



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC NO. 171 OF 2012**

**JULIUS KAMURU MWANGI.....PLAINTIFF**

**VERSUS**

**PERMANENT SECRETARY MINISTRY OF DEFENCE.....1<sup>ST</sup> DEFENDANT**

**PERMANENT SECRETARY MINISTRY OF LANDS.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

The 3<sup>rd</sup> Defendant filed an application dated **5<sup>th</sup> September 2014** seeking an order that the leave be granted for the joinder of Nairobi City County Government as a Defendant to the suit and if so granted, the parties be at liberty to amend their pleadings.

The application is premised on grounds that the demolished buildings, the subject matter of this suit, were constructed with the approval of the City Council of Nairobi, which approval was not issued in consultation with the **Commandant Moi Air Base**. It is averred that City Council of Nairobi was the body charged with planning and therefore tasked with giving approvals for the construction of buildings within its jurisdiction but subject to approvals of the Moi Air Base Commandant for restricted areas. Consequently, that there is a proper question to be tried between the Plaintiff and the intended Defendant on the issue of liability.

The application was supported by an affidavit sworn by **Lt. Colonel Yvonne Kerubo Kirui** who deposed that **Moi Air Base** has a runway from which aircraft land, maneuver, and take off which demands that its surfaces be protected from obstacles. The deponent referred the Court to legislation of Obstacle Restriction and Removal as enforced by the Kenya Civil Aviation Authority and deposed that such protection enhances flight safety by avoiding catastrophic aircraft accidents involving crashing into vertical obstacles, such as buildings, and to prevent the aerodromes from being rendered unusable due to the rise of obstacles. The standards are achieved by establishing a series of obstacle limitation surfaces that define limits to which objects may project into the airspace.

The deponent stated that the construction erected by the Plaintiff was an obstacle that limited the use of the **Moi Air Base Eastleigh** aerodrome. Further, that the City Council of Nairobi allocated the Plaintiff the parcel of land, of land disregarding the fact that the parcel was in a restricted area and as a result, consultation with the Commandant was called for as any building would have the potential of infringing the efficient use of the airstrip. Failure by the City Council of Nairobi to inform the Plaintiff that its

approval was subject to approval from the Air Base was a mistake on its part and therefore the inclusion of the Council as a Defendant will help with the apportionment of liability against the parties found liable.

The Plaintiff filed Grounds of Opposition dated **1<sup>st</sup> December 2014**, wherein he averred that the application is an abuse of the court process as it is calculated to delay and distract expedient dispensation of justice. Further, that the application has been brought late in the day, the Plaintiff and one witness having already testified. The Plaintiff averred that there was no display in the Defendants' affidavits of the form or procedure for obtaining approval from the Commandant or evidence to demonstrate that there is a practice of granting such approvals.

The application was further canvassed by way of written submissions. Litigation Counsel on behalf of the Defendants filed submissions dated **8<sup>th</sup> December 2014** wherein he recapped the Defendants' deposition that the approval of the Commandant of the Air Base was necessary in view of the close proximity of the property to the Base. It was submitted by counsel that it was proper for the County Government to be joined to enable the Court effectively adjudicate on the issue of liability.

**Maina, Njuguna & Associates** for the Plaintiff filed submissions dated **16<sup>th</sup> December 2014** wherein counsel submitted that the application was fundamentally defective having been filed under **Order 1 Rule 14** which provides for joinder before trial whereas trial had already commenced. Counsel urged the court to decline to exercise its discretion in favour of the Defendants for being indolent in filing the application and doing so with the intention of distracting the expedient dispensation of justice.

The Defendants seek an order for joinder of the Nairobi County Government as a Defendant in the suit on the ground that being the body responsible for planning, its predecessor (**City Council of Nairobi**) failed to notify the Plaintiff that its approval for construction was subject to that of the **Commandant Moi Air Base** due to the proximity of the property to the aerodrome. This application has been brought under **Order 1 Rule 14** and **Order 24 Rule 4** of the **Civil Procedure Rules**, which the Plaintiff avers are wrong provisions of the law and therefore the application, is defective. It is indeed true that **Order 1 Rule 14** makes provision for joinder any time before trial whereas **Order 24 Rule 4** provides for the procedure in case of death of one of several defendants or of sole defendant. It is my view, and I do so find, that citing a wrong provision of the law is a procedural technicality which this court has been directed not to pay due regard in administering justice. I see no prejudice occasioned to the Plaintiff considering the substratum of the application is clearly understood.

The issue for determination is joinder of the Nairobi City County Government as a Defendant in view of two aspects, first, it is the Defendants who have brought the application and secondly, trial has already commenced. **Order 1 Rule 10(2) of the Civil Procedure Rules** provides as follows:

**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.**  
**(Emphasis added).**

From the foregoing provision, it is clear that the Court has discretion to order joinder of a party at any stage of the proceedings and secondly, either party can make an application for joinder. The provision further demands of this court to grant such an order on such terms as may be just. In essence, the Court is called upon to exercise its discretion judicially in determining an application such as this.

The circumstances of this case are such that the Plaintiff obtained approval from the City Council of Nairobi to erect a 3 storeyed building comprising residential units. The Plaintiff charged his property to Housing Finance Ltd to secure a facility for the development. The Plaintiff's building was demolished at the instance of the 1<sup>st</sup> Defendant on grounds that the structure put up by the Plaintiff was an obstacle to

the flight path hindering take-off and landing of aircrafts. The 1<sup>st</sup> Defendant also claims that its consent was not sought by the Plaintiffs in approving the buildings in view of the proximity of the property to the aerodrome. It is this for this reason that the Defendants pray that the County Government of Nairobi be joined to the suit. The Defendants contend that its predecessor, the City Council failed to notify the Plaintiff that its approval was subject to that of the Commandant of the Air Base.

Having considered the ground adduced by the Defendants, I do find that the application is one of merit. Joinder of the County Government will assist the court effectually and completely to adjudicate upon the dispute. Indeed the application has been made late in the day noting that the Plaintiff and one witness have already testified. Thus, the only prejudice occasioned to the Plaintiff is delay, which in my view, can be compensated by costs. It will also be just for this court to allow the Plaintiff to give further evidence, if need be, in view of the joinder of Nairobi City County Government.

The orders of the Court are therefore as follows:

- 1. The Nairobi City County Government is hereby joined to the suit as a 4<sup>th</sup> Defendant and is directed to enter appearance and file a Defence, witness statements and supporting documents within 21 days from the date of this ruling.***
- 2. The Defendants to serve the 4<sup>th</sup> Defendant with all the pleadings and documents on record.***
- 3. The parties be at liberty to amend their pleadings.***
- 4. The Defendants shall bear the costs of the application.***

Dated, Signed and Delivered this 21<sup>st</sup> day of **May** 2015

**L. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff

.....For the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

..... Court Clerk

**L.GACHERU**

**JUDGE**