



Kenya Anti-Corruption Commission v Aerial Developers Limited & 2 others (Environment & Land Case 166 of 2009) [2024] KEELC 3357 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3357 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 166 OF 2009**

NA MATHEKA, J

APRIL 23, 2024

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

AERIAL DEVELOPERS LIMITED 1ST DEFENDANT

ENOCK TUITOEK 2ND DEFENDANT

SAMMY SILAS KOMEN 3RD DEFENDANT

RULING

1 The application is dated 3rd July 2023 and is brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, Order 1 Rule 9, and Order 1 Rule 14, of the [Civil Procedure Rules](#) Cap 21 Laws of Kenya seeking the following orders;

1. That the Honourable Court be pleased to grant an order that the 2nd Defendant Enock Tuitoek was wrongfully joined to the suit and/or sued.
2. That the Honourable Court be pleased to grant an order to strike out the 2nd Defendant Enock Tuitoek for having been wrongfully joined and/ or sued.
3. That the 2nd Defendant be awarded the costs.

2 It is based on the following grounds that the 2nd Defendant is the Director of the 1st Defendant the allottee and registered owner of the suit property. That the 2nd Defendant has been wrongfully sued in his personal capacity since the suit property belongs to the 1st Defendant. That 1st Defendant Company is a different person all together from its subscribers and directors. That for efficient disposal of the business of the court it is imperative that the suit proceeds against the correct parties against whom any orders of the court can be enforced. That this application has been brought in line with Order 1 rule 14 of the [Civil Procedure Rules](#) which provides that any application to add or strike out or substitute



a Plaintiff or defendant may be made to the court at any time before trial by chamber summons. That it is for the interests of justice and fairness that the present Application be allowed as prayed.

4 The Respondent stated that the Application herein is bad in law for material non-disclosure of crucial the facts of whether the 2nd Defendant being a Director of the 1st Defendant, was aware of the fraudulent acquisition of the suit property and whether he actively participated and passed resolutions as the 1st Defendant's Director in respect to acquisition of the suit property. That the 2nd Defendant directly participated in the fraudulent and or irregular allocation, acquisition and registration of the suit property on behalf of the 1st Defendant whilst knowing that the property was reserved for Kenya Civil Aviation Authority and therefore not available for allocation to them. A claim has been raised against both the 1st and 2nd Defendants at paragraphs 11, 13, 19 of the Plaint. The Plaintiff has also sought remedies against the 2nd Defendant. That the Plaintiff/Respondents suit raises not only specific but also serious triable issues that requires the 2nd Respondent's full and active participation. That the 2nd Defendant is therefore a necessary party whose participation would enable this Honorable Court to effectually and completely adjudicate upon and settle all questions and triable issues involved in the Plaintiff's/Respondent's suit.

5 This court has considered the application and the submissions therein. Order 1 rule 10(2) of the said Rules provides that:

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.”

6 The effect of misjoinder of non-joinder of parties, is provided for by Order 1 Rule 9 of the Civil Procedure Rules, 2020, which make it patently clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. It provides that:

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

7 The importance of parties in proceedings before a court of law cannot be gainsaid. In Apex International Ltd and Anglo Leasing and Finance International Finance Ltd v Kenya Anti-Corruption Commission (2012) eKLR, the Court quoted the words of Mukhtar J. of the Supreme Court of Nigeria in Goodwill and Trust Investment Ltd v Will and Bush Ltd (2011) LCN/B820 (SC) as follows;

It is trite law that to be competent and have jurisdiction over a matter proper parties must be identified before the action can succeed, the parties must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the Court, the Court lacks jurisdiction to hear the suit and where the Court purports to excise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”



8 In *William Kiprono Towett & 1597 others v Farmland Aviation Ltd & 2 others* [2016] eKLR the Court of Appeal held that;

Most critically Order 1 Rule 9 of the *Civil Procedure Rules* (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.”

The legal provisions on parties to a suit are found in Order 1 of the *CPR*;

9. Misjoinder and non-joinder [Order 1, rule 9.]

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

10. Substitution and addition of parties [Order 1, rule 10.]

(1) Where a suit has been instituted in the name of the wrong persons as Plaintiff, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the Court thinks fit.

(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.

(3) No person shall be added as a Plaintiff suing without a next friend or as the next friend of a Plaintiff under any disability without his consent in writing thereto.

(4) Where a Defendant is added or substituted, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new Defendant and, if the Court thinks fit, on the original Defendants.”

11 The 2nd Defendant/Applicant argues that he is wrongly sued since he is the Director of the 1st Defendant the allottee and registered owner of the suit property. That the 2nd Defendant has been wrongfully sued in his personal capacity since the suit property belongs to the 1st Defendant. That 1st Defendant Company is a different person all together from its subscribers and directors. The Plaintiff/ Respondent insists that the Applicant was aware of the fraudulent acquisition of the suit property and that he actively participated and passed resolutions as the 1st Defendant's Director in respect to acquisition of the suit property. That the 2nd Respondent directly participated in the fraudulent and irregular allocation, acquisition and registration of the suit property on behalf of the 1st Defendant that the claim has been raised against both the 1st and 2nd Defendants and remedies sought remedies against the 2nd Defendant. I find that the question of parties to a suit is question of fact. As already highlighted above, a suit would not fail for mere reason of misjoinder. I find that it would be premature to remove the 2nd Defendant from the suit without the benefit of the evidence to be adduced against him. I find that this application is not merited and dismiss it. Costs to be in the cause.

12 It is so ordered.



DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF APRIL 2024.

N.A. MATHEKA

JUDGE

