



Mwangi v Indigo Universe Supply Limited & another; Equity Bank Kenya Limited (Intended Third Party) (Environmental and Land Originating Summons E020 of 2023) [2024] KEELC 3316 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 3316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E020 OF 2023**

**JA MOGENI, J
MARCH 20, 2024**

BETWEEN

JULIA WANJIRU MWANGI PLAINTIFF

AND

INDIGO UNIVERSE SUPPLY LIMITED 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

AND

EQUITY BANK KENYA LIMITED INTENDED THIRD PARTY

RULING

1. The application for determination before me is essentially one of joinder, with the 1st defendant/ applicant – Indigo Universe Supply Limited – seeking to enjoin Intended Third Party/Defendant, Equity Bank Kenya Limited as a new party in the suit. The application is a motion on notice expressed to be brought under Sections 1A, 1B, 3A of *Civil Procedure Act*, Order 1 Rule 15 and Order 37 Rule 3 of the Civil Procedure Rules and all other enabling legislations.
2. The application is seeking for orders that Equity Bank Kenya Limited be joined in this suit as the Third Party/Defendant. The Application is supported by the grounds set out in the face of it together with the Supporting Affidavit of Moses Michira, the General Manager of Indigo Universe Supply Limited, the 1st Defendant herein, sworn on 11/12/2023 in which he averred that he charged the suit property with the Interested Party, Equity Bank of Kenya Limited charged for a sum of Ksh 17,000,000 yet the plaintiff/respondent has filed an originating summons seeking to be declared the owner of the suit property.



3. In the affidavit he avers that due to the charge the interested party is a central player in the 1st defendant's claim in this suit and that as such joinder is absolutely necessary to effectually and completely adjudicate on the issues in controversy herein.
4. The notice of motion as filed seeks the following prayers:
 - a. Spent
 - b. The honorable court do grant leave to the defendant to enjoin M/S Equity Bank Limited as a co-defendant in this suit
 - c. That pursuant to the grant of order (b) above the said Equity Bank of Kenya Limited do file its pleadings in answer to the plaintiff's claim within 14 days of service of this order
 - d. In the alternative the honorable court do grant the defendant leave to enjoin M/S Equity Bank Limited as a third party in respect of this suit
 - e. The honorable court do grant leave to the defendant to issue a 3rd party notice and further direct the timely manner of service of the third party notice on the said M/S Equity Bank Kenya Limited.
 - f. The honorable court do issue directions on the mode and manner of dispensation of 3rd party proceedings herein.
 - g. Costs be provided for.
5. The justification for the application is said to consist in the fact that the proposed 1st defendant/applicant took a loan facility granted by the intended defendant/third party that is at risk of default if the orders sought are not granted. Further that the plaintiff/respondent has started collecting rent from the tenants after the court issued an order of injunction against the defendant who claims to have purchased the suit property, LR 9042/785 IR 72111 vide an auction that was held on the 17/08/2021 and that the 1st defendant is the registered proprietor of the suit property.
6. Further that the intended third party/defendant shall in view of the facts in the instant suit indemnify the defendant against any claim as against it.
7. The Plaintiff/Respondent, opposed the application vide a replying affidavit dated 25/01/2023 through an affidavit sworn by Julia Wanjiru Mwangi on even date. According to him, the application is

“frivolous, filed as an afterthought, bad in law.....a waste of court's precious time...and filed in very bad faith...joinder of intended third party/defendant is of no probative value, seeking indemnity from third partyapplicant has not come to court with clean hands” Its aim was said to be “ seeks indemnity as if pre-empting outcome of matter in court, grounds upon which application is premised indicates a commercial claim where this court has no jurisdiction, further delaying the hearing of the main suit.” And the 1st defendant/applicant wants to cause delay because “he is afraid that the plaintiff's suit will succeed”.
8. The proposed third defendant was said to have charged the property that the 1st defendant allegedly bought by public auction but the plaintiff avers that the disputes are distinctly different and enjoining the intended interested party and third defendant will serve the purpose of clogging the system.
9. That the suit before the court is about adverse possession but the 1st defendant's claim is a commercial transaction in nature which is marred with irregularities and would best be settled in a commercial court. The court was thus asked to dismiss the application.



