



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C. PETITION NO. 11 OF 2017

UNILEVER TEA KENYA LIMITED.....PETITIONER/RESPONDENT

-VERSUS-

NATIONAL LAND COMMISSION.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

SBI INTERNATIONAL

HOLDINGS AG (KENYA).....3RD RESPONDENT/APPLICANT

RULING

Introduction

1. This Ruling is in respect of the 3rd Respondent's application dated 13th March 2018 in which the 3rd Respondent seeks to be removed from the proceedings herein.

2. The application is based on the ground that that the Petition raises no cause of action against the 3rd Respondent as the 3rd Respondent was merely contracted by the 2nd Respondent as its agent to construct the Kericho Interchange at B1/23 Junction as per the road designs availed to it by the 2nd Respondent and that the 3rd Respondent has no claim over the Petitioner's property. The 3rd Respondent further states that the 2nd Respondent having been struck out from the suit, the Petitioner cannot maintain a claim against it.

3. The application is supported by the affidavit of Zeevji Jakoby, the Managing Director of the 3rd Respondent in which he reiterates the above-mentioned grounds and states that before commencement of the project, the 2nd Respondent handed over the site to the applicant on which the interchange was to be constructed and the official of the 2nd Respondent outlined the extent of the said site to the applicant. He further avers that the applicant has no claim over the Petitioner's land and has never been involved in the issues raised in the Petition. The applicant avers that it is therefore not a necessary party to the suit and it ought to be removed from the suit.

4. The application is opposed by the Petitioner through its Replying Affidavit sworn by Nicholas Yiannakis, the Managing Director of the Petitioner, sworn on the 10th July 2018 in which he avers inter alia that the applicant had a duty to satisfy itself that all the legal requirements had been satisfied before entering into the Petitioner's property, which it failed to do. He further avers that the applicant is therefore sued in its own personal capacity for violating the Petitioner's right to property enshrined in Article 40 of the Constitution and for trespassing into the Petitioner's property and not just as an agent of the 2nd Respondent. He depones that even though the applicant is an agent of a disclosed principal, its conduct in this matter places it within the exception to the general rule that an agent of a disclosed principal cannot be held liable for the acts of its principal.

5. The court directed that the application be canvassed by way of written submissions and counsel for both parties filed their submissions.

Issues for determination

6. The key issues for determination are as follows:

- i. Whether the Petitioner has a cause of action against the 3rd Respondent.
- ii. Whether the 3rd Respondent as an agent of the 2nd Respondent can be held personally liable for the wrongful acts committed in the course of its contract.

iii. Whether the 3rd Respondent is a necessary party against whom the Petitioner seeks substantive reliefs.

Analysis and determination

7. In order to determine the first issue, it is necessary to examine the Petition filed by the Petitioner. The Petitioner has pleaded that it is the absolute proprietor of all that parcel of land known as Land Reference number 5467/3 situate in Kericho County measuring 5,037 acres. It has further pleaded that pursuant to a Gazette Notice published on 18th march 2016, the 1st Respondent indicated its intention to acquire by way of compulsory acquisition several parcels of land within Kericho county on behalf of the 2nd Respondent for the purpose of carrying out the construction of the Mau-Summit- Kericho-Nyamasaria – Kisumu Bypass. Among the said parcels was the Petitioner's parcel of land aforesaid.

8. It is the Petitioner's contention that without complying with the Constitutional and legal requirements with regards to compulsory acquisition, the 2nd and 3rd Respondents unlawfully entered into the Petitioner's property on the 19th July 2017 and commenced preparations for the road construction process thereby violating the petitioner's proprietary rights under Article 40 of the Constitution.

9. The Petitioner seeks declaratory orders as well as an order for eviction and damages against the Respondents for wrongs committed by the 1st, 2nd and 3rd Respondents.

10. Counsel for the Petitioner has submitted that the 3rd Respondent personally violated the Petitioner's rights under article 40 of the Constitution and the Petitioner has a valid cause of action against them thus making them a necessary party in the suit.

11. Whereas it is true that the 3rd Respondent through its officers, entered into the Petitioner's property, it is common ground that it's officers only did so in furtherance of its contract with the 2nd Respondent who is a disclosed principal and the Petitioner therefore has no cause of action against them.

12. The second issue is if the 3rd Respondent as an agent of the 2nd Respondent can be held personally liable for the wrongful acts committed in the course of its contract. The general rule is that the agent of a disclosed principal cannot be held personally liable for the acts committed in the course of his contract with a third party. However, there are exceptions to the said rule. One such exception is when the fraud, deceit, criminal or tortious acts are committed by the agent.

13. **Halsbury's Laws of England, 4th edition** places tortious liability upon an agent. **At page 123**, it states: **"Any agent, including a public agent, who commits a wrongful act in the course of his employment, is personally liable to any third person who suffers loss or damage thereby, notwithstanding that the act was expressly authorized or ratified by the principal, unless it was deprived of its wrongful character. It is immaterial that the agent did the act innocently and without knowledge that it was wrongful except in case where actual malice is essential to constitute the wrong. An agent cannot rely upon an exclusion clause contained in the contract between the principal and the third party, unless on the wording of the contract the principal has been contracted not only on his own behalf, but also on behalf of his agent."**

14. In **National Social Security Fund Board of Trustees v Ankan Holdings Limited & 2 Others [2006] eKLR** the court relied on the case of **Williams & Anor v Natural Life Health Foods Ltd & Anor [1989] 2 ALL ER** where the court stated as follows:

"Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicariously or attributed liability upon his principal. The court further relied on the case of Standard Chartered Bank v Pakistan National Shipping Corporation [2000] UKHL 43 where the court stated "He was being sued for his own tort and all elements of that tort were proved against him. Having put the question in the same way he did, Sir Anthony answered it by saying that the fact that Mr. Mehra was a director did not in itself make him liable. That of course is true. He is liable not because he was a director but because he committed a fraud. "I am convinced that there is a cause of action against the 2nd and 3rd Defendants not because they were directors of the 1st Defendant but because they may have committed acts of false misrepresentation or fraud on the Plaintiff. If the Plaintiff may prove its claims against the two Defendants, they may very well be found liable personally."

