



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 273 OF 2013

JOSEPH LEBOO & 2 OTHERS.....PLAINTIFFS

VS

DIRECTOR KENYA FOREST SERVICES & ANOTHER.....DEFENDANTS

(Applications seeking joinder to the suit as defendants or interested parties; principles upon which the court will consider such application; suit by plaintiff alleging that the Kenya Forest Service has not followed the law in allowing the harvesting of trees; applicants being saw millers who are the persons licenced by the Kenya Forest Service; whether applicants need to be enjoined as defendants to the suit; whether applicants qualify to be interested parties)

RULING

I have before me two applications seeking fairly similar orders.

The first application is dated 16 May 2013 and is filed by five persons namely Benard Gitau Kimani, John Wakaba, Eric Kinyua, John Koskei and the Timber Manufacturers Association. The first four persons are officials of the Timber Manufacturers Associations which is a society registered under the Societies Act. It is brought under the provisions of Order 1 Rule 3 and 15 of the Civil Procedure Rules, and Sections 3A, 1A and 1B of the Civil Procedure Act.

The second application is dated 21 May 2013 and is filed by Comply Limited. It is brought under the provisions of Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act, and all other enabling provisions of the law.

The applicants in both of these applications seek to be enjoined in these proceedings as they claim to have an interest in this suit.

These proceedings were commenced by way of plaint filed on the 7 May 2013. The plaintiffs reside in Baringo County and are committee members of the Lembus Council of Elders. The 1st defendant is the Director of Kenya Forest Services whereas the 2nd defendant is the Forest Co-Ordinator of Baringo County. It is pleaded that in the month of March 2012 the defendants allocated pre-qualified and unqualified saw millers to harvest timber and firewood in 8 Blocks of the Lembus Forest within Baringo County. These eight blocks are Sabatia, Maji Mazuri, Kiptuget, Chemususu, Naivasha, Koibatek, Chemurgok and Esegeri.

It is contended that the defendants made the allocation without following the laid down procedures as per the Forest Participation in Sustainable Management Rules, 2009 and the Forest Act. It is pleaded that the

said saw millers have entered and started harvesting unspecified trees which are not marked for harvesting. It is further averred that the said harvesting is being done without a management plan being put in place as per the Forest Act, 2005.

The plaintiffs claim that the Lembus Council of Elders were never consulted and are not being involved as required by law. It is contended that the community is in charge of maintaining the forests and is supposed to share in the proceeds of the said forests yet they have been left out.

In their prayers, the plaintiffs want the defendants and/or their agents permanently restrained from the illegal and irregular harvesting. The plaintiffs also seek the illegal allocation nullified.

Alongside the plaint, the plaintiffs filed an application seeking to restrain the defendants or anybody claiming through them from harvesting timber and fuel materials out of the 8 Blocks of forests. I granted interim orders on 7 May 2013 and stopped the defendants or anybody claiming to have been authorized by the defendants from felling trees, harvesting timber or wood fuel or removing any felled timber from the 8 forest blocks.

The applicants feel affected by the order and by the prayers sought in this suit hence the applications for joinder.

In his submissions, Mr. Mongeri for the Timber Manufacturers Association stated that the Association wishes to be enjoined to these proceedings as interested parties, although in his closing statement he seemed to change his mind, and stated that the Association now wished to be joined as defendant, so as to actively participate in the proceedings.

On the application by Comply Limited, the body of its application seeks an order to be enjoined as an interested party. So too does the supporting affidavit of Nitesh Mehta a director of Comply Ltd. In his submissions, Mr. Kurgat seemed to depart from the prayers in the application and sought Comply Ltd to be enjoined as a defendant to this suit. He pointed me to part of the pleadings in the plaint which allege that there is harvesting of timber which is not marked for harvesting and averred that his client will be condemned unheard.

Miss E.C Rotich for the plaintiffs opposed the application. She opposed any proposed joinder of the applicants as defendants as in her view, the applicants are agents of the defendants and whatever grievances they have can adequately be addressed by the present defendants. She stated that the plaintiffs have no issue with the applicants; their grievance being whether proper procedure has been followed by the defendants in licencing the applicants. She however had no problem with the applicants being joined as interested parties and "spectate" in the proceedings.

