



**Shah & another v Attorney General; Ethics and Anti - Corruption Commission (Proposed Interested Party) (Environment & Land Case 110 of 2014) [2015] KEELC 854 (KLR) (1 October 2015) (Ruling)**

*Khilan Chandulal Shah & another v Attorney General Proposed Interested Party Commission [2015] eKLR*

Neutral citation: [2015] KEELC 854 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 110 OF 2014**

**L WAITHAKA, J  
OCTOBER 1, 2015**

**BETWEEN**

**KHILAN CHANDULAL SHAH ..... 1<sup>ST</sup> PLAINTIFF**

**SHUSHILABEN W/O CHANDULAL SHAH ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ATTORNEY GENERAL ..... DEFENDANT**

**AND**

**ETHICS AND ANTI - CORRUPTION COMMISSION .... PROPOSED  
INTERESTED PARTY**

**RULING**

**Introduction**

1. By a plaint dated 27<sup>th</sup> May, 2014 the plaintiffs instituted this suit against the defendant, the Hon. Attorney General of the Republic of Kenya, seeking judgment against the defendant for:-
  - a) An order barring the County Housing Officer, the County Commissioner or any of them from interfering with their possession, occupation and use of the property known as L.R NO. Nyeri Municipality Block 1/1066;
  - b) An order directing the defendant to grant them access to the suit property comprised in the title Nyeri Municipality Block 1/1066;
  - c) An order barring the defendant from acquiring the suit property from the plaintiff;



- d) Damages for trespass
  - e) Aggravated, exemplary and punitive damages
  - f) Such further or other orders as this court may deem just to grant.
2. The plaintiff's claim against the defendant is that whereas they are the registered owners of the parcels of land Known as L.R No.Nyeri Municipality /Block 1/1066 having been registered as such on 16<sup>th</sup> May, 1996, on or about 25<sup>th</sup> May, 2012 the District Housing Officer Nyeri, his agents, servants, and/or employees accompanied by Administration police officers trespassed upon the said property, removed the fence and uprooted the hedge forming part of the boundary of the suit property and forcefully evicted the employees and placed their own fence.
  3. Contending that they are innocent purchasers of the suit property, the plaintiffs point out that the proposed interested party (Ethics and Anti-Corruption Commission) has placed a restriction on the title pending investigations.

**Application by proposed interested party:**

4. By chamber summons dated 5<sup>th</sup> November, 2014 the proposed interested party moved this court seeking to be enjoined in the suit as an interested party.
5. The proposed interested party explains that in pursuance of its mandate under the *Anti-Corruption and Economic Crimes Act*, 2003, it is investigating allegations that L.R No. Nyeri Municipality/Block 1/1066 was fraudulently, illegally and or otherwise unlawfully allocated to the plaintiffs.
6. The proposed interested party contends that the suit property was hived off the compound for the government house HG 57 also known as “the judiciary compound” along ring road within Nyeri Town; that it has learnt that the plaintiff has filed the current suit seeking to, inter alia, restrain the state from claiming ownership of the suit property. Explaining that the current proceedings have an impact on its mandate and it's desirous of filing a replying affidavit, to assist the court in arriving at a just determination in this matter, the proposed interested party contends that it is a proper and/or necessary party in these proceedings.
7. The application is supported by the affidavit of one MohamedBoru, an investigator with the proposed interested party, in which the grounds on the face of the application are reiterated. Annexed to the supporting affidavit are:-

MB I-II;MB I-IV;MB-3;MB-4;MB-5 I-II.PARAGRAPH 8.

In reply and opposition to the application, the plaintiffs filed grounds of opposition dated 4<sup>th</sup> December, 2014 where they term the application an afterthought and contend that it has been filed in bad faith; that the applicant has no locus standi in the suit; that the issues the proposed interested party wishes to raise have already been conclusively dealt with by the Ndungu report. 9. Terming the application incurably defective, lacking in merit and intended to prejudice the plaintiffs' claim against the defendant the plaintiffs urge the court to dismiss it with costs.

10. When the application came up for hearing, Counsel for the applicant M/SFaith Ngethe based on the grounds on the face of the application and averments contained in the affidavit sworn in support of the application, submitted that the interested party is a necessary party in this suit because the orders sought will affect the interested party's mandate. Concerning the grounds of opposition filed by the plaintiffs/respondents, she submitted that the interested party has a mandate to carry out investigations into any property suspected to have been illegally acquired.



