



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1242 OF 2016

NASELA AND MUKAKAIK LTD.....PLAINTIFF

VERSUS

KENYA URBAN ROADS AUTHORITY.....1ST DEFENDANT

HYDRATED BUILDING CONTRACTION.....2ND DEFENDANT

HYDRATECH BUILDING CONTRACTORS.....3RD DEFENDANT

AND

THE COUNTY GOVERNMENT OF KITUI.....INTENDED DEFENDANT

RULING

Introduction:

I have before me two applications both dated 22nd May, 2017 brought by the County Government of Kitui (hereinafter referred to as “the applicant”). The 1st application has been brought under Order 1 rule 10(2), (4) and 25, and order 51 rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking an order for the joinder of the applicant as a defendant in the suit. The 2nd application has been brought under Order 40 rule 7 of the Civil Procedure Rules and seeks the setting aside and discharge of the order of temporary injunction that was made herein on 11th October, 2016 and confirmed on 8th November, 2016.

The applicant’s case:

The 1st application has been brought on the grounds set out on the face thereof and on the supporting affidavit of Alex Kimanzi who is the acting County Secretary of the applicant. The applicant has contended that the plaintiff filed this suit on 11th October, 2016 together with an application for a temporary injunction. The application for temporary injunction was placed before the duty judge on the same day who granted the orders sought on an interim basis pending the service and hearing of the application inter partes. The applicant has contended that the defendants were served but they did not file a response to the application and when the application came up for hearing inter partes, the court confirmed the interim orders of injunction that had been granted on 11th October, 2016.

The applicant has contended that the plaintiff was not candid to the court when it came before the court ex parte. The applicant has contended that as at the time this suit was filed and the order of injunction obtained, the construction of the road in dispute had already been completed and as such there was no activity against which the injunction which was issued by court could attach. To demonstrate that the construction of the said road had been completed, the applicant annexed to the supporting affidavit photographs said to have been taken at the site of the said road showing completed works. The applicant has contended that the aforementioned scenario explains in part why the defendants showed no interest in participating in this case. The applicant has contended that the failure by the defendants to defend the application left the general public who are the beneficiaries of the road in question exposed to inconvenience and suffering resulting from the closure of the said road. The applicant has contended that in the circumstances, it has become necessary to bring on board a new defendant to protect the public interest. The applicant has contended that if it is denied leave to join the suit as a defendant, the court and the parties would have left out of the proceedings an important party whose presence is necessary for the effective determination of the suit before the court.

The 2nd application has also been brought on the grounds set out on the face thereof and on the supporting affidavit of Alex Kimanzi the acting County Secretary of the applicant. In his affidavit in support of this application, Alex Kimanzi has reiterated the contents of the affidavit he swore in support of the applicant's 1st application for leave to be joined in the suit as a defendant. The applicant has contended that the plaintiff is guilty of misrepresentation and non-disclosure of material facts. The applicant has contended that the plaintiff failed to disclose to the court that the construction of the road in issue had been completed by the time the plaintiff came to court and obtained injunctive orders which it served through public notice. The applicant has contended that the plaintiff failed to disclose to the court that there were no excavations, erections of buildings, road construction or laying of structures at the time the orders sought to be set aside were sought and obtained. The applicant has contended further that the plaintiff misrepresented to the court that its property had been encroached on which was not true because the road in question has been in existence as a service road since time immemorial.

The applicant has contended that non-disclosure of material facts aforesaid disentitles the plaintiff to equitable relief of injunction and hence the ex parte orders obtained herein should be discharged. The applicant has contended further that the plaintiff is estopped by acquiescence and waiver of rights from challenging the construction of an already completed road. The applicant has contended further that the plaintiff's loss if any is capable of being compensated by way of damages. The applicant has contended that the 1st defendant has been maintaining the road in question since 2010 without any complaint from the plaintiff. The applicant has contended that the interim orders issued by the court have interfered with the public use of the said road which has been constructed with tax payer's money which is likely to go waste if the said orders are not discharged.