15. In the instant case, it is common ground that the 3rd Respondent was contracted by the 2nd Respondent to construct the road-works according to the road designs availed to it. What is not clear is whether the 2nd Respondent instructed the Applicant to make unlawful entry into the Respondent's property on 19th July 2017, before the gazettement of the notice of intention to acquire and before the inquiry was issued, and dig up the property before full compliance with Sections 120 and 129 of the Land Act. These are issues which will only become clear during the hearing of the case. I therefore hold the view that it would be premature to conclude that the 3rd Respondent ought to be held liable for trespass, their conduct must be looked at in the context of the terms of their contract. It is therefore my finding that based on the material placed before the court so far, I cannot conclusively hold that the 3rd Respondent should be held liable for the wrongful acts committed in the course of their contract.

16. The third issue is if the 3rd Respondent is a necessary party against whom the Petitioner seeks substantive reliefs.

17. The Applicant's Application is brought pursuant to Order 1 rule 10 (2) of the Civil Procedure Rules, 2010. The said rule permits joinder or removal of a party at any stage of the proceedings to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

18. Counsel for the Petitioner has submitted that the Applicant is required to enable the court determine whether the violation of the Petitioner's rights on 19th July 2018 were authorized by the 2nd Respondent or not and whether the said actions were violations of the law or

not thus making it a necessary party to the suit.

19. In order to be properly enjoined in a suit a '**Respondent**' has not only to be a necessary party as enumerated under Order 1 Rule 10(2) of the Civil Procedure Rules but also a proper party under Order 1 Rule 3 of the said Rules .

20. In the case of **Pizza Harvest Limited v Felix Midigo [2013] eKLR** Havelock J when faced with a similar issue took into cognizance the case of **Amon v Raphael Tuck & Sons Ltd (1956) 1 All ER 273**, in which Devlin, J held at p. 286-287 as follows:

*“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.**”*

21. The definition of who a 'necessary party' is further illustrated by Havelock, J (as he then was) in **Elisheba Muthoni Mbae v Nicholas Karani Gichohi & 2 Others (2014) eKLR** where the learned Judge cited the case of **Werrot & Co. Ltd & Others v Andrew Douglas Gregory & Others Nairobi (Milimani) H.C.C No. 2363 of 1998 (UR)**, where Ringera, J (as he was then) observed that;

The guiding principle in deciding whether to add a party is whether the presence of that party is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. As stated in SARKAR'S LAW OF CIVIL PROCEDURE, Vol. I at pages 531 and 532 there are two tests in the application of this principle:-

There must be a right to some relief against the party sought to be added in respect of the matter involved in the proceedings in question.

It should not be possible to pass an effective decree in the absence of such a party.

22. Learned Counsel for the Applicant has submitted that the 3rd Respondent/Applicant is not a necessary party to this suit and that his presence is neither necessary nor helpful to the determination of the issues in dispute. He has submitted that the Petitioner has no right to relief against the Applicant as the issues in dispute can be determined without the presence of the Applicant.

23. It has further been submitted that for a person to be enjoined in a suit his presence must be necessary for effectual and complete settlement of all questions in the suit. Additionally, it has to be shown that the orders, which the Petitioner 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 by the decision of the Court in that suit.

24. It is clear to me that this suit is predominantly about the manner in which the 1st and 2nd Respondents acquired the Petitioner's land. These are the parties against whom the reliefs in the Petition are sought. The acts of trespass attributed to the Applicant are merely incidental.

25. It has not been demonstrated that the Applicant had any role to play in the acquisition of the said land. According to the contract signed between the Applicant and the 2nd Respondent, the 2nd Respondent was responsible for handing over the land on which the designed road was to be constructed and this is what happened.

26. The relevant tests for determination whether or not to join a party in proceedings were restated Odunga J in **Laisa Mpoye & 2 Others v Kajiado Central Milk Project "The Board" & 5 Others[2012]eKLR** where the learned judge was guided by **Kingori Vs. Chege & 3 Others [2002] 2 KLR 243** where Nambuye, J (as she then was) listed the guiding principles as follows:

1. He must be a necessary party.

2. He must be a proper party.

3. In the case of the Respondent there must be a relief flowing from that Respondent to the Petitioner.

4. The ultimate order or decree cannot be enforced without his presence in the matter.

5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

27. It is my finding that if the above principles were strictly applied, the applicant would not fall within the definition of a necessary and proper party as the case can be determined and the decree enforced without its presence in the matter.

28. Accordingly, I exercise my discretion in favour of the Applicant and allow the application. The suit against the 3rd Respondent is struck out. The costs of the application shall be borne by the Petitioner.

Dated, signed and delivered at Kericho this 25th day of October 2018.

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Kemboi for Mr. Kamande for the 3rd Applicant
2. No appearance for the Petitioner/Respondent
3. Court assistant - Rotich