



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 624 OF 2017

(Formerly Nairobi ELC No. 1070 of 2016)

JOHN KARUMO MACHARIA 1ST PLAINTIFF
MICHAEL MWANGI NDUNGU 2ND PLAINTIFF
CHARLES KIMANI KIMOTHO 3RD PLAINTIFF
PURITY MUMBI NGUNJIRI 4TH PLAINTIFF
RICHARD NJOROGE NGANGA 5TH PLAINTIFF
KABOGO GITAU PROPOSED 6TH PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF KAJIADO DEFENDANT

RULING

What is before Court for determination is the Plaintiff's application dated the 7th December, 2017 brought pursuant to Article 159 of the Constitution, Sections 1A, 1B, 3A and 100 of the Civil Procedure Act, Order 1 Rule 1, Order 8 Rule 3, 5, 7, 8 and Order 51 Rule 1 of the Civil Procedure Rules and all the other enabling provisions of the law. The Plaintiffs seek the following Orders:

1. THAT KABOGO GITAU be enjoined to these proceedings as the 6th Plaintiff.
2. THAT upon prayer (1) above being granted, the Plaintiffs be granted leave to amend the Plaintiff in terms of an annexed draft amended Plaintiff.
3. THAT the costs of this application be in the cause.

The application is premised on the summarized grounds that the proposed 6th Plaintiff is a party whose presence before court is absolutely necessary to enable the court effectually and completely adjudicate upon the matter and settle all the questions involved in the suit. The proposed 6th Plaintiff has his right to relief in respect of and arises out of the same act complained of by other Plaintiffs. The proposed amendments to the Plaintiff is for the purpose of determining the real question or issue raised by the Plaintiffs and is necessary to conclusively as well as justly adjudicate on the matter including avoiding multiplicity of suits. No prejudice will be suffered by any parties if the orders sought are granted.

The application is supported by the affidavit of JOHN KARUMO MACHARIA and KABOGO GITAU. JOHN KARUMO MACHARIA who is the 1st Plaintiff herein avers that the Respondent has demolished the commercial permanent buildings and illegally repossessed land parcels numbers NGONG/ BLOCK 2 /522, without prior notice or warning. Further, that the Chief Land Registrar had initially revoked the said title vide gazette notice no. 15581 published on 26th November, 2010 but the said notice was quashed on 31st October, 2012. He contends that on the 26th August, 2016, without prior notice or warning, the Respondent's employees, servants and/or agents started excavating the area reserved for the bus terminus adjacent to his plot. He claims in the process of excavation, the Respondent's employees started pouring as well as dumping moulds of sand, soil including debris onto his commercial plot, thus blocking access to it, which has made it impossible for him to operate therefrom. He states that on 29th August, 2016, the Defendant's employees whilst continuing to excavate marked (X) in red the buildings earmarked for demolition and his tenants have been forced to close their businesses. He reiterates that the planned demolitions are contrary to the Order of the Court granted vide Mis Application No. 129 of 2011 and on 11th April, 2014,

the Defendant published in the Standard Newspaper a public notice requesting many owners including himself to submit their relevant documents to prove the plots were theirs. He avers that upon filing this suit, the Respondent has demolished the permanent commercial buildings and proceeded to illegally possess the subject parcels of land. Further, that upon demolition of their permanent commercial buildings, their advocate instructed Advent Valuers Ltd to carry out a valuation of the suit properties, which exercise is complete and a report issued to that effect. He reiterates that the proposed amendments to the Plaint are necessary to conclusively and justly adjudicate on the matter and avoid a multiplicity of suits. He insists that pleadings have not closed as the Defendant is yet to file its Defence, and it shall suffer no prejudice if the application is allowed.

KABOGO GITAU the proposed 6th Plaintiff deposes that he is the registered proprietor of land parcel number NGONG TOWNSHIP/ BLOCK 2/ 888, which is a commercial, plot measuring approximately 0.075 hectares. He confirms that he was issued with a Certificate of Lease on the 14th December, 2012 by the Chief Land Registrar and applied to the Defendant for approval of development plan, which was duly granted. He contends that he has always paid rates to the Defendant and vide a gazette notice no. 15582; some plots were nullified to be falling inside the bus terminus. He claims vide their letter dated the 28th June, 2012, the Defendant confirmed that his plot was not among those nullified but was surprised when it was repossessed without a notice to him. He hence seeks to be enjoined in the instant suit because his right to relief as delineated above is in respect of and arises out of the same act complained of by other Plaintiffs. He insists his claim raises common question of law and fact with the other Plaintiffs but at the time of filing this suit, he was away in the United States of America for specialized medical treatment. He reiterates that the Defendant does not stand to suffer by his joinder in this suit and it is in the interest of justice that the orders sought are granted to avert gross miscarriage of justice.

The Defendant filed grounds of opposition where it stated as follows:

1. That pursuant to the provisions of section 3 of the Public Authorities Limitation Act Cap 39, the claim by the 6th Applicant is statute barred.
2. That the application by the 6th Applicant is ill concerned.
3. That the Court's Jurisdiction is not properly invoked.
4. That the said application is an abuse of the courts process.

Both parties filed their submissions that I have considered.

Analysis and Determination

Upon perusal of the instant application including the supporting affidavits, grounds of opposition and considering the submissions herein, the following are the issues for determination:

- a. Whether the Plaintiffs' should be granted leave to amend their Plaint.
- b. Whether the KABOGO GITAU should be enjoined as the 6th Plaintiff in this suit.
- c. Whether the Court has jurisdiction to hear and determine this suit.

As to whether the Plaint should be amended and whether KABOGO GITAU should be enjoined as the 6th Plaintiff in this suit, the Applicants' reiterated their claim in their submission and relied on the following judicial authorities: **Institute for Social Accountability & Anor Vs Parliament of Kenya & 3 others (2014) eKLR**; **Bosire Ogero Vs Royal Media Services (2015) eKLR**; **Lucy Nungari Ngigi & 128 others Vs National Bank of Kenya Limited & another (2015) eKLR**; to support their claim. The Defendant insisted that KABOGO GITAU's claim is statute barred in accordance with section 3(1) provisions of Public Authorities Limitation Act, as it arose in August 2016 but he filed the application after one year. The Defendant further submitted that the suit herein fits squarely within the definition of tort of trespass and conversion. It relied on the following judicial authorities: **Nyeri Civil Appeal No. 21 of 2015 Attorney General & Another Vs Andrew Maina Githinji & Another (2016) eKLR** and **ELC Appeal No. 50 of 2012 County Council of Nyamira Vs Mageka Oseko & Another (2014) eKLR** to buttress his arguments. The Defendant further submitted that the suit herein is statute barred and relied on the case of **Rawal Vs Rawal (1990) KLR 275**; **IGA vs Makerere University (1972) EA 65**; **Mehta Vs Shah (1965) EA 321**; and **Anaclet Kalia Musau (suing on behalf of the estate of Vincent Mangalo Kalia (deceased) vs Attorney General & 2 others (2015) eKLR** to support on their argument.

It is KABOGO GITAU's contention that his property NGONG TOWNSHIP/ BLOCK 2/ 888, has been repossessed by the Defendant without any notice to him. He seeks to be enjoined in the instant suit because his right to relief as delineated above is in respect of and arises out of the same act complained of by the other Plaintiffs.

Order 1 rule 1 of the Civil Procedure Rules provides a description on who should be a Plaintiff and stipulates as follows: **'All persons may be joined in one suit as plaintiffs in 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 such persons brought separate suits, any common question of law or fact would arise.'**

While Order 1 Rule 10 of the Civil Procedure Rules stipulates 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.'

In the case of Joseph Njau Kingori vs. Robert Maina Chege & 3 others [2002]eKLR Nambuye J as she then was, provided the guiding principles to be adhered to when an intending interested party seeks to be enjoined in a suit: 'When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectually and completely to adjudicate upon and settle all questions involved in the suit.'

The Defendant opposed that the proposed 6th Plaintiff should not be enjoined in this suit as his claim is statute barred and offends the provisions of section 3 (1) of the Public Authorities Limitation Act which provides that **'No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.'** At the interpretation section of this Act, I note it applied to local government including County Council but not to the County Government, which is a creation of the 2010 Constitution and governed by the County Government Act. I further note that the cause of action herein arose against the County Government of Kajiado and not the defunct Ol Kejuado County Council. Order 8 rule (3) (2) states that **'Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.'**

Further Order 8 rule (3)(5) further stipulates that **'An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.'**

In the case of **Attorney General v Kenya Bureau of Standards & another [2018] eKLR**, the Court of Appeal held as follows: '.....at any stage of the proceedings, upon application by either party or suo motu, order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added/joined as a party. The guiding principle in joinder of parties 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 properly be compensated for in costs."

See Central Kenya Ltd. V. Trust Bank & 4 Other, CA NO. 222 of 1998. Having thus set out the law applicable to the circumstances of this case, we stress that power of the court to add a party to proceedings can be exercised at any stage of the proceedings including at the appellate stage. Indeed, a party can be joined even without applying. We also bear in mind the principle that no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the Court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned.'

I note that the proposed 6th Plaintiff is simply applying to enjoin this suit because his right to relief as delineated above is in respect of and arises out of the same act complained of by other Plaintiffs herein. It is against the foregoing that I hold that the proposed 6th Plaintiff is a necessary party in the suit herein as the cause of action he is complaining of arose out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the Plaintiffs herein who are seeking leave to amend their Plaint. In relying on the circumstances above including the Court of Appeal decision and the legal provisions above, I proceed to allow KABOGO GITAU to be enjoined in this suit as the 6th Plaintiff.

On the issue raised by the Defendant regarding the jurisdiction of this court to handle the dispute herein, it relied on the case of **Owners of Motor Vehicle M.V Lillian Vs Caltex Oil (Kenya)**

Section 13 (1) of the Environment and Land Court Act confers jurisdiction to the ELC and stipulates as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

Section 13 (2) (c) & (d) further stipulates that 'in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes - (c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land'

The above provisions are distinct in terms of jurisdiction of the Environment and Land Court. In the circumstances, I find that since the fulcrum of the suit herein revolves around repossession of land as well as demolition of property, I find that this Court has jurisdiction to hear and determine the dispute herein.

It is against the foregoing that I find the application dated the 7th December, 2017 merited and will allow it.

Costs will be in the cause.

Dated signed and delivered in open court at Ngong this 15th day of October, 2018.

CHRISTINE OCHIENG

JUDGE