



**Trustees of Kenya Ports Authority Pension Scheme v Nairobi City Council & another  
(Environment & Land Case 932 of 2016) [2023] KEELC 286 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 286 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 932 OF 2016  
OA ANGOTE, J  
JANUARY 26, 2023**

**BETWEEN**

**THE TRUSTEES OF KENYA PORTS AUTHORITY PENSION  
SCHEME ..... PLAINTIFF**

**AND**

**THE NAIROBI CITY COUNCIL ..... 1<sup>ST</sup> DEFENDANT**

**THE HONOURABLE DIANA KAPEEN ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. The 2<sup>nd</sup> Defendant/ Applicant, through the Notice of Motion dated 21<sup>st</sup> February 2022, has sought the following orders that:
  - i. The 2<sup>nd</sup> Defendant/ Applicant be struck out and/ or removed from these proceedings.
  - ii. Costs be in favour of the 2<sup>nd</sup> Defendant/ Applicant
2. The application is supported by the Affidavit of the 2<sup>nd</sup> Defendant who deponed that at the institution of this suit, she was sued as the substantive holder of the seat of Member of County Assembly for South C Ward, Nairobi City County, and that she subsequently lost the seat in the 2017 General elections.
3. The 2<sup>nd</sup> Defendant deponed that the claim against her cannot be sustained since she is no longer the area Member of County Assembly and that it is in the interest of justice and fairness that she be struck out or removed from these proceedings.
4. The Plaintiff/ Respondent opposed the application vide a Replying Affidavit sworn by Violet Mugambi, a trustee of the Plaintiff, who deponed that the application is frivolous and an abuse of the



court process; that this suit was filed on 2<sup>nd</sup> August 2016 and that it was too late for the Applicant to be removed from the record after more than six years.

5. The Plaintiff's trustee deponed that the Applicant has been indolent and cannot be allowed to make this application at the eleventh hour when this matter is pending Judgement and that based on the pleadings on record, the Applicant personally incited and mobilized members of the public to trespass/invade the Respondent's land without verifying whether the land was a road reserve or not.
6. It was deponed by the Plaintiff's trustee that the Applicant was sued both individually and as a member of the County Assembly and that the Applicant has not informed the court the prejudice that she will suffer if Judgement is delivered in this matter as she has already closed her case.

### Submissions

7. The Applicant's advocate submitted that the 2<sup>nd</sup> Defendant/ Applicant was sued by virtue of being the Member of County Assembly and that neither the alleged trespass on the Plaintiff's property nor construction of the kiosks on the road reserve was ever authorized by the Applicant.
8. It was submitted by the 2<sup>nd</sup> Defendant's/Applicant's counsel that the Applicant as a Member of County Assembly was often approached by area residents requesting to be allowed to modernize the shanty kiosks that had been erected on the road reserve for more than 15 years and that the area residents were advised to apply for temporary occupation licenses from the County Government of Nairobi with the view of obtaining permission to formalize their occupation and modernize the shanty kiosks.
9. It was the Applicant's submission that she is not a necessary party in this suit as per the twin test established in *Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others*, as quoted in *Boniface Omondi v Mathare Youth Sports Association & Another* (2021) eKLR.
10. The Applicant submitted that her removal from the proceedings will leave this suit intact as the Plaintiff has sufficient recourse against the 1<sup>st</sup> Respondent and that her application had fulfilled the terms of Order 1 Rule 10(2) and Order 14 of the *Civil Procedure Rules 2010*.
11. The Plaintiff's/Respondent's advocate submitted that the impugned acts of the Applicant do not fall under the duties of Section 9 of the County Government Act and that she was acting ultra vires. Counsel quoted the case of *Kimunai Ole Kimeiwa & 5 Others v Joseph Motari Mosigisi (the then District Commissioner, Rongai District) & 3 others* [2019] eKLR in support of his argument.
12. It was submitted by counsel that it is premature for the Applicant to claim that there is no cause of action against her and to seek to be struck out from these proceedings; that the Applicant's presence in this suit is necessary and important because she took part in the encroachment of the Respondent's property as an individual, and not just as the MCA of South C Ward, and that the suit discloses a cause of action against her.
13. The Plaintiff's counsel relied on the case of *Letang v Cooper* [1965] Q.B. 232, which defined a cause of action as a factual situation the existence of which entitles one person to obtain a remedy against another person. Counsel also relied on the decision of *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Matzagaro & Ezekiel Misango Mutisya* [2014] eKLR and *Pravin Bowry v John Ward & Another* [2015] eKLR which suits considered the issue of joinder of parties.
14. Counsel also relied on the case of *D.T. Dobie and Company (K) Ltd v Joseph Mbaria Muchina & Another* (1982) eKLR which held that the power of the court to strike out a suit should be exercised after consideration of all facts and *Yaya Towers Limited v Trade Bank Limited (in liquidation)* [2000]



