



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 176 OF 2007

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

JOHN F. KINYUA.....1ST DEFENDANT

ROCKHOUND PROPERTIES LIMITED.....2ND DEFENDANT

RULING

What I have before me is the 1st defendant's Notice of Motion application dated 29th April, 2015 seeking orders that he be struck out from this suit. The application is supported by the 1st defendant's affidavit sworn on 29th April, 2015. The grounds upon which the application has been brought are that the 1st defendant is not the registered proprietor of L.R No. 1160/613(hereinafter referred to as "the suit property") and that he has no interest in the same. The 1st defendant has contended that the suit property is registered in the name of the 2nd defendant and that he has no connection or proprietary rights over the property.

The 1st defendant has contended that interlocutory judgement has already been entered against the 2nd defendant and as such nothing remains to be determined as against him. The 1st defendant has contended further that the suit as framed does not disclose a reasonable cause of action against him. The 1st defendant has contended further that he has not been accused of any wrong doing and that no relief has been sought against him in the plaint. The 1st defendant has contended that it is not necessary for this suit to proceed to full trial since the reliefs sought by the plaintiff have already been granted.

The 1st defendant has contended that the plaintiff has instituted criminal proceedings against him over the same subject matter in Milimani Anti-Corruption Court Case No. 35 of 2008. The 1st defendant has contended that whether or not he is guilty of economic crimes as alleged by the plaintiff will be determined by the said Anti-Corruption Court. The 1st defendant has contended that this suit is spent as against him and that it would be a waste of judicial time and an abuse of the process of the court if the suit is allowed to proceed to full hearing as against him. Finally, the 1st defendant has contended that his unnecessary joinder to the suit is prejudicial to him as he continues to incur unnecessary costs.

The application is opposed by the plaintiff through a replying affidavit sworn by its investigator, John Lolkoloi on 19th June 2015. The plaintiff has contended that contrary to the 1st defendant's allegations, the reliefs sought in the plaint are against the defendants jointly and severally. The plaintiff has contended that the interlocutory judgement entered against the 2nd defendant in default of appearance does not determine the rights, duties and obligations of the parties and that in any event, there is no final judgement disposing of the suit.

The plaintiff has averred that its investigations revealed that the 1st defendant fraudulently and corruptly caused the transfer and registration of the suit property from Kenya Reinsurance Corporation Ltd. to the 2nd defendant. The plaintiff has contended that the 1st defendant has been adversely mentioned in the plaint and as such he was properly joined in the suit. The plaintiff has contended that the presence of the 1st defendant in the suit is necessary for the effective and complete adjudication of all the questions in the suit. The plaintiff has contended further that the existence of a criminal case against the 1st defendant over the same subject matter is not a valid ground for discharging the 1st defendant from the suit.

The application was argued by way of written submissions. The 1st defendant filed his submissions on 13th February, 2017 while the plaintiff filed its submissions on 21st February, 2017. The 1st defendant has submitted that the suit against him violates sections 4 and 12 of the Government Proceedings Act, Chapter 40 Laws of Kenya which require civil suits by or against the Government to be instituted by or against the Attorney General. The 1st defendant has submitted that there is no evidence that he derived personal benefit from the transaction through which the suit property was transferred to the 2nd defendant. The 1st defendant has submitted that the plaintiff had admitted that the 1st defendant has no proprietary interest in the suit property. The 1st defendant has submitted that he acted above board in the subject transaction. The 1st defendant has cited the case of Bishop vs. A.G of Uganda (1967) EA293 in support of his submission that only the

Attorney General can be sued for acts committed by Government officers.

The 1st defendant has argued further that section 7(1)(a) of the Anti-Corruption and Economic Crimes Act, 2003(hereinafter referred to as “the Act”) should not be read in isolation. The 1st defendant has submitted that personal liability cannot attach to the 1st defendant unless it is established that the 1st defendant derived personal benefit from the alleged wrongs as provided under sections 51 to 55 of the Act. The 1st defendant has referred to section 54 of the Act and submitted that the plaintiff can achieve what the plaintiff has sought in the present suit in the criminal proceedings pending in the Anti-corruption Court. The 1st defendant has submitted that it is prejudicial for the 1st defendant to have criminal proceedings running concurrently with proceedings before this court over the same subject matter. In support of this submission, reliance has been placed on the case of KACC vs. Judith Okungu & another ELC No. 8 of 2008.

In its submissions in reply dated 20th February, 2017, the plaintiff has argued that its case against the 1st defendant is that the 1st defendant who was the Director of Finance and Corporate Services at Kenya Reinsurance Corporation Ltd. fraudulently caused the transfer of the suit property from the said corporation to the 2nd defendant. The plaintiff has argued that the 1st defendant has been adversely mentioned in paragraphs 4, 7 and 11 of the plaint and that at the trial of the suit, the plaintiff will establish that the 1st defendant’s conduct led to the illegal, fraudulent and corrupt transfer of the suit property to the 2nd defendant. The plaintiff has submitted that the 1st defendant is a necessary and proper party whose presence before the court would enable the court to effectively and completely adjudicate all questions in this suit.

The plaintiff has submitted that one of the orders sought against the defendants jointly and severally in the plaint is a declaration that the sale and subsequent transfer of the suit property by Kenya Reinsurance Corporation Ltd. to the 2nd defendant was illegal, fraudulent, null and void. The plaintiff has submitted further that the 1st defendant is a necessary party to the suit since the reliefs sought flow from his conduct. In support of this submission, the plaintiff has cited the cases of Joseph Njau Kingori vs. Robert Maina Chege & 3 others (2002)eKLR and Brek Sulum Hemed vs. Constituency Development Fund Board & another (2014)eKLR.

Analysis and determination:

I have considered the 1st defendant’s application together with the affidavit filed in support thereof. I have also considered the replying affidavit that was filed by the plaintiff in opposition to the application. Finally, I have considered the submissions of counsel and the authorities that were cited in support thereof. The only issue that arises for determination in the present application is whether the 1st defendant should be struck out as a party in these proceedings. The 1st defendant’s application was brought under Order 1 rule 10(2) of the Civil Procedure Rules. That rule gives the court power to strike out from the suit the name of a party who has been improperly joined. The question that I need to answer is whether the 1st defendant was improperly joined as a party to this suit.

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 (2) of the Civil Procedure Rules on the other hand 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 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.”

Under Order 1 rule 10(2) of the Civil Procedure Rules, the court can only strike out from a suit a person who has been improperly joined. The onus was upon the 1st defendant to establish that he ought not to have been joined in this suit as a defendant. I am not satisfied that the 1st defendant was improperly joined in the suit. The plaintiff has contended in the plaint that at all material times, the suit property was registered in the name of Kenya Re-Insurance Corporation (hereinafter referred to as “the Corporation”). The 1st defendant was the Director of Finance and Corporate Services at the Corporation. The plaintiff has contended that the suit property was illegally and fraudulently transferred by the Corporation to the 2nd defendant.

The plaintiff has averred that no consideration was paid by the 2nd defendant to the Corporation for the suit property. The plaintiff has contended that the 1st defendant had an interest in the 2nd defendant and that the suit property was transferred from the Corporation to the 2nd defendant on the instructions of the 1st defendant. The plaintiff has accused the 1st defendant of misuse of public office for personal gain by transferring the Corporation’s property to the 2nd defendant in which he had an interest. The 1st defendant has also been accused of transferring the suit property to the 2nd defendant without authority to do so. The reliefs sought in the plaint are against the defendants jointly and severally. The plaintiff has sought among others, a declaration that the sale agreement and the instrument of transfer in respect of the suit property that were purportedly executed by the Corporation and the 2nd defendant are illegal, fraudulent, null and void.

It is clear from the foregoing that the plaintiff has not only accused the 1st defendant of wrongdoing in the plaint but has also sought reliefs against the 1st defendant. The 1st defendant may not be the registered proprietor of the suit property. The plaintiff has however raised questions touching on the conduct of the 1st defendant in the transfer of the suit property to the 2nd defendant. These questions can only be answered by the 1st defendant. These questions cannot be determined by the court in the absence of the 1st defendant. I am of the view that it would have been a breach of the rules of natural justice if the plaintiff had omitted to join the 1st defendant in the suit so that he may be heard

on the allegations that have been made against him by the plaintiff.

The 1st defendant had also argued that under sections 4 and 12 of the Government Proceedings Act, Chapter 40 Laws of Kenya, suits by or against the Government can only be instituted by or against the Attorney General and as such the plaintiff's suit against him is bad for misjoinder. I am not in agreement with this submission. There is nothing in sections 4 and 12 of the Government Proceedings Act that absolutely bars suits against Government officers. In the case of Ethics and Anti-Corruption Commission vs. Judith Marilyn Okungu & another (2017) eKLR the Court of Appeal interpreted the provisions of sections 4 and 12 of the Government Proceedings Act while dealing with the arguments similar to the ones raised here by the 1st defendant. The court stated as follows:

“We understand the appellant’s main complaint to be the learned Judge’s decision that the 1st respondent was improperly sued as she was immunized from personal liability by reason of her acting in her official capacity at the material time. The learned Judge arrived at that conclusion upon consideration of the provisions of sections 4 and 12 of the Government Proceedings Act, Cap 40... It would seem, with respect, that the learned Judge misunderstood the import of the two provisions. What they do is provide that the Government can be sued for the tortuous acts of its officers in much the same way as private persons are vicariously liable for the tortuous acts of their servants or agents and that when Government sues or is sued in civil proceedings, the said proceedings shall be in the name of the Attorney General. There is nothing in those two sections per se that provides a blanket immunity from suit for Government officers. All that can properly be deduced from them is that liability extends to the Government.”

The 1st defendant had also contended that the existence of these proceedings and criminal proceedings before the Anti-Corruption Court in respect of the same subject matter is prejudicial to him. The issue was also addressed by the Court in the same case of Ethics and Anti-Corruption Commission vs. Judith Marilyn Okungu & another (supra) where the court stated as follows:

“...This finding ought to dispose of this appeal but we need to state also that the learned Judge was clearly wrong to conclude, as he did, that the proceedings before him amounted to harassment of the 1st respondent merely because there was a pending criminal case before the anti-corruption court. The matters forming the basis of the litigation traversed both the civil and criminal terrain. There is no law stating that the two types of proceedings cannot be carried out concurrently. It is spelt out expressly in section 193A of the Criminal Procedure Code that the existence of the one should not lead to a stay of the other”.

I have said enough to show that the 1st defendant was properly joined as a defendant in the suit herein. I am also satisfied that the plaintiff raises reasonable causes of action against the 1st defendant. The 1st defendant had submitted that he was not connected in any way with the sale of the suit property to the 2nd defendant and that he was not involved in the acts of fraud alleged against him. These in my view are issues which can only be determined at the trial. The court cannot determine issues of fraud and abuse of office on affidavit evidence.

The upshot of the foregoing is that the 1st defendant's application dated 29th April, 2015 has no merit. The application is dismissed with costs to the plaintiff.

Delivered and Signed at Nairobi this 9th day of February, 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

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|-----------|-----------------------------------|
| N/A | for the Plaintiff |
| N/A | for the 1 st Defendant |
| N/A | for the 2 nd Defendant |
| Catherine | Court Assistant |