I have considered the applications. The prayer sought in the application by the Timber Manufacturers Association is for leave to be enjoined to these proceedings. As I said earlier, the application is brought under the provisions of Order 1 Rules 3 and 15. The application as drafted does not disclose whether the Association wants to be enjoined as an interested party or as a defendant. The provisions of Order 1 Rules 3 and 15 under which the application is brought provide as follows :-

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.

15.(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-

matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.

(3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.

(4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions "third party notice" and "third party" shall respectively apply to and include every notice so issued and every person served with such notice.

(5) Where a person served with a notice by a third party under subrule (4) makes such a claim as is mentioned in subrule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule.

Straight away, it will be seen that the provisions of Order 1 Rule 15 relate to third party proceedings. They cover situations in which a defendant seeks to claim against another person who is not a party to the proceedings. Order 1 Rule 15 cannot be applicable to the situation that the Timber Manufacturers Association finds itself.

Order 1 Rule 3 relates to joinder of persons as defendants. In my view the provisions of Rule 3 are an instruction to persons who wish to file suits and passes the information that the plaintiff is at liberty to join several persons as defendants so as to avoid a multiplicity of suits.

The application by Comply Limited only cited the general discretionary powers of the court under Section 3A of the Civil Procedure Act (CAP 21). Laws of Kenya.

I do not think, that the applications herein can be considered under the provisions of Order 1 Rule 3 or 15. Probably the closest legal provision is Order 1 Rule 10 (2) which provides as follows :-

Rule 10 (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.

It will be discerned that the court has discretion to order the name of a person who ought to be enjoined whether as plaintiff or defendant, or whose presence before the court may be necessary, to enable the court effectually and completely adjudicate upon the matter and settle all questions involved in the said

suits. There is clear wording for a person to be enjoined as plaintiff or defendant, but there is no clear wording for a person to be enjoined as an interested party. However, the words "*whose presence before the court may be necessary to enable the court effectually and completely to adjudicate upon...*" may be deemed to cover persons interested in the subject matter of the suit. There is therefore no bar to the joinder of an interested party to a suit although the rules are not very explicit. As was stated in the case of ***Supermarine Handling Services Ltd vs Commissioner General, Kenya Revenue Authority (2002) 2 KLR 758***, it is probably time, that the procedure for applying to be joined as an interested party to proceedings, be given more consideration. An interested party is not a litigant per-se as he is neither a plaintiff nor defendant.

The question herein is whether the applicants ought to be enjoined as defendants or as interested parties.

I think courts need to be careful before making an order for a person to be joined as a defendant where the application for that joinder is not emanating from the plaintiff. This is so as to avoid thrusting upon the plaintiff a party against whom the plaintiff does not intend to sue, or the plaintiff feels he has no cause of action against, or even if he does, has opted not to pursue the action. It is important, unless there will be great prejudice to an existing party, or a clear lacunae in the proceedings, for courts not to seem to be choosing a defendant for the plaintiff to sue. This is because the choice of whom to sue is that of the plaintiff and there may be cogent reasons as to why a litigant has opted not to sue some other persons. Even, in the absence of any reason, the choice to sue ought to be left to the litigant, and this choice ought not to be disturbed without the presence of compelling reasons. Joining a defendant to the proceedings on an application which is not coming from the plaintiff, may also compel the plaintiff to pursue a cause of action that the plaintiff, for his own reasons, or lack of any, of which there is perfect freedom, the plaintiff has opted not to pursue.

Where there is an application for a person to be joined as defendant, and the plaintiff objects to such joinder, the court should even be more cautious before making an order for such joinder. It ought to be clear that the remedy sought by the plaintiff in the proceedings, actually ought to be directed against the party sought to be enjoined, or that the remedy the plaintiff seeks cannot be granted, or the proceedings cannot be properly conducted without the person sought to be enjoined being a party.

In this suit, it is the case of the plaintiffs that the defendants have not followed proper procedure according to the Forest Act and the Rules thereunder in licencing and in the harvesting of trees. The applicants herein are not among the entities empowered by statute to grant licences for the harvesting of trees. They are beneficiaries of the licences, but the onus of ensuring that the licences are properly issued, or that it is the correct trees that are harvested, is not that of the applicants. The cause of action by the plaintiffs is that the entities which are empowered to grant licences have flouted the law. The applicants cannot in my view answer the question whether the entity empowered to issue licences has complied with the law. They cannot be called to answer for the entity so empowered. It is the onus of the entity granted power under the law to provide the answer to that question. If the entity wants assistance from any quarter, including from the interested parties, it is free to seek help, but in so far as answering the question is concerned, that burden is not the burden of the applicants. Even the question whether the trees being felled are not those earmarked for felling, is a question to be answered by the entity that is bound to ensure that only the proper trees are felled. Those entities comprise the defendants herein.

In my view there is no remedy that the plaintiff seeks from the applicants. I am unable to thrust upon the plaintiffs a cause of action that they feel they do not have, or do not intend to pursue. Neither am I, in the circumstances of this case, prepared to thrust upon the plaintiffs, parties that the plaintiffs feel have no cause of action against. The applicants in my view are not necessary parties to be enjoined as defendants. For these reasons I decline to allow a joinder of the applicants as defendants to this suit.

Can the applicants be enjoined as interested parties ?

In my view, the joinder of a person as an interested party ought not to be as stringent as the joinder of a person as a defendant. So long as a person can demonstrate that he has a legitimate interest in the subject matter, there is little reason to deny such person a joinder as an interested party. However, this does not

mean that the test for joinder ought to be so low so that any busy-body can squeeze himself into a suit as an interested party. There should be a clear demonstration that the suit affects the person directly. If the test is too liberal, then courts will be inundated by numerous applications for joinder, for suits inevitably affect more than just the litigants. The applicant must in my view demonstrate a direct interest in the subject matter, or show that the questions in the suit cannot be determined adequately without his input, even where he is not strictly plaintiff or defendant. An interested party is of course not a plaintiff and neither is he a defendant. He only has a direct interest in the subject matter of the suit.

There is no question, that the applicants herein are interested in the subject matter of the suit. The orders sought in this suit will affect them, although it is not them who are bound to answer the questions arising in this suit. They have some knowledge which may assist the court in dealing with the matters in controversy. They can in my view be enjoined as interested parties. How far they can be involved in the subject matter is the other issue.

I have not come across an authority that has properly defined how involved an interested party ought to get in the proceedings. Can he file applications for consideration, or affidavits in reply to applications filed by the actual litigants ? Can he make submissions in favor or against either party ? Can he call forth evidence in favor or against either party ? Or does he merely spectate as the battle between the litigants unfolds ? These questions are nowhere answered in the rules. His position in the suit is ambiguous, nebulous and undefined by the rules. He is like a mutt, an animal that can clearly be seen as belonging to a specific species, but which belongs to no single organizationally recognized breed.

But there is no question that an interested party is not the actual litigant; as I have stated before, he is neither plaintiff nor defendant. If he wants actual remedies, then he ought to be enjoined as a party or he ought to file his own suit.

Since there are no defined rules as to how involved in the litigation an interested party can be, I think it falls upon the discretion of the court to define the parameters of involvement of the interested party. This will of course depend on the circumstances of each case. The involvement can be by leave sought by the interested party or as granted by the court in its discretion, even without leave being actively sought. The court has a duty to guide the involvement of the interested party in every step so that the interested party does not now end up being a litigant, for which different rules must apply.

For the circumstances of this matter, I reserve the discretion to issue directions as to how involved the interested parties may be in this matter.

For the above reasons, I allow the applicants to be enjoined as interested parties. How far they may be involved will be subject to my directions, but they will be free to seek leave in the event that they wish to file documents or make submissions.

I make no orders as to costs.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Miss E.C. Rotich present for the plaintiff/Respondent

Mr. E.K. Maritim present for the defendants

Mr. E.O. Miyenda holding brief for Mr. Mongeri and Mr. Kurgat for the applicants