11. With regard to the contention that the Ndungu report conclusively dealt with the suit property, she submitted that the report did not bar the interested party from executing its mandate.
12. Maintaining that the application is grounded in law, she submitted that the issues raised in it should be adjudicated upon in a substantive suit.
13. Counsel for the defendant, Mr. Makori associated himself with the submissions by counsel for the applicant and added that paragraph 8 of the plaint makes the proposed interested party a critical party to the suit.
14. Pointing out that the interested party is a Government body, Mr. Makori submitted that adding it to the suit will facilitate it in discharge of its legal mandate.
15. Concerning reference to the Ndungu report, he submitted that the report can only be evaluated after the application is allowed. He further submitted that public interest in this matter tilts in favour of allowing the application.
16. Counsel for the plaintiffs/respondents, Mr. Nyagoro, reiterated the contention that the issues sought to be addressed by the interested party were conclusively dealt with in the Ndungu report. He maintained that the interested party has no locus to be enjoined in the suit because the defendant can take care of its interest.
17. Maintaining that the plaintiffs are innocent purchasers of the suit property without notice and that they are not under investigation, Mr. Nyagoro maintained that the issue raised in this case is trespass to land.
18. Mr. Nyangoro further submitted that the applicant's application is defective for having been brought by way of a chamber summons as opposed to a notice of motion.
19. In a rejoinder, M/S Ngethe maintained that the interested party has locus standi in the matter. In this regard she referred to Section 2 of the *Anti-Corruption and Economic Crimes Act, 2003*.
20. Concerning the contention that it is only the National Land Commission (NLC) which has mandate to carry out investigations into the impugned title with a view of revoking it, she submitted that NLC is an independent Commission whose role is not in conflict with that of the interested party. She pointed out that the interested party has mandate to file suits for recovery of Government assets.
21. With regard to the contention that the application ought to have been brought by way of notice of motion and not chamber summons M/S Ngethe submitted that the plaintiffs' counsel misdirected himself on that issue.

### **The Law applicable:**

22. The law on joinder is found in Order 1 Rule 1, 3 and 8 of the Civil Procedure Rules which provide as follows:-
  - “(1). All persons may be enjoined as plaintiffs in whom any right to relief in respect or arising out of the same act or transactions is alleged to exist whether jointly, severally or in alternative where, if such persons brought separate suits any common question of law or fact would arise.”
  - (3). 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.”

“(8)

- (1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
- (2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.
- (3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.”

23. Order 1 Rule 14 on the other hand, provides for the procedure of enjoining parties to a suit or removing them from the suit. The rule provides as follows:-

“An application to add or strike out or substitute a plaintiff may be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner.”

24. Contrary to the contention by the plaintiffs’ counsel that an application for joinder has to be made by way of notice of motion, it is clear from Rule 14 aforementioned, that such an application has to be made by chamber summons or orally at the trial of the suit.

25. The factors which the court considers in an application for joinder are those set out in Order 1 Rule 1 that is- existence of any right to relief in respect or arising out of the same act or series of acts or transactions alleged to exist whether jointly, severally or in alternative where, if such persons brought separate suits any common question of law or fact would arise.

26. In this application, although the plaintiffs contend that the interested party has no locus standi in the matter, the subject matter of the suit being property that is suspected to have been unlawfully acquired, I entertain no doubt that the proposed Ethics and Anti-Corruption Act, 2011 has sufficient interest in the matter. See Section 11 of the aforementioned Act which provides as follows:-

- “(11) In addition to the functions of the Commission under Article 252 and
- (1) Chapter Six of the *Constitution*, the Commission shall-
  - (j) institute and conduct proceedings in court for purposes of recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.”



27. The issue as to whether or not the proposed interested party has an interest in these proceedings is also discernable from the plaint at paragraph 8 where the plaintiffs have deposed as follows:-

“That the Ethics and Anti-Corruption Commission has placed a restriction pending investigation on 8<sup>th</sup> February, 2012.”

28. It is my considered view that the restriction against dealings with the suit property placed by the proposed interested party cannot lawfully be removed without according the proposed interested party an opportunity to be heard on it. In fact under Order 1 Rule 8 aforementioned, the plaintiffs ought to have given a notice to the proposed interested party in the manner provided in sub rule 2 thereof.

29. Since the plaintiffs’ in this suit seek to prevent the defendant from, inter alia, acquiring the suit property from them on behalf of the Government, yet it is alleged to have been Government property that was irregularly or unlawfully alienated to them, I am convinced that the issues raised in the suit touch on the mandate of the proposed interested party. That being the case, the proposed interested party is a necessary party for the purpose of assisting the court to conclusively deal with the matter.

30. The contention by the plaintiffs’ counsel that the issues to be raised by the proposed interested party were conclusively dealt by the Ndungu report or that the plaintiffs are innocent purchasers for value can only be raised during hearing of the case. I say so because the Ndungu report did not make a decision on the issue which is binding on this court or which impacted negatively on the mandate of the proposed interested party. Moreover, I am not convinced that the plaintiffs stand to suffer any prejudice if the proposed interested party is allowed to join these proceedings.

31. The upshot of the foregoing is that the application by the proposed interested party has merit and is allowed as prayed. However, since Order 1 of the Civil Procedure Rules recognizes parties to a suit as either plaintiffs, defendants or third parties I will allow the interested party to join the suit not as an interested party but as a defendant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 1ST DAY OF OCTOBER, 2015.**

**L N WAITHAKA**

**JUDGE.**

In the presence of:

N/A for the plaintiff

Mr. Muthuri h/b for mr. Kakori for the defendant

Ms. Ngetha for the interested party

Court assistant - Lydia

