



REPUBLIC OF KENYA



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Ndirangu v AA Bayusuf & Company & Co Ltd & 4 others (Environment & Land Case E057 of 2022) [2024] KEELC 55 (KLR) (18 January 2024) (Ruling)

Neutral citation: [2024] KEELC 55 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E057 OF 2022**

AE DENA, J

JANUARY 18, 2024

BETWEEN

KAMAU NDIRANGU PLAINTIFF

AND

AA BAYUSUF & COMPANY & CO LTD 1ST DEFENDANT

COUNTY GOVERNMENT OF KWALE 2ND DEFENDANT

REGISTRAR OF LANDS 3RD DEFENDANT

LAND SURVEYOR OF KWALE 4TH DEFENDANT

THE HON. ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. The 3rd 4th and 5th Defendants filed a Notice of Motion application dated 20/9/23 seeking to have the suit filed against them be struck out. The application is premised on the grounds that the Plaintiffs hold a letter of allotment and the land has not been registered at the Kwale land registry and therefore the right office to be sued ought to be the National Land Commission. That matters touching on part developments plans are handled by the relevant County Physical Planning Department. That the Gazette Notice dated 17/2/2017 was published by the 2nd Defendant and not officers of the applicants. Further that the pleadings do not disclose a cause of action against the applicants. The application is supported by the affidavit sworn by Nimwaka K. Muema Principal State Counsel and which reiterates the grounds.
2. The application is opposed by the replying affidavit sworn by Grace A. Okumu counsel for the Plaintiff. It is deponed that all the parties are correctly before court and parties may be added as circumstances demand and require. That the Attorney General serves the entire Republic of Kenya which includes the Kwale County. That the Letter of Allotment was issued by the Department of



Lands and which still exists in the government structure and which is represented by the Commissioner of Lands. The allotment fees were paid to the Department of Lands on 9/10/95, the Letter of Allotment was approved by the Minister for Lands a government department represented in civil proceedings by the 5th Defendant. That while it is true that the Kwale County predecessor allocated the suit land, the actual registration will ultimately be done by the 3rd Defendant. Retaining its right to amend its pleadings to include the National Land Commission the Plaintiffs were of the view this did not mean the applicants should be struck out of this suit.

3. Mr. Koja for the 2nd Defendant did not respond to the application.
4. The application was canvassed by way of written submissions. The Applicants submissions were filed on 22/11/23. It is submitted that the court has powers under Order 2 Rule 15 of the [Civil Procedure Rules](#) to strike out pleadings for failure to disclose a reasonable cause of action. The court is referred to the case of [D.T. Dobie & Co. \(K\) Ltd Vs. Muchina](#) (1982) eKLR and [Crescent Construction Ltd vs. Kenya Commercial Bank Limited](#) (2019) eKLR on the definition of a reasonable cause of action and that a party should not be dragged to the seat of justice when the case against him is a non-starter. It is stated that all dealings on the suit property were done by the officer of the 2nd Defendant. According to the state this the court should not waste the precious judicial time.
5. The Plaintiff's submissions were filed on 27/11/23. Reiterating the averments in the replying affidavit, it is submitted that no sufficient reasons have been canvassed to warrant the striking out of the applicants from the proceedings. Citing Order 1 Rule 9 of the [Civil Procedure Rules](#) it is submitted that the same is couched in mandatory terms that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. The court is referred to various authorities enumerating the issue including who is a necessary party and principles on determining whether or not to join a party to a suit. The court is also invited to invoke article 159(d) of the [Constitution](#) and ignore procedural technicalities in favor of justice.

Analysis and Determination

6. Having considered all the foregoing the issue that commends determination is whether the application filed on behalf of the 3rd 4th and 5th Defendants has merit.
7. The application is brought under the provisions of Orders 1 Rule 10(2), 2 Rule 15(1)(a) of the [Civil Procedure Rules 2010](#) and Section 1A and 3A of the [Civil Procedure Act](#).
8. This application is about the removal of a party who has already been joined into proceedings for the reason that there is no cause of action disclosed against them and that they are wrongly sued. It is the applicant's case that the issuance of the allotment herein was by the 2nd Defendants officers and not the Applicants. It states that the National Land Commission is the body with the mandate to issue letters of allotment and not the Registrar of Lands and Land Surveyor Kwale and therefore the appropriate institution to be sued. It is therefore not about striking out the pleadings herein.
9. Order 1 Rule 10(2) is on substitution and addition of parties and provides as follows
 - (1)
 - (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.

10. Arising from the above provisions the power is discretionary but the same ought to be exercised judiciously. The issue that arises is whether the 3rd 4th and 5th defendants have been properly sued as Defendants in this suit. Order 1 Rule 3 is on who may be joined as defendants and provides as follows;

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transactions is alleged to exist whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.

11. Let me state that arising from the above the law recognises that a suit may have several defendants for the reasons enumerated. The Plaintiff avers at paragraph 14 as follows; -

It's the Plaintiff's contention that the 1st 2nd and 4th Defendants jointly have no rights over the Plaintiff's property and the 2nd and 5th Defendants should ensure that the Plaintiff's right to the property are protected and the 3rd Defendant should issue registration documents for the benefit of the Plaintiff.

12. The above clearly explains why the 3rd and 4th Defendants have been joined into the suit as defendants. Further the Plaintiff believes that there exists a right to a relief from these parties. That the 3rd Defendant who is the Registrar of Land Kwale should issue registration documents to him. I do not see therefore how the 3rd Defendant Land Registrar Kwale would miss out in these proceedings being the one who ultimately registers titles. The Plaintiff believes at paragraph 17 that he has been denied peaceful and quiet possession of its property by the 4th Defendant and seeks a final order of mandatory injunction directing the 4th Defendant to register land in the name of the Plaintiff. As to the 5th Defendant it is trite that the Attorney General represents the Government in all Civil Proceedings. I have perused the Letter of allotment dated 17/07/1995 and which I note is the most critical document in these proceedings as it is the alleged basis of ownership. I note that it is signed on behalf of the Commissioner of Lands and is on the letter head of the Department of Land. It is also copied to the PS (Permanent Secretary) Ministry of Lands and Settlement, Director of Surveys Nairobi, Director of Physical Planning Nairobi. I have seen the part development plan by the Ministry of Lands and Physical Planning department Kwale which clearly is a department of the Ministry. All these are institutions are under the umbrella of the Government of Kenya and having been sued the Attorney General is therefore properly made a party to these proceedings.

13. In arriving at the above this court has been persuaded by the holding in *Kingori vs. Chege & 3 Others* (2002) 2 eKLR cited by the Plaintiff.

Also see *Jeremiah Matagaro and Ezekiel Misango Mutisya* [2014] eKLR and *Departed Asians Property Custodian Board versus Jaffer Brothers Ltd* [1999] 1 EA 55.

14. Assuming the court is wrong on the above and considering the facts of the case and the players mentioned, the law recognises and envisages instances where a plaintiff may not be sure who to sue. Order 1 Rule 7 is on when the Plaintiff is in doubt from whom redress is to be sought

Where the Plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable and to what extent may be determined as between the all parties.



15. The 3rd, 4th and 5th Defendants have been made parties to this suit and flowing from the above provisions and the extent to which or not they are liable is a matter for the court to determine when it has heard the suit on merits.
16. On the submission that the National Land Commission is the body that issues Letters of allotment and therefore ought to have been sued herein. I hear the Applicant saying that the National Land Commission is a necessary party who ought to have been joined abinitio as a Defendant in these proceedings. Clearly this is an issue of non-joinder and cannot be a basis for striking out a defendant from a suit. I say so because the cure for non-joinder is given by the provisions of Order 1 Rule 10(2) and which I have already cited elsewhere in this ruling. It is by amendment by way of an application to the court by the Plaintiff and alternatively by the court suo motto based on the stipulated criteria.
17. The court has noted the Plaintiffs contention that before the year 2012 the Commission did not have data. This to me is not a justification. The test ought to be whether they are a necessary party that would enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. Guided by the case of *Zephir Holdings Ltd vs. Mimosa Plantations Ltd & 2 Others* (2014) eKLR it is my view that the National Land Commission is also a critical party and their presence in these proceedings will enable all parties to be heard once and for all.
18. The upshot of the foregoing is that the application dated 20/9/2023 is not merited and it is dismissed. Costs shall be in the cause. It is hereby further ordered that the National Land Commission be and is hereby added to this suit.

Orders accordingly

RULING DATED, SIGNED AND DELIVERED THIS 18TH DAY OF JANUARY 2024

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A.E DENA

JUDGE

Ms. Okumu for the Plaintiff

Saisi for 1st Defendant

No appearance for 2nd Defendant

Waswa holding brief Kiti for 3rd, 4th and 5th Defendants

Mr. Daniel Disii – Court Assistant