The respondent's case:

The two applications were opposed by the plaintiff/respondent through a replying affidavit sworn by Mumo I. Mwendwa, a director of the plaintiff on 9th June, 2017. The plaintiff has contended that the 1st defendant which is a body corporate established under the Kenya Roads Act is mandated under the said Act to manage, develop, and maintain all urban roads in the Republic of Kenya. The plaintiff has contended that in the purported exercise of the said mandate, the 1st defendant conspired with the 2nd defendant to divert the already existing JICA-PRISON ROAD in Kitui County to pass through the plaintiff's parcel of land known as L.R No. 4096/232/Kitui Township (hereinafter referred to as "the suit property"). The plaintiff has averred that it is as a result of the actions of the defendants aforesaid that it brought the suit herein and obtained the orders complained of.

The plaintiff has contended that it has no cause of action against the applicant. The plaintiff has contended that the applicant cannot force itself to be sued by the plaintiff. The plaintiff has contended that the reason advanced by the applicant to be joined in the suit namely, public interest is misguided since the suit property is undisputed private property registered in the name of the plaintiff. The plaintiff has averred that there can be no public interest in trespassing on or forcefully acquiring private property. The plaintiff

has averred that the applicant being a County Government has no right over private property and as such there is no basis for its joinder in the suit herein.

The plaintiff has admitted that there was untarmacked service road between JICA and Kitui prison. The plaintiff has averred that in 2016 through a purported road maintenance scheme, the defendants diverted the said road from its former location to the suit property thereby forcing the plaintiff to institute this suit. The plaintiff has averred that the governor of the applicant sent the applicant's surveyors to ascertain the ownership of the suit property. The said surveyors confirmed that the suit property belongsto the plaintiff and that the construction of a road thereon was erroneous. The plaintiff has denied that the road construction had been completed at the time injunctive orders were issued herein. The plaintiff has contended that it has since reclaimed its land by completing the construction of a wall thereon and commencing other construction works.

The plaintiff has averred that the defendants are represented by the Office of the Attorney General and that the construction which was to be completed in November, 2016 was stopped midway in October, 2016 hence there is no road in use as claimed by the applicant. The plaintiff has averred that the applicant could have been joined in this suit only if the suit property was public land. The plaintiff has contended that the applicant's application to set aside the orders issued herein 6 months ago is scandalous and an abuse of court process. The plaintiff has contended that the applicant cannot seek the setting aside of the orders that were not made against it. The plaintiff has urged court to dismiss the two applications for want of merit.

Analysis of the parties' respective cases:

I have considered the two applications together with the affidavits that were filed in support thereof. I have also considered the replying that was filed by the plaintiff in opposition to the applications. Finally, I have considered the submissions by the advocates for the parties. The application for joinder of the applicant as a defendant in the suit was brought under among others, Order 1 rule 10 (2) and (4) of the Civil Procedure Rules.

Order 1 rule 3 of the Civil Procedure Rules 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 transaction or series of acts 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.”

Order 1 rule 10 (1) to (4) of the Civil Procedure Rules on the other hand provides as follows:-

(1) “ Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(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.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaintiff shall, unless the court otherwise directs,

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.”

The applicant has sought leave to be joined in this suit as a defendant. Order 1 rule 3 of the Civil Procedure Rules that I have reproduced above provides for the persons who may be joined as defendants in a suit. Order 1 rule 10 on the other hand empowers the court to substitute and add parties to an existing suit like in the present case. In my view, under Order 1 rule 10(2) of the Civil Procedure Rules, the court can only join a person as defendant to an existing suit in two instances; first, where such person ought to have been joined as a defendant under Order 1 rule 3 of the Civil Procedure Rules aforesaid and was not so joined and secondly, where the presence of such person before the court may be necessary in order to enable the court to adjudicate and settle all questions involved in the suit. The onus was upon the applicant to bring itself within the provisions of Order 1 rule 10(2) of the Civil Procedure Rules.

