



**Ethics & Anti-Corruption Commission v Otara & 6 others;
Christamarriane Hospital (Interested Party) (Environment & Land Case
41 of 2020) [2024] KEELC 5964 (KLR) (18 September 2024) (Order)**

Neutral citation: [2024] KEELC 5964 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 41 OF 2020
M SILA, J
SEPTEMBER 18, 2024**

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

CHARLES GEKONDE OTARA 1ST DEFENDANT

DR. CHRISTA OTARA 2ND DEFENDANT

SANDRA CATHLEEN OTARA 3RD DEFENDANT

GRACE KERUBO MOSE 4TH DEFENDANT

VICTOR MOKAY NYAMBATI 5TH DEFENDANT

KISII DISTRICT LAND REGISTRAR 6TH DEFENDANT

HEZEKIAH MACHORA OIRA MOGARE 7TH DEFENDANT

AND

CHRISTAMARRIANE HOSPITAL INTERESTED PARTY

ORDER

1. This matter is due for judgment today. The matter proceeded for hearing and parties filed their submissions. However, upon retiring to write the judgment and upon a keen perusal of the pleadings it is my view that it would be imprudent to proceed and write the judgment without the inclusion of the County Government of Kisii as defendant. It is my opinion that the County Government of Kisii is a necessary defendant in this case given the pleadings of the plaintiff particularly paragraphs 11, 15, and 25 of the plaint. These paragraphs state as follows :



11. On 22nd April 1977 and in total disregard of the pre-existing public user, Gusii County Council irregularly and/or illegally caused a green card to be opened at Kisii Land Registry in the name of Gusii County Council for parcel number Kisii Municipality/Block II/112 measuring 0.453 Hectares under registry index map sheet number 16/10.
 15. On 3rd May 2011 and in blatant disregard of the pre-existing public user and without considering the existence of Kisii Municipality/Block II/112 on the ground and in the Registry Index Map, Gusii County Council irregularly and/or illegally caused a green card to be opened at Kisii Land Registry in the name of Gusii County Council for parcel number Kisii Municipality/Block II/169 measuring 0.216 Hectares which parcel physically encroaches and forms part of Kisii Municipality/Block II/112.
 25. In the alternative and without prejudice to the foregoing, the Plaintiff avers that the leases granted by the Council to the 1st and 4th defendants were made in excess of the Council's statutory authority and are thus void *ab initio* for being ultra vires the Council's statutory authority, and the subsequent purported registration and issuance of Certificates of Lease by the 6th defendant could not confer on the defendants any estate, interest or right in the subject properties.
2. Apart from the above paragraphs, there are also prayers directly sought against the Gusii County Council. These are prayers (a) – (d) which are drawn as follows :
- (a) A declaration that the parcel of land known as Kisii Municipality/Block II Milimani Government Quarters was not available for alienation and any subdivision and alienation, issuance of lease for the parcel Kisii Municipality/Block II/112 by the Gusii County Council to the 1st defendant was irregular, fraudulent, and illegal and consequently null and void.
 - (b) A declaration that the parcel of land known as Kisii Municipality/Block II Milimani Government Quarters was not available for alienation and any subdivision and issuance of lease for alienation of the parcel Kisii Municipality/Block II/169 by the Gusii County Council to the 4th defendant was irregular, fraudulent and illegal and consequently null and void.
 - (c) A declaration that the issuance of a Lease by the Gusii County Council in respect of Kisii Municipality/Block II/112 and subsequent registration and issuance of Certificates of Lease in favour of the 1st defendant was null and void *ab initio* and ineffectual to confer any rights, interests or title upon the 1st defendant.
 - (d) A declaration that the issuance of a lease by the Gusii County Council in respect of Kisii Municipality/Block II/169 and subsequent registration and issuance of Certificate of Lease by the 6th defendant in favour of the 4th defendant was null and void *ab initio* and ineffectual to confer any rights, interest or title upon the 5th defendant.
3. It will be observed that these prayers are actually declarations against the Gusii County Council.
 4. Given the above pleadings and prayers, I am persuaded that it is necessary for the plaintiff to amend the plaint, to join the County Government of Kisii (the successor of Gusii County Council) as defendant.
 5. The other alternative is to amend by deleting any reference of any alleged culpability on the part of the Gusii County Council. That is a choice for the plaintiff to make but this case cannot proceed for judgment in the manner that it is drawn.
 6. It is regretful, of course, that this has dawned on me rather late in the day and no party appears to have seriously thought of making an application for joinder. However, in my view, making an order



for joinder at this stage is the right thing to do or else the entire trial risks being a mistrial for failure to join a necessary party to the suit which would mean starting all over again. I take solace, however, in the provisions of Order 1 Rule 10 (2) which provides as follows :

- (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 adjudicate upon and settle all questions involved in the suit, be added.
7. From the above, amendment to join a necessary party to the suit can be made at any stage of the proceedings and this, in my opinion, is any time before judgment.
8. It is for the above reasons that judgment in this matter will not be delivered pursuant to the pleadings at hand. Instead, I order the amendment of the plaint as directed above. It follows that the respective cases of the parties will be opened pending further directions upon amendment.
9. Orders accordingly.

DATED AND DELIVERED THIS 18 DAY OF SEPTEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Wairimu Kamau for the plaintiff

Mr. Otara for the 1st – 3rd defendants

Mr. Wabwire for the 7th defendant

N/A for 4th & 5th defendants who filed no appearance

N/A on part of M/s Maosa & Co for interested party

6th defendant – Deceased.

