



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 87 OF 2012

EVANSON WAITIKI.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD...DEFENDANT

RULING

1. The application before court is the Chamber Summons dated **13th October, 2015** brought by the defendant under **Order 1 Rule 10 (2) (4) & (5) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**. The defendant is seeking leave to enjoin the National Land Commission, the County Government of Mombasa and the Honourable Attorney General on behalf of the Ministry of Lands and Housing as parties to this suit.

2. The application is premised on the grounds that the proposed entities have an interest in the outcome of the suit, that the National Land Commission is the custodian of all public land by virtue of **Article 63 of the Constitution** as well as under the National Land Commission Act and that although the suit property is not a public land the Government has shown interest in converting it to be public property for purposes of distributing it amongst squatters in occupation and the County Government of Mombasa will be naturally involved as the lower administrative organ in the Government; that the Ministry of Lands and Housing has shown great interest in facilitating the purchase of the suit land for distribution to the squatters in occupation and that the law requires the Honourable Attorney General be enjoined as the Chief Legal Advisor of the Government of Kenya. It is the defendant's contention that for purposes of doing substantive justice it is important to have all the three parties joined to this suit and that no prejudice will be suffered by any of the parties (if the application is allowed).

3. The application is further supported by an affidavit sworn by Emily Kirui a Legal Officer of the defendant on 15th October, 2015. It is deponed that the suit herein seeks orders to compel the defendant to remove its power lines from the suit property among other prayers. That the defendant has filed an application to join all the people occupying the suit property as 3rd parties to this suit. The defendant avers that as an entity where the Government has a majority interest and control is mandated by law and by the Government to endeavour to provide access to electric power supply to the people living in Kenya which is done in line with the policy set out by the Government of Kenya through the Ministry of Energy and Petroleum. That the government of Kenya should be informed and involved where a large population of Kenyans is targeted to be denied the supply of electric power. It is the defendant's contention that if the court were to direct the defendant to remove its electric installation from the suit property, the Government of Kenya must be involved to provide security. The defendant further contends that the County Government of Mombasa is charged with the statutory responsibility of controlling developments on all the land within its County and is equally concerned with the provision of electric supply to the residents of its County. The defendant avers that it did not connect power on the suit property when there was no development. The defendant further avers that by joining the additional defendants as prayed, the plaintiff will not suffer prejudice.

4. The plaintiff opposed the application through grounds of opposition dated 27th November, 2015 and filed on 30th November, 2015 and further grounds of opposition dated 23rd July, 2018 and filed on 24th July, 2018. It is the plaintiff's contention inter alia, that the proposed parties are not necessary parties and that their presence is not necessary for the court to effectually and completely determine the issues in question because the issue before the court is the tort of trespass between the plaintiff and the defendant and the land the subject of the suit is private land and not public land. The plaintiff contends that the application is an abuse of the court process as two previous applications for joinder as well as to issue 3rd party notice were abandoned by consent of the parties herein to pave way for leaning of the main suit.

The plaintiff avers that on 6th January, 2016, he disposed off his interest in the suit land and the proposed parties have no interest whatsoever on it. The plaintiff further avers that on 9th December, 2015 the court gave directions on this application where it ordered that the matter do proceed to hearing despite the application and that the said directions have not been set aside. That the application is meant to delay the finalization of this matter. The plaintiff further contends that he has liberty to choose the party or parties to sue as defendants which right he has exercised to sue the defendant herein, that no reliefs have been sought against the intended defendants and that their presence will only confuse and prolong the conclusion of this suit, thus defeat the overriding objective of civil litigation. The plaintiff avers that there is no evidence that the proposed defendants had trespassed on the suit land before the plaintiff disposed it in January, 2016.

5. Mr. Muniyithya, learned counsel for the applicant submitted that at the time of filing the application, there was on going negotiation between the plaintiff and the government through National Land Commission and the Ministry of Lands in which an agreement was reached and the plaintiff was paid the sum of Kshs.1.25 Billion as compensation. It is the applicant's position that the compensation paid to the plaintiff was for the use and loss of the suitland. Mr. Muniyithya submitted that the presence of the Attorney General representing the Government of Kenya would be a necessary party as an additional defendant. He further submitted that the defendant's installations are funded by the Government and that it would be double payment if the defendant was to pay the plaintiff again. While abandoning prayer 1(b) which relates to the County Government of Mombasa, Mr. Muniyithya submitted that the National Land Commission and the Attorney General are necessary parties and should be enjoined. He argued that no prejudice will be suffered and urged the court to allow the application.

6. Mr. Nganga, learned counsel for the respondent opposed the application and submitted that the same is gross abuse of the court process. He added that the same application was dealt with by the court on 9/12/2015 when it ruled that it would not entertain the application and a notice of appeal was filed though no appeal had been filed by the time the application was being argued. He submitted that this court cannot re-open and entertain the application. Mr. Nganga further submitted that the application was made in bad faith and its effect is to delay this case, adding that the claim before court is for trespass upon land and breach of statutory duties which was not part of the agreement for sale of the land between the plaintiff and the government.

It was counsel's submission that enjoining the National Land Commission and the Ministry of Lands as parties will confuse the issues and delay the case. He relied on the case of *Joseph Leboo & 2 Others -vs- Director of Forest Service & Another [2013] eKLR* and submitted that the plaintiff chose the defendant and does not wish to sue the proposed parties. He urged the court to dismiss the application

7. In response, Mr. Muniyithya submitted that the matter is not *res judicata* as the court only gave directions and did not strike out the application or give a ruling on it. He added that since 2015 the parties have made amendments changing the nature of the case and that the defendant had filed 3rd party proceedings against squatters and therefore the Attorney General is a necessary party.

8. I have considered the application. The plaintiff argues that the court should not entertain the application because the same has already been dealt with previously, and therefore is *res judicata*. I have looked at the proceedings of 9/12/2015. It is clear that the application was not heard. The court simply made an order the matter proceeds for full hearing despite the pending application. It is therefore my finding that the application is not *res judicata* as the same has not been heard and determined by the court previously.

9. The prayer sought in the application by the defendant is for leave to enjoin the National Land Commission and the Attorney General as parties in these proceedings although in his submissions, Mr. Muniyithya submitted that the applicant wishes to have the proposed parties joined as defendants. The application as drafted does not disclose whether the applicant wants to have the proposed parties enjoined as defendants. The provisions of *Order 1 Rule 10(2), (4), (5) and (17)* under which the application is brought 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.

(4) Where a defendant is added or substituted, the plaintiff 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”.

10. It should be noted that there is no such provisions as *Order 1 Rule 10(5)* while *rule 17* relates to judgment after trial against third party in default.

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 suits. The question herein is whether the proposed parties ought to be enjoined as defendants.

12. In the case of *Joseph Leboo & 2 Others -vs- Director of Forest Services & Another [2013] eKLR, Munya, J* stated as follows:-

“I think courts need to be careful before making an order for a person to be joined as a defendant where the application for that joinder is not emanating from the plaintiff. This is so as to avoid thrusting upon the plaintiff a party against whom the plaintiff does not intend to sue, or the plaintiff feels he has no cause of action against, or even if he does, has opted not to pursue the action. It is important, unless there will be great prejudice to an existing party, or a clear lacunae in the proceedings, for courts not to seem to be choosing a defendant for the plaintiff to sue. This is because the choice of whom to sue is that of the plaintiff and there may be cogent reasons as to why a litigant has opted not to sue some other persons. Even, in the absence of any reason, the choice to sue ought to be left to the litigant, and this choice ought not to be disturbed without the presence of compelling reasons. Joining a defendant to the proceedings on an application which is not coming from the plaintiff, may also compel the plaintiff to pursue a cause of action that the plaintiff, for his own reasons, or lack of any, of which there is perfect freedom, the plaintiff has opted not to pursue. Where there is an application for a person to be joined as defendant, and the plaintiff objects to such joinder, the court should even be more cautious before making an order for 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. In this suit, it is the plaintiff's case that the defendant without permission, consent or authority of the plaintiff entered upon the plaintiff's

land, erected transformers and laid out electricity cables, purportedly to sell, for a profit, electricity power to illegal trespassers on the said land. The plaintiff therefore seeks general damages for trespass against the defendant upto 6th January, 2016 when the plaintiff sold the suit land to the Government of Kenya. The proposed defendants herein are not among the entities alleged to have trespassed on the suit land. The defendant avers that it received requests from individuals who were in possession of the suit land to be supplied with electricity. The proposed defendants cannot in my view answer the question whether there was trespass or not on the plaintiff's land at the material time. It is the onus of the defendant to answer whether or not its action on the plaintiff's land amounted to trespass or not. If the defendant wants assistance from any quarter, including from the proposed defendants, it is free to seek help, but in so far as answering the question is concerned, that burden is not of the proposed defendants.

14. In my view there is no remedy that the plaintiff seeks from the proposed defendants. I am unable to thrust upon the plaintiff a cause of action that he feels he does not have, or does not intend to pursue. Neither am I, in the circumstances of this case, prepared to thrust upon the plaintiff parties that the plaintiff feels he has no cause of action against. The proposed defendants in my view are not necessary parties to be enjoined as defendants. I find the case of *Joseph Leboo (Supra)* very persuasive.

15. There is dispute that the proposed defendants entered into an agreement with the plaintiff and purchased the suitland. I note that the defendant had filed 3rd party proceedings against the Attorney General. If the defendant thinks it has a claim against the proposed parties, it can pursue those 3rd party proceedings against them.

16. For the above reasons I decline to allow a joiner of the proposed parties as defendants to this suit. The Notice of Motion dated **13th October, 2015** is dismissed with costs.

Dated, signed and delivered at Mombasa this 17th day of December, 2018.

C. YANO

JUDGE