eKLR where it was held that no suit should be summarily dismissed unless it appears so hopeless, in disclosing no cause of action and being beyond redemption.

15. It was the Plaintiff's advocate's submission that this application is dragging the litigation process; that the court should ensure that justice is not delayed in accordance with Article 159(2) (a) and (b) of the [Constitution](#); that the Applicant should not be allowed to raise new issues after seven years and that the application was not brought in good faith.

### **Analysis and Determination**

16. The 2<sup>nd</sup> Defendant/Applicant in this matter has sought to be removed from these proceedings on the basis that she was sued in her capacity as Member of the County Assembly, which office she no longer holds, and that on that basis, the claim against her cannot be sustained.
17. The Respondent has refuted this argument, asserting that the Applicant was sued in her capacity as an individual as well as an MCA, and that it is too late in the day for this application considering that this matter is pending Judgement.
18. The facts in this matter are that the Plaintiff, vide its Amended Plaint dated 29<sup>th</sup> September 2016, has sought remedies against the Defendants for trespass on its land by constructing kiosks on a portion of the suit property. The 2<sup>nd</sup> Defendant's case is that in an effort to modernize the informal shanty kiosks on the disputed portion, residents and traders applied for and were issued with Temporary Occupation Licenses, and that the modernization of the kiosks did not encroach on the Plaintiff's property.
19. The Application herein has been made under Order 1 Rule 10 of the [Civil Procedure Rules](#), in which the Applicant/ 2<sup>nd</sup> Defendant is seeking to be struck out from these proceedings. This provision grants the court discretion to order joinder or removal of a party from proceedings.
20. Order 1 Rule 10 (2) provides that the court may at any stage, 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.
21. The issue for determination is whether the 2<sup>nd</sup> Defendant is improperly enjoined in this suit, and whether her presence is necessary to enable the court to effectively adjudicate and settle all the questions in this suit. The term 'proper party' was defined in [Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Maztagaro & Ezekiel Misango Mutisya](#) [2014] eKLR, by Gikonyo J. as follows: -

"A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties." (emphasis added)

22. The Applicant has referred this court to the case of [Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others](#) [1998] eKLR as quoted in [Boniface Omondi v Mathare Youth Sports](#)



Association & Another (2021) eKLR, wherein the court laid out two tests to determine the question of who is a necessary party:

“For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”

23. This test was reiterated in Kizito M. Lubano v KEMRI Board of Management & 8 Others [2015] eKLR as follows:

“The question should then be whether the current respondents are properly joined herein and if so whether such presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus necessary parties herein...”

24. In determining the issue of whether the Applicant is a necessary party to this suit, this court is bound to exercise its discretion judiciously and not whimsically or capriciously. It must do so on the basis of evidence and sound legal principals, as held by the court in George Kimotho Ilewe v Joseph Mathuku Ngewa & Another [2022] eKLR.

25. As earlier discussed, the Plaintiff’s claim against the Defendants is for trespass and wrongful issue of a license by the county government, which it claimed was issued at the behest of the 2<sup>nd</sup> Defendant. In its Plaintiff, the Plