



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 36 OF 2009

FRANCIS NJOROGE KIGUONGO.....PLAINTIFF/RESPONDENT

VERSUS

BERNERD MURAYA KIIGE.....DEFENDANT/APPLICANT

RULING

Introduction

1. This Ruling relates to the Defendant's Notice of Motion Application dated 31st March 2015, through which he seeks leave to enjoin the National Land Commission (hereinafter called "**the Commission**") as a Defendant in this Matter.
2. The Application raises two issues to be answered by this Ruling. The first issue is the question as to whether or not, in the circumstances of this particular case, the National Land Commission is a necessary party for the effectual and complete adjudication and settlement of the questions involved in the main suit. The second issue to be determined is whether or not the Application is *res judicata* by dint of the fact that the Applicant filed a previous application seeking to enjoin the Commissioner of Lands as a party and the said Application was heard and determined by the Deputy Registrar.

Background

3. It is important to outline a brief background to the Application because it has a bearing on the Application.
4. The Plaintiff, Francis Njoroge Kiguongo, filed this suit against the Defendant, B. Muraya Kiige, on 29th January 2009, seeking to eject and restrain the Defendant from Land Title Number: Nairobi Block 129/509 (hereinafter referred to as "**the suit property**").
5. The Plaintiff contends that he is proprietor of the suit property pursuant to a ninety nine year lease from the Government of Kenya. He alleges that the Defendant, without the Plaintiff's authority, trespassed onto the suit property, erected thereon a semi-permanent structure, and engaged in acts of waste and damage to the suit property.
6. The Defendant filed a Statement of Defence on 23rd March 2009 in which he denies the Plaintiff's title to the suit property and contends that the suit property belongs to one Jane Wambui Karuku who was allocated the suit property in 1992. In his alternative defence, he contends that if the Plaintiff is the registered owner of the suit property, "the registration must have been irregular, illegal and one induced

through corruption by the Plaintiff, and the same ought to be cancelled by the order of this honourable court.” He also asserts that the structure on the suit property belongs to Jane Wambui Karuku. Lastly, he contends that he is a licensee of Jane Wambui Karuku, hence not a trespasser on the suit property.

7. On 3rd April 2009, the Plaintiff filed a Reply to Defence in which he reiterated the averments made in the Plaintiff.

8. Since closure of Pleadings in April 2009, there have been three Applications preceding the present Application. The first Application was a Chamber Summons filed by the Plaintiff on 7th July 2009, seeking to strike out the Defendant’s Defence. This Application was dismissed by Muchelule J on 18th May 2011. Second was a Chamber Summons Application by the Defendant’s Advocates seeking leave to cease acting for the Defendant, filed on 8th February 2010. The third Application was a Notice of Motion by the Defendant, seeking leave to amend the Defence to plead a counterclaim and enjoin 1. Jane Wambui Karuku 2. Commissioner of Lands and 3. Ngundu Farmers Co-operative Society Limited as 2nd, 3rd, and 4th Defendants respectively. This third Application was heard and dismissed by the Deputy Registrar under the provisions of Order 49 of the Civil Procedure Rules on 26th October 2012. Thereafter, pretrial was concluded and the case was certified ready for hearing.

9. Subsequently, on 14th April 2015, the Defendant filed an Application dated 31st March 2015, seeking leave to enjoin the National Land Commission as a 2nd Defendant in this suit. This Ruling relates to that particular Application.

Grounds of the Application

10. **The principal ground upon which the Defendant/Applicant seeks to enjoin the Commission** is that, the Commission holds vital information in relation to the suit property. This is captured in Ground Number 3 of the Application.

11. The Application is supported by the Defendant’s Affidavit sworn on 31st March 2015 in which he depones that the Title relied upon by the Plaintiff was fraudulently and irregularly issued to him by the Commissioner of Lands, predecessor to the Commission. Secondly, he depones that the Commission holds vital information in relation to the suit property.

Grounds of Opposition:

12. The Plaintiff filed Grounds of Opposition and an Affidavit, both raising largely similar grounds; namely: (1) similar application by the Defendant was heard and dismissed on 26th October 2012; (2) the Application is belated; (3) the claim against the Commissioner of Lands is statute barred; (4) the Commission was not in existence when the cause of action arose; and (5) that there is no specific claim against the Commission hence the Application lacks legal basis.

13. Parties opted to canvass their respective positions through written submissions.

Applicant’s Submissions:

14. Counsel for the Applicant/Defendant submitted that the Commission is a constitutional organ established under Article 67 of the Constitution of Kenya 2010 and charged with the responsibility of managing public land. He further submitted that the Commission is the successor to the Office of Commissioner of Lands by dint of the provisions of Sections 30 and 32 of the National Land Commission Act. He argued that all property, assets, rights, liabilities, obligations, agreements, and other arrangements existing at the commencement of the National Land Commission Act and vested in, acquired, incurred or entered into by or on behalf of the Ministry of Lands with respect to the departments whose functions were transferred to the National Land Commission are deemed to be vested in or to have been acquired, incurred or entered into by or on behalf of the National Land Commission. He relied on **Mbeere Elders Advisory Welfare Group & 4 Others –Vs- Attorney General & 5 others (2015) eKLR**. He also relied on **Republic Vs National Land Commission & Another; Ex parte Muktar**

Saman Olow (2015) eKLR.

15. Counsel for the Applicant further submitted that amendments to pleadings should be freely allowed before trial of a case if they can be made without any injustice to the other party. He cited **Eastern Bakery Vs Castelino (1958) EA 461 (CA)** to buttress this view.

16. He further submitted that the cause of action in this suit accrued in 2007 and that limitation period for claims relating to land is 12 years. He argued that the claim against the Commissioner of Lands is not time-barred.

17. In conclusion, he submitted that the intended joinder has been occasioned by the Constitution of Kenya 2010 and the abolition of the Office of Commissioner of Lands. He urged the Court to allow the Application.

Respondent's Submissions:

18. Counsel for the Respondent/Plaintiff opposed the Application and submitted that the Defendant's Application is actuated by mischief and malafides. He argued that the Defendant's defence is that he is a licensee of one Jane Wambui Karuku. He further submitted that the Defendant is relying on a power of attorney donated by a person who did not have title to the suit property. In this regard he argued that, the Applicant lacks locus standi.

19. Further he submitted that a similar Application seeking to enjoin the Commissioner of Lands was dismissed on 26th October 2012. He submitted that the present Application is a delaying tactic by the Defendant.

20. Counsel further submitted that the Application is bereft of legal basis, contending that a defendant can only seek to enjoin a third party through third party proceedings. He further contended that a Plaintiff cannot be asked to prosecute a claim against a party against whom he has no cause of action.

21. He further submitted that the purpose of Rule 10 of the Civil Procedure Rules is to enable the enjoining of a party necessary for determination of issues in controversy. He argued that the ground advanced by the Applicant in support of the Application is that the National Land Commission holds vital evidence in relation to the property. This, he argued, makes the Commission a witness, not a litigant.

22. The Plaintiff's counsel further submitted that the claim against the Commission is statute-barred by dint of the provisions of Section 3(2) of the Public Authorities Act (Cap 39), and Section 13A of the Government Proceedings Act (cap 4). He relied on **Bayusuf Brothers Ltd Vs Kyalo (1981) KR 407; Shah Vs Aperit Investments SA & Ano. (2003) 1 KLR 120; and Atieno Vs Omoro (1985) KLR 677 and Kivuva Vs Res Motors & 2 others (1987) KLR 670**. He urged the court to dismiss the Application.

Substantive Question

23. The substantive suit raises one key question to be ultimately answered by the Judgment of the court. The substantive question is whether or not the defendant is a trespasser on the suit property, Title Number: Nairobi Block 126/509. The plaintiff alleges that he is the registered proprietor and lawful owner of the suit property. On his part, the Defendant contends that the suit property belongs to one Jane Wambui Karuku who has licenced him to be on the suit property. In the alternative, the Defendant contends that if the plaintiff has title to the suit property, then the title was acquired irregularly

The Law on Joinder of Parties:

24. Article 159(2) of the Constitution of Kenya 2010 provides a broad constitutional framework of principles to guide our courts in the administration of justice. In my view, this broad constitutional framework is what should be the basic guide to a court face with any legal question. Indeed, in seeking to

answer the question as to whether or not a party should be enjoined in an on-going litigation, Article 159 should be the first reference guide. The ultimate finding of the court should resonate with and be in tandem with the letter and broad spirit of Article 159 (2) of the Constitution.

25. Legislative framework on the issue of joinder of parties to a suit is spelt out in Order 1 of the Civil Procedures Rules. Order 1 Rule 10 provides a framework for substitution and addition of parties to a suit. Under Order 1 Rule 10(2), the court may at any stage of 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 the name of any person who ought to have been joined either as plaintiff or defendant or whose presence before the court may be necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit to be added. Order 1 Rule 10 (4) provides for the manner in which the Plaint is to be amended where a defendant has been added to the suit. Indeed, this sub rule reaffirms the view that a defendant can be added at the behest of an existing party or by the court *suo motto*.

26. The Court of Appeal discussed and settled the guiding principles on the question of joinder under Order 1 Rule 10 in **Civicon Limited Vs Kivuwatt Limited & 2 Others [2015] eKLR** and observed as follows:-

“Again the power given under the Rules is discretionary, which discretion must of necessity be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.”.....

From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 Rule 10(2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

27. In addition to the above guiding principles, the Court of Appeal in **Meme Vs Republic (2004) KLR 637** outlined the following circumstances which would warrant grant of leave to enjoin a party:-

“(i) Where the presence of the party will result in the complete settlement of all the questions involved in the proceedings;

(ii) Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and

(iii) Where the joinder will prevent a likely course of proliferated litigation.”

28. In **Central Kenya Ltd Vs Trust Bank Ltd & Others CA No. 222 of 1998** the Court of Appeal held that “the paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit.”

29. The Learned Authors of Sarkar’s Code of Civil Procedure (11th Ed. Reprint, 2011, Vol 1. Page 887) have shade light on how a legal provision equivalent to Order 1 Rule 10(2) should be interpreted. They have observed thus:-

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

The Doctrine of Res Judicata

30. The doctrine of res judicata is enshrined in Section 7 of the Civil Procedure Act which provides as follows:-

“7. No court shall try any suit or issues in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”

31. The Court of Appeal gave a rendition of the doctrine in **John Florence Maritime Services Limited & Ano. Vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) e KLR** in which it cited verbatim the following paragraph in **Henderson Vs Henderson (1843) 67 ER 313**.

“.....Where a given matter becomes the subject of litigation in any adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.....”

32. The rationale behind res judicata was outlined in the above case as follows:-

“the rationale behind res judicata is based on the public interest that there should be an end to litigation over the same matter. Res judicata ensures the economic use of the court’s limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent court. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.”

33. It is settled jurisprudence that res judicata is a principle of general application. It applies to substantial suits as well as to interlocutory applications brought within suits.

Determination

34. There are two questions which this Ruling seeks to answer. The first question is whether or not, in the circumstances of this particular case, the National Land Commission is a necessary party for the effectual and complete adjudication and settlement of the questions involved in this suit. The second question is whether or not, the Applicant is entitled to bring an application to enjoin the Commission after having previously brought and lost an application in which he sought to enjoin the Commissioner of Lands.

35. I have carefully considered the submissions by learned counsel for the parties. I have also considered the parties’ respective pleadings which, in my view, form the foundation upon which interlocutory applications are predicated. I have also carefully considered the legal framework governing the subject of joinder of parties under Kenya’s current civil procedure regime. Similarly I have considered the doctrine of res judicata and its applicability. Lastly, I have considered the prevailing judicial and scholarly

jurisprudence on the subjects of joinder of parties and the doctrine of res judicata.

36. Looking at the legal framework under Order 1, Rule 10 of the Civil Procedure Rules and the existing judicial and scholarly interpretation of that particular provision, I can confidently state that the principles applicable to the question of joinder of parties such as the one under determination in this Ruling is well settled. Under Order 1 Rule 10 (2) the court may at any stage of proceedings, either upon the application of either party or *suo motto*, on just terms, order that the name of any party improperly joined be struck out and the name of any person who ought to have been joined or whose presence before court may be necessary to enable the court to effectually and completely adjudicate upon and settle all the questions involved in the suit added. Order 1, Rule 10 (4) reinforces the view that the party to be added may be a plaintiff or a defendant.

37. The court of Appeal in **Civicon Limited –Vs- Kivuwatt Limited & 2 Others (2015) eKLR** observed that “the objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings”. The Court of Appeal added that any party reasonably affected by the litigation is a necessary and proper party.

38. A more succinct test to be applied in answering the question of joinder was pronounced by the Court of Appeal in **Central Kenya Limited Vs West Bank Ltd & Others, CA No. 222 of 1998** as follows:-

“the paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the question involved in the suit.”

39. Because of the above settled criteria for determination of questions of joinder of parties, I am obligated to look at the question that requires settlement in the main suit. In my view, this is necessary in determining whether the Commission is a necessary party. The question in the main suit can be gleaned from the Pleadings of the Parties. The key question, in my view, is whether or not the defendant is a trespasser on the suit property. The Plaintiff alleges that he is the registered proprietor of the suit property and that the defendant is a trespasser. The Defendant’s defence is that he is a lawful licensee of one Jane Wambui Karuku. The said Jane Wambui Karuku is not a party to this suit. At this point, I pause to ask: Is the National Land Commission a necessary party in determining the question as to whether or not the Defendant is a trespasser?

40. The ground upon which the present Application is premised is that the Commission holds “all records in relation to any transfers and transactions in relation to the suit property.”

41. There is no doubt that, as a constitutional body performing public functions, the Commission holds many records in relation to public land. In my view, that alone does not make the Commission a necessary party to a litigation involving what parties consider to be private land. Officers of the National land Commission can be properly summoned to produce those records as witnesses. If a contrary view were to be accepted, the Commission would be inundated with a plethora of suits in which it has no interest.

42. The upshot of my answer to the first question is that, taking into account the substantive question in the main suit, the Application under consideration does not meet the established threshold for joinder of a party under Order 1 Rule 10(2). The Application to enjoin the National Land Commission lacks merit and fails.

43. I now turn to the question as to whether or not the Defendant is entitled to bring the present Application taking into account the doctrine of res judicata. From the record, the Defendant filed a Notice of Motion dated 20th March 2012 seeking leave to amend his defence and bring a counterclaim. From the Supporting Affidavit and the Draft Amended Defence attached to the Application, he sought to enjoin 1) Jane Wambui Karuku, 2) the Commissioner of Lands and 3) Ngundu Farmers Co-operative Society Limited as 2nd, 3rd and 4th Defendants respectively. The said Application was brought under Order 8 Rule 3 and Order 51 Rule 1 which prescribes the form of the Application.

44. The Application was heard and determined by the Deputy Registrar under the provisions of Order 49 Rule 7 (1) (b) which empowers a duly gazetted Registrar or Deputy Registrar to hear and determine an Application brought under Order 8 of the Civil Procedure Rules. The Deputy Registrar made a determination dismissing the Application.

45. The Defendant elected not to appeal against the decision of the Deputy Registrar within the framework of Order 49 Rule 7 (2) and (3). Consequently, that determination stands and binds the parties.

46. I should observe that, besides the appeal mechanism provided under Order 49 Rule 7 (2) and (3) of the Civil Procedure Rules, the Environment & Land Court Act provides a review mechanism for similar redress under Section 12. This too was not utilised by the Defendant.

47. The Defendant seeks to enjoin the National Land Commission by virtue of the fact that it is the successor to the defunct Office of the Commissioner of Lands. In my view, a determination having been made regarding the issue of joinder of the Commissioner of Lands, predecessor to the National Land Commission, it is an abuse of the process of the court for the Applicant to now seek to renew the same Application seeking to enjoin a party whom he acknowledges to be the statutory successor to the Commissioner of Lands. He is properly precluded from doing so by the doctrine of *res judicata*. The Application fails on that ground too.

Disposal and Directions

48. The upshot of my determination is that the Defendant's Notice of Motion Application dated 31st March 2015 seeking leave to enjoin the National Land Commission as a Defendant in this suit lacks merit and the same is dismissed with costs to the Plaintiff.

49. Taking into account that this is a 2009 case, I direct that parties take a convenient hearing date as soon as this Ruling is delivered.

Dated, signed and delivered at Nairobi this 9th day of March 2017

.....

B M EBOSO

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court clerk