



Muiruri v Kenya Railways Corporation & another (Environment & Land Case E012 of 2021) [2024] KEELC 855 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E012 OF 2021
MAO ODENY, J
FEBRUARY 22, 2024**

BETWEEN

ZACHARIA GWIMI MUIRURI PLAINTIFF

AND

KENYA RAILWAYS CORPORATION 1ST DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY 2ND DEFENDANT

RULING

1. This ruling is in respect of a Chamber Summons dated 9th June 2023 by the 2nd Defendant/applicant seeking the following orders:
 - a. The suit against the 2nd defendant /applicant be struck out with costs.
 - b. The 2nd defendant/applicant be awarded the costs of this application.
2. The application was supported by the annexed affidavit of Kaminza Charles Zakayo counsel for the 2nd defendant who deponed that upon perusal of the amended plaint and the accompanying documents, he noted that they did not disclose any complaint against the 2nd defendant.
3. Counsel stated that paragraphs 3, 4, 4A, 5, 6, 7 and 8 of the Amended Plaint dealt with the issues of ownership of land parcel No's Njoro Jewathu/108B and plot No. 259 Njoro Site and Service and the subsequent paragraphs only dealt with an issue of trespass with regard to the 1st defendant.
4. It was counsel's further averment that the 2nd defendant stands to incur great financial loss as a consequence of defending a cause that discloses no reasonable cause of action and sought that the suit against it be struck out.
5. The 1st defendant filed a replying affidavit sworn by counsel George Kirumba Mbiyu where he deponed that the 2nd defendant was a necessary party to the proceedings as it was joined by the court suo moto



with the view of confirming whether the suit property is public land and whether the suit property can be accessed from the 1st defendant's operational corridor.

6. Counsel relied on Order 1 Rules 5 and 10 of the *Civil Procedure Rules*, and stated that the court has the power and discretion to add a party to the proceedings to enable it to completely adjudicate all questions in a suit.

2nd Defendant's Submissions

7. Counsel submitted on whether the suit against the 2nd defendant should be struck out with costs and relied on the cases of Independent *Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others* [2014] eKLR, *Stephen Onyango Achola & another vs Edward Honga Sule & another* [2004] eKLR and submitted that the issues raised in the plaintiff's amended plaint dated 4th March 2023 together with the 1st defendant's Statement of Defence dated 9th May 2023 do not require the presence of the 2nd defendant.
8. Counsel submitted that the issues raised in the pleadings revolve around the railway line reserve corridor which is the mandate of the 1st defendant. Mr. Kaminza submitted that Section 3 of the *Kenya Roads Act* restricts the duties of the 2nd defendant to issues of construction and maintenance of national highways and it does not prepare or keep records of part development plans as alleged by the 1st defendant.
9. Counsel submitted that if there were any such issues on part development plans, then the best person to aid the court in making a determination would be the County Physical and Land Use Director who is the custodian of part development plans.
10. Counsel urged the court to allow its chamber summons application dated 9th June 2023 as prayed.

1st Defendant's Submissions

11. Counsel for the 1st defendant submitted that on 7th February 2023 the court issued an order that the Kenya National Highways Authority be joined to the suit as the second defendant. It was his submissions that the plaintiffs were ordered to amend their plaint to include the 2nd defendant which they did.
12. Mr. Mutonyi relied on Order 1 rule 10(2), Order 8 rule 3 of the *Civil Procedure Rules*, the cases of *Joseph Njau Kingori vs Robert Maina Chege & 3 others* [2002] eKLR, *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended plaintiff)* [2022] eKLR and submitted that the court has the discretion to include any party deemed necessary to effectively adjudicate on all issues in the suit.
13. It was counsel's submissions that the 2nd defendant was a necessary party to the proceedings and urged the court to dismiss the 2nd defendant's application.
14. Counsel for the Plaintiff filed submissions in support of the 2nd Defendant's application save for the issue of costs. The Plaintiff submitted that it did not join the 2nd Defendant as a party to the suit.

Analysis and Determination

15. The issue for determination is whether the 2nd defendant should be struck out from the suit with costs.



16. Order 1 Rule 10(2) of the *Civil Procedure Rules* 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.”

17. It is the 2nd defendant’s contention that the amended plaint and the 1st defendant’s statement of defence do not disclose any cause of action against it therefore 2nd Defendant’s name should be struck off from the suit with costs.

18. In response, the 1st defendant argued that it was the court on its own motion that added the 2nd defendant as a party to the suit in order to determine whether the suit property is public land and whether it can be accessed from the 1st defendant’s operational corridor.

19. The court record shows that 1st defendant filed a surveyor’s report on 6th May 2021 whose findings were that the suit parcels Nos Njoro/Jewathu/108B and Plot No. 259 Njoro Site & Service encroached on a road reserve.

20. On 25th January 2022, the court was informed of the said findings and it ordered that Kenya Urban Roads Authority be joined to the suit as an interested party. On 7th February 2023, the court ordered for the joinder of the 2nd defendant where it stated as follows:

“Under Order 1 Rule 10(2) of the *Civil Procedure Rules*, the Kenya National Highways Authority is now joined as a substantive party, as the 2nd defendant in this suit. The plaintiff shall amend the plaint and on the basis of the disclosure and claims made by the defendants and the interested party so far, plead against KENHA accordingly. KENHA shall be at liberty to...the defence it has filed dated 3rd February 2020 or amend it. That defence, once the pleadings are closed, whether amended or not, shall be deemed to be the 2nd defendant’s defence in this matter...”

21. The 2nd defendant was joined to this suit by the court suo moto on 7th February 2023 whereby the plaintiff and the 2nd defendant were ordered to amend their pleadings. The plaintiffs amended their plaint on 23rd March 2023, and removed the interested party and on 21st November 2023, and subsequently the court ordered that the interested party be removed from the proceedings.

22. I notice that the Plaintiff’s amended plaint filed on 22nd March 2023 only has a claim against the 1st defendant. The plaintiff’s claim in the plaint is that the 1st defendant trespassed onto the suit property and marked the buildings thereon claiming that they had encroached onto its property. In response, the 1st defendant filed a surveyor’s report on 6th May 2021 which alleges that the suit properties have encroached onto a road reserve. Road reserves are under the mandate of the 2nd defendant.

23. Flowing from the above, it follows that even though the plaintiffs did not specifically plead against the 2nd defendant, the 2nd defendant is nonetheless a necessary party to the proceedings. Similarly, if the court were to remove the 2nd Defendant as a party to this suit, then it must be through a review or setting aside of the order that the court had issued on 7th February 2023. The court does not issue orders that have not been sought for.



24. If the Applicant had filed an application for review, then the court would have considered the issue of reviewing the order that joined it *suo moto*. That is not the case therefore; we cannot deal with it at this juncture.
25. The upshot is that the application dated 9th June 2023 lacks merit and is hereby dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF FEBRUARY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

