application will be in the cause.

**DATED, SIGNED and DELIVERED at MOMBASA this 9<sup>th</sup> day of October 2019.**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Alwenya holding brief for Taib for Plaintiff

No appearance for defendants.

Yumna Court Assistant

**C.K. YANO**

**JUDGE**