I am in agreement with the submissions by the plaintiff that the applicant is not a person who ought to have been joined in the suit herein as a defendant under Order 1 rule 3 of the Civil Procedure Rules. The Plaintiff's claim against the defendants is based on trespass. The plaintiff has contended that the defendants entered the suit property without its permission and commenced construction of a road thereon. It is not disputed that the said road is being constructed by the defendants. The 1st defendant has the statutory mandate under the Kenya Roads Act, Chapter 408 Laws of Kenya to construct and maintain urban roads. The 1st defendant has engaged the 2nd and 3rd defendants to tarmac the road in question. The applicant is not involved in the construction of the said road. It is also not disputed that the road is being constructed on the suit property which is private land owned by the plaintiff. Neither the defendants nor the applicant has any statutory or constitutional right over the said property. I am in agreement with the plaintiff that it has no cause of action against the applicant and as such was not under any obligation to join the applicant as a defendant in the suit.

The applicant has contended that the defendants have not defended the suit and that it should be added to the suit so that it may protect the public interest in the dispute. I have noted from the record that the 1st defendant has entered appearance and filed a statement of defence through the Attorney General. I am of the view that any public interest question arising in the suit would be protected by the Attorney General. It is not necessary therefore to add the applicant in the suit to protect the same interest. For the foregoing reasons, I am unable to see any legal connection between the applicant and the subject matter of the dispute herein or the issues in dispute between the parties. The applicant has not demonstrated that the outcome of this suit would affect its legal rights.

In the case of Deported Asians property Custodian Board vs. Jaffer Brothers Limited (1999)1E.A 55 (SCU) which was cited with approval in the case of Pravin Bowry vs. John Ward and another (2015) eKLR, the court stated among others that:-

“For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seeks in the suit, would legally affect the interest of that person, and that it is desirable, for avoidance of multiplicity of suits to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on application by a defendant) to be joined as a co-defendant where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

I have said enough to show that the applicant's application to be joined as a defendant in the suit has no merit. I do appreciate however that the road construction in dispute is being undertaken within the jurisdiction of the applicant and for that reason, although the applicant may have no legal interest in the dispute over the construction of the said road, it has a general interest in the outcome of the case due to the nature of the dispute. For that reason, I would allow the applicant to participate in the proceedings as an interested party rather than as a defendant.

The disposal of that application takes me to the second application which seeks the setting aside and

discharge of the orders that were issued by the court on 11th October, 2016 and confirmed on 8th November, 2016. Like in the first application, I find no merit in this application. As I have pointed out earlier in this ruling, the applicant has no interest in the dispute herein which concerns the plaintiff and the defendants. The orders complained of were issued against the defendants. The applicant has not pointed out in what manner the said orders have affected it. As I have pointed out, public interest in the case is well taken care of by the Attorney General who is appearing for the 1st defendant in the proceedings. I am in agreement with the submissions by the plaintiff that the applicant has no business seeking the setting aside of the orders that were not issued against it.

In any event, there is no cogent evidence that the court was misled into granting the said orders. It is also not contested that the road in question was being constructed on private property. Neither the defendants nor the applicant has given any justification for the construction of the said public road on private property. In my view, it would be an affront to the plaintiff's constitutional right not to have its property taken away arbitrarily without just compensation if the court was to discharge the orders in force and allow the defendants to continue with the construction of the said road on the suit property.

Conclusion:

The upshot of the foregoing is that the applicants' two applications dated 22nd May, 2017 are not for granting. The same are dismissed with costs to be in the cause. The applicant is however granted leave to participate in the suit as an interested party only subject to the direction of the court.

Delivered and Signed at Nairobi this 19th day of December 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Nzamba Kitonga	for the Plaintiff
Ms. Fatma	for the 1 st Defendant
N/A	for the 2 nd Defendant
N/A	for the 3 rd Defendant
Ms. Mulumba	for the Applicant
Catherine	Court Assistant