10. The application was canvassed by way of written submissions. The plaintiff's submissions were dated 5/02/2024. She re-submitted, inter alia, that the issues between the 1st defendant and the intended 3rd party/Defendant would be of a commercial nature since after the alleged purchase of the house by public auction the intended 3rd party/Defendant processed a loan facility of Ksh 17,000,000 to the 1st defendant. The application is therefore premised upon the 1st defendant seeking to be indemnified by the intended 3rd party and this is not a matter where this court has jurisdiction.
11. He has submitted that the 1st defendant has not placed any evidence before the court to show that he owns the suit property. That the 1st defendant claims that the suit property was owned by one Jackson Mwangi who defaulted in servicing his loan which led to the suit property being sold by public auction which sold to the 1st defendant.
12. Coincidentally though the plaintiff has submitted that the said Jackson Mwangi has written notices to vacate to the tenants including the plaintiff claiming to the owner of the suit property that was sold by public auction. A copy of the notice was annexed to the Replying Affidavit as "JW01".
13. The plaintiff has submitted that he has no dealings with 3rd Intended Party/Defendant which would require them to be enjoined to the suit to shade light. Further that the 1st defendant failed to file a supplementary affidavit to rebut the averments of the plaintiff leaving all the averments unrebutted. On which the application is anchored empowers the court to do justice without undue regard to procedural technicalities. The submissions then went on to highlight the salient aspects of both the application and the response made to it.

Analysis and Determination

14. I have considered the application, the response made, the submissions made by the plaintiff and decided case law. As the application is one of joinder and/or amendment of the pleadings, I have also had a look into the pleadings. Joinder of parties is governed by Order I, rule 10 (2) of the Civil Procedure Rules, 2010. It should be allowed in all situations where common questions of law or facts may arise. It may also be allowed where the subject matter is the same. For the court, it is essentially a matter of discretion. Sometimes, joinder can even be ordered by the court SUO MOTO.
15. The issues I believe emerge for determination are as follows;
 - a. Whether this court has jurisdiction to hear and determine this application.
 - b. Whether the Applicant is deserving of the orders sought through the application.
16. Article 162(2) (b) of *the Constitution* empowers Parliament to "establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land." In this regard and pursuant to Article 162(3) or *the Constitution*, Parliament enacted the *Environment and Land Court Act*, Act No. 19 of 2011.
17. Section 13 of the *Environment and Land Court Act* outlines the jurisdiction of the Environment and Land Courts as follows:-
 1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 2. In exercise of its jurisdiction under Article 162 (2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes-



- a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. Relating to compulsory acquisition of land;
 - c. Relating to land administration and management;
 - d. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. Any other dispute relating to environment and land.
18. The locus classicus case on the question of jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1 where the Court stated that:-
- “Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
19. Jurisdiction is the power of the court to hear and determine a matter and without it, the court cannot proceed. Jurisdiction flows from *the Constitution* or statute or both and a court cannot apply judicial craft or innovation to arrogate itself jurisdiction that it does not have. See the Supreme Court decision in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & Another [2012] eKLR, Paragraph 68.
20. The jurisdiction of this court is set out in Article 162 (2) (b) of *the Constitution* as well as Section 13 of the *Environment and Land Court Act*. Article 162 (2) (b) of *the Constitution* provides as follows;
1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in Clause 2.
 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:
 - a.
 - b. The Environment and the use and occupation of and title to, land.
21. Section 13 of the *Environment and Land Court Act* No. 19 of 2011 provides for the jurisdiction of the court as follows;1.The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.2.In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the court shall have power to hear and determine disputes a).relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; b).relating to compulsory acquisition of land; c).relating to land administration and management; d).relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and e).any other dispute relating to environment and land.
22. Part VII of the *Land Act* (Sections 78 to 106) provides for charges and all matters appurtenant thereto and the jurisdiction of the court in respect of the matters that arise in respect thereto. These include the



- power of the court under Section 104 to grant remedies and reliefs to the chargor or chargee, and the court's power to re-open certain charges and revise terms thereof under Section 106 of the Land Act.
23. It is therefore my considered view that since the Land Act which provides for charges defines the court as the ELC, therefor this court has jurisdiction to try matters touching on charges.
 24. Thus, I observe that matters touching on charges are both matters touching on interest in land and as they involve the lending and borrowing of funds, they are also commercial matters, like in this case. Therefore, these matters may be heard before this court or the High Court. Thus, this court has jurisdiction to hear the instant matter.
 25. On the second issue whether the applicant is entitled to the prayers sought. I will relook at what the law says about joinder and judicial decisions made in this area especially for an interested party who may as well be a defendant.
 26. The role and place of an interested party was well articulated in the case of Marigat Group Ranch & 3 others – Versus - Wesley Chepkoimant & 19 others [2014] eKLR where the court held the view that:-

“For purposes of one who wants to be enjoined as an interested party, I think, that such person needs to fit himself into the catch words “whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit...”
 27. In the same case the court relied with approval on the case of Joseph Leboo – Versus - Director, Kenya Forest Service & Others (Eldoret ELC No 273 of 2013), wherein the following appears:

“It should be appreciated that an interested party is not strictly plaintiff or defendant. The contest in a suit is between plaintiff and defendant and if any person has a claim over the subject matter, then such party needs to apply to be enjoined and considered as plaintiff or defendant, and not as interested party. An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it.....” “It follows therefore that applications seeking to join proceedings as interested parties ought to be handled with caution so that a person does not come to a suit, disguised as an interested party, while all along he/she wishes to agitate rights of his/her own over the subject matter of the suit.”
 28. The court would normally consider the function meant to be served by joinder. In order to do this, it considers whether the legal and factual issues arising in a matter can effectively be handled together. It also considers the possible relations of the parties to the issues. Where issues and parties overlap or become inseparably linked, joinder will normally be allowed so that the process of trial can be more efficient and fair. This helps the court avoid hearing the same facts or legal issues multiple times over. It also ensures that parties do not return to court separately for each of their legal disputes.
 29. Joinder necessarily occasions amendments. And like in the case of joinder, the court has a wide discretion to allow amendment to determine the real question in dispute. The aim is always to do substantial justice. Amendment can be sought at any stage but within reasonable time. The only thing to consider is whether costs can compensate the other side. The circumstances under which joinder or amendments can be allowed are wide and varied and each case should depend on its own facts.
 30. In all cases however, joinder or amendments should be sought in good faith. The court will decline to allow joinder or amendment if the end result will be abuse of the court process or, as pointed out by the plaintiff, the proposed joinder or amendment is immaterial, useless or merely technical. It will also



decline if allowing it will work serious injustice to the other side. But a caution needs to be sounded: an injury that can be compensated by way of costs is not treated as an injustice. The predisposing concern of the court should be to avoid multiplicity of proceedings and any joinder or amendment meant to avoid such multiplicity should be allowed.

31. The facts of this case are that the 1st defendant claims to be the owner of the suit property and that the said property has been charged to the intended 3rd party/defendant who he seeks to have enjoined. I do however note that there is absolutely no document laid before the court to attest to the claim of ownership by the 1st defendant nor to the claim that he is servicing a loan with the said 3rd intended party/defendant thus casting doubt on the joinder and relevance of the 3rd intended party/defendant.
32. I am therefore not convinced that there is any value in enjoining the 3rd party to a case where the claim is for adverse possession and the 1st defendant is not reflected as the owner of the said suit property which he claims to have acquired through a public auction. My reading of the pleadings tells a different story which will require to be canvassed further at the hearing of the suit especially on the issue of ownership,
33. The plaintiff has alleged a delay which is being caused by the 1st defendant which will lead to delay of the hearing. But is this what the record reflects? Nope, not very much so. This is a case where the trial has not commenced. Further if there was a delay precipitated by this application, the plaintiff will be compensated by way of damages.
34. And will the plaintiff be prejudiced if joinder is allowed? From the documents on record and the pleadings filed I am persuaded that he will be especially in introducing a party who the plaintiff has not staked any claim against that action in itself is superfluous process

Disposal

35. It appears to me that even if the court decides not to allow the 1st defendant to enjoin the proposed 3rd intended party/defendant, the 1st defendant can easily opt to sue the same party in a new suit if need be.
36. The upshot, when all is considered, is that the application herein has no merits. I therefore dismiss it. Costs to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY MARCH 2024.

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MOGENI J

JUDGE

In the virtual presence of:

Mr. Karanja for the Defendant/Applicant

Ms. Were for Mr. Nyachiro for the 1st Defendant

Ms. C. Sagina : Court Assistant

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MOGENI J

JUDGE

