



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 63 OF 2008

IDOW TRADING COMPANY LIMITED.....PLAINTIFF

VERSUS

MOHAMED JIMALE.....1ST DEFENDANT

OSMAN ALI MOHAMED.....2ND DEFENDANT

CITY COUNCIL OF NAIROBI.....3RD DEFENDANT

R U L I N G

1. On 9/6/2017, the 2nd defendant brought an application dated 16/5/2017 for an order enjoining the National Land Commission (**the Commission**) as a 4th defendant in this suit. The ground upon which the order is sought is that the Commission is undertaking review of grants and dispositions of public land in regard to the suit property in accordance with Sections 6 and 14 of the National Land Commission Act, No 5 of 2012. The applicant further contends that it is in the interest of justice that the Commission is enjoined to facilitate adjudication and settlement of the issue of double allocation of the suit property, Land Reference Number 36/1/1034, situated in Eastleigh, Nairobi.
2. The application is supported by an affidavit sworn on 16/5/2017 by Felix Momanyi Advocate in which the deponent reiterates the above grounds. Annexed to the affidavit are two letters from the Commission, dated 22/2/2016 and 8/3/2016 respectively, inviting the plaintiff and the 1st defendant to attend hearings at the Commission in relation to Land Reference Number 1033/1034 and Land Reference Number 36/1/1024-34.
3. The application was canvassed in open court on the day this suit came up for substantive hearing. Mr Momanyi, Counsel for the applicant submitted that the Commission had invited the parties to attend a hearing at its offices. He added that the Commission is the only party that can shed light on the outcome of its findings. For these reasons, he contended that the Commission is a necessary party.
4. Mr Maina, counsel for the 3rd defendant, without expressly taking a position on the application, referred the court to Article **67(2) (a)** of the **Constitution** which mandates the Commission to manage public land on behalf of the national and county governments. He contended that the 3rd defendant had not been invited by the Commission for the hearing and was therefore unaware of the hearings. He contended that it would be wrong to dilute the constitutional mandate of the Commission. Mr Maina added that the dispute in this suit is predicated upon a temporary licence issued to one of the parties to occupy the suit property.
5. Ms Keya, holding brief for Mr Etole, counsel for the plaintiff, opposed the application. She submitted that joinder of the Commission would be an academic exercise. She added that if the Commission were a necessary party, the 2nd defendant could have made the application earlier. She contended that the application was a red herring brought by the 2nd defendant to scuttle the scheduled hearing of the main suit.
6. I have considered the tenor and import of the application, the supporting affidavit of Felix Momanyi and the parties' rival submissions. The two issues to be determined in the present application are: (i) whether the application meets the criteria for joinder of a party; and (ii) if in the affirmative, whether such joinder can be made without causing prejudice to any of the parties.
7. The exercise of the discretionary jurisdiction to enjoin a party into subsisting proceedings is guided by the framework in Order 1 rule 10(2) of the Civil Procedure Rules which 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.

8. The requirements of Order 1 rule 10(2) of the Civil Procedure Rules are that one would qualify to be enjoined as a party to ongoing proceedings if: (i) that person ought to have been made a party *ab initio*; or (ii) the presence of that person before the court is necessary for the effectual and complete adjudication and settlement of all questions involved in the suit.

9. From a perusal of the pleadings and the materials presented by the plaintiff in this suit, the 3rd defendant was the proprietor (lessee) of Land Reference Number 30/1/915 and caused the said parcel of land to be subdivided into various portions, among them, Land Reference Number 36/1/1034 (**the suit property**). The 3rd defendant thereafter subleased the suit property to the plaintiff for the residue of the 99 year term. The sub lease was registered at the Lands Registry as Title Number IR 98315 on 12/7/2002.

10. Similarly, from perusal of the pleadings and materials presented by the 2nd defendant, he contends that he applied for a temporary occupation licence and the 3rd defendant granted him the temporary occupation licence to occupy the suit property in 1997. He further contends that subsequently, in 2010, the 3rd defendant resolved to issue a sublease to him. He adds that he is the lawful owner of the suit property.

11. The 3rd defendant's case is that it subleased the suit property to the plaintiff and that the plaintiff has been paying all monies payable to the 3rd defendant. It further contends that if a temporary occupation licence was issued to the 2nd defendant, the issuance was an inadvertence.

12. From the above brief outline of parties' respective cases it is clear that the key question in this suit is the question as to who is the rightful proprietor of the sublease interest in the suit property. The reversionary interest of the 3rd defendant is not in dispute. It is therefore not clear what role the Commission will be playing in the adjudication and settlement of the dispute relating to the sublease granted by the 3rd defendant.

13. Litigation entails expenditure of financial and human resources. Public bodies such as the Commission operate on strict budgets. To drag the Commission into court proceedings without a proper basis would be inappropriate in the circumstances. In my view, evidence required from the Commission can be properly tendered without making the Commission a party to the suit.

14. Besides, if on its own volition, the Commission wishes to be made a party to these proceedings, it has the liberty to apply to be enjoined and that application will be considered in the context of its constitutional mandate under Article 67 of the Constitution and the relevant statutes.

15. For the above reasons, the court is not convinced the Commission is a necessary party for the effectual adjudication and settlement of the dispute in this suit. The net result is that the 2nd defendant's Chamber Summons dated 16/5/2017 is dismissed. The 2nd defendant shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF MAY 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mrs Keya holding brief for Mr Etole Advocate for the Plaintiff

Ms Savini holding brief for Mr Koceyo Advocate for the 3rd Defendant

Ms Kajuju - Court clerk