



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT KAKAMEGA

ELC NO. 196 OF 2016

HADIYA CONTRUCTION AND MINERALS LTD.....PLAINTIFF

VERSUS

AJABU EAST AFRICA LIMITED.....DEFENDANT/RESPONDENT

COUNTY GOVERNMENT OF KAKAMEGA.....INTERESTED PARTY

RULING

The first application dated 26th November 2016 is brought under section 1A, 1B, 3, 3A & 63 (e) of the Civil Procedure Act and Order 51 Rule 15 of the Civil Procedure Rules seeking the following orders;

1. THAT the order made by the Deputy Registrar on 17th November, 2016 joining the Kakamega County Government as an interested party in this suit be et aide and/or revoked.
2. THAT the application by the Kakamega County Government to be joined as an interested party in this suit be served upon all parties on record and the same e heard inter parties and on merit before the judge.
3. THAT the costs of this application be provided for.

The second application dated 17th November 2016 is brought under Order 1 Rule 10 of the Civil Procedure Rules seeking the following orders;

1. THAT service of this application be dispensed with due to reasons of urgency.
2. THAT the honourable court do hereby order tha Kakamega County Government be enjoined in this suit as a defendant/ interested party.
3. THAT the honourable court do give instructions in the following terms;
 - a. That the Plaintiffs plaint be amended accordingly
 - b. That the above named plaintiff do serve the aforesaid enjoined party with court summons to enter an appearance and respond to the suit accordingly
4. That the costs of this application be provided for.

The plaintiff submitted that the application to join Kakamega County Government as an interested party

was never and has not yet been served to date upon the parties on record herein. The orders made on 17th November, 2016 were ex-parte and not on merit. The Deputy Registrar has neither the jurisdiction nor power to join an interested party in a suit. The plaintiff was never consulted on the intention to join an interested party nor has the interested party disclosed its interests in the suit to enable the plaintiff accordingly amend its plaint. That they have no claim whatsoever against Kakamega County Government and wonder how they are to amend their plaint to claim against them. They do not know what the Kakamega County Government wants in this as they are yet to serve them with the application to understand their claim. That it is only fair that they understand the claim by the Kakamega County Government and they be given an opportunity to oppose their application on merit.

The interested party herein has opposed this application by filing and serving statement of grounds of opposition dated 16/2/2017 relying on the application dated 17/11/2016 together with it supporting affidavit. The facts of the plaintiff's/applicant case as seen from the pleadings and the document filed therewith are simple and straight forward. The plaintiff/applicant entered into an agreement with Kakamega Municipal Housing cooperative where the plaintiff company leased the parcels of land for a period of 3 years for the purpose of removing heaps of oil therefrom at a consideration of Ksh. 1,500,000/= . However the defendant company mobilized equipment in preparation to move onto the aforementioned parcels of land claiming that an unnamed 3rd party has granted it the right to remove the said heaps of soil. The plaintiff went ahead and obtained interim order which are still effective upto date.

The plaintiff submitted that interested party filed an application in this court dated 17th November 2016 whose application was brought by way of certificate of urgency seeking amongst other order that Kakamega County Government to be enjoined as an interested party in this suit for the reason that the suit parcels of land belong to the County Government of Kakamega. The same was heard ex-parte on 17th November 2016 where the deputy registrar ordered that Kakamega County Government be enjoined in the suit necessitating the filing of this application. The interested party filed an application dated 17th November 2016 seeking orders inter alia that they be enjoined as an interested party. However, they did not serve the application upon the plaintiff as provided for by the law but proceeded to have the application heard and determined the absence of the plaintiff notwithstanding which is contrary to the law. The law provides that any application involving parties must be served upon all parties in the suit. In the case of **YAMKO YAPPAZ INDUSTTIES LIMITED VS. KALKA FLOWERS (LTD) [2013] eKLR** while quoting the principles of discretion the court referred to the case of **KANJI NARAN VS. VELJI RAMJI [1954] 21 EACA 20C** where the learned judge held that the court has no discretion where it appears there has been no proper service.

In addition the said application is technically defective in that they invoked order 1 rule 10 (4) of the Civil Procedure Rules. Rule 10 deals with addition of plaintiffs and rule 10 (4) is on amendment of the plaint upon the order of addition being allowed. This application is defective because addition of defendants should be brought by way of chamber summons under rule 1 (14)

The interested party response in opposition to the application has not demonstrated any prejudice that it is likely to suffer if our application is granted. The plaintiff/applicant is likely to suffer irreparable harm as they were never consulted on the intention to join an interested party nor has the interested party disclosed its interest in the suit and therefore it will be in the best interest of justice that the ex-parte order e set aside and application be heard on merit.

Order 51 rule 15 of the Civil Procedure Rules provides that the court may set aside an order made exparte. The principles guiding the setting aside of ex-parte orders are trite that the court has wide powers to set aside such exparte save that where the discretion is exercised, the court will do so on terms that are just. The principles touching on courts discretion were clearly laid out in the case of **PATEL VEA CARGO HANDLING SERVICES LTD [1974] EA 75 at 76C and EB) which was cited in the case of PITHON WAWERU MAINA S. THUKA MUGIRIA (1983) eKLR** where the learned judge stated that the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter discretion given it by the rules. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or

error but is designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. It is trite law that every application that is likely to affect any party in a matter cannot be canvassed in the absence of a party that it seeks to affect. The interested party had the knowledge of the content of his application and the effect it was likely to have on the plaintiff/applicant but chose to conveniently ignore the plaintiff contrary to the principles of good practice, equity and the law. In the circumstances, it would therefore be a miscarriage of justice if the order granted ex-parte to the interested party/respondent is allowed to stand. The plaintiff/applicant further stands prejudiced by the order granted ex-parte in the sense that the application dated 17th November 2016 filed by the interested party not only ought to have the interested party enjoined as a party to the suit but had a substantial impact on the plaintiffs' plaint in that it sought to have the plaintiffs amend their plaint.

The plaintiff/applicant is at a loss on how it can be directed to amend its plaint considering that it has no claim against the interested party/respondent. Our claim your honour is solely against the defendant and we have no claim of whatsoever nature against the interested party and therefore we submit that the ex-parte order directing as to amend our plaint be set aside. The County Government of Kakamega claims to own the land yet they have not annexed any search or title to prove it. The ones on record belong to the Kakamega Housing Co-operative whose members leased the land to our client and as such they have no *locus standi*. From the foregoing, it is clear that the applicant has established the necessary conditions to warrant the setting aside of the orders issued by the Deputy Registrar on 21st November 2016. In the circumstances, we humbly pray that the plaintiff's application dated 21st November 2016 be allowed and the proposed interested party's application dated 17th November 2016 be dismissed with costs.

The defendants submitted that the interested party herein, County Government of Kakamega filed an application dated 17th November, 2016 seeking to be enjoined in this suit. The said application was placed before the Deputy Registrar who granted prayer 1 & 2. It is upon granting the said orders by the Deputy Registrar, necessitated filing of the plaintiff's application dated 26th November, 2016. For the interest of justice as enshrined under Article 159 of the Constitution, the defendant submits that the interested party must be enjoined and made a party to this suit. Hence the defendant is not opposing the interested party application dated 17th November, 2016. The anomaly created by the Deputy Registrar can be cured by this court. It should be noted that the plaintiff herein by its own application dated 26th November, 2016 supports the interested party being enjoined to this suit. In regard to the plaintiff's application dated 26th November, 2016, they shall rely on the defendant's replying affidavit dated 8th December, 2016, which sets down ground why the interested party should be enjoined to this suit to enable the court to hear and determine this case on merit. It's the defendant's submission that the parcels of land herein which are the subject of this suit are leasehold properties and some of the leased properties are reserved for public utility by the interested party as exhibited in the defendant's replying affidavit and the lease cannot sublease the said properties to the plaintiff without following the laid down procedures and consent of the interested party who is the Lessor having not been obtained and the said lease agreement not being registered. Further the plaintiff has not exhibited any loss, damage and/or irreparable loss the plaintiff will suffer that cannot be compensated by way of costs by the interested party herein if the interested party is enjoined to this suit.

This court has considered both applications. County Government of Kakamega filed an application dated 17th November, 2016 seeking to be enjoined in this suit. The said application was placed before the Deputy Registrar who granted prayer 1 & 2. It is upon granting the said orders by the Deputy Registrar, necessitated filing of the plaintiff's application dated 26th November, 2016. The same was heard ex-parte on 17th November 2016 where the deputy registrar ordered that Kakamega County Government be enjoined in the suit necessitating the filing of this application. The interested party filed an application dated 17th November 2016 seeking orders inter alia that they be enjoined as an interested party. However, they did not serve the application upon the plaintiff as provided for by the law but proceeded to have the application heard and determined the absence of the plaintiff notwithstanding which is contrary to the law. The law provides that any application involving parties must be served upon all parties in the

suit.

Based on the foregoing, the court has no discretion as regards the service of this application as there is also nothing on record filed by the interested party/respondent confirming service of the same upon the plaintiff/applicant and as such it will be in the interest of justice that the orders granted in the said application be set aside for want of service and the interested party to be compelled to effect proper service to enable the application be heard on merit. I hereby order that the order made by the Deputy Registrar on 17th November, 2016 joining the Kakamega County Government as an interested party in this suit be set side and/or revoked. The application by the Kakamega County Government to be joined as an interested party in this suit be served upon all parties on record and the same be heard inter parties and on merit before the judge.

The date was taken by consent but the interested party failed to attend court and there was no one to submissions filed on the same. This court cannot therefore rule on the same as the applicant has not prosecuted and/or submitted on it (application dated 17th November 2016). Therefore, the orders therein having been set aside, parties are free to obtain a hearing date for the application dated 17th November 2016.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF JULY 2017.

N.A. MATHEKA

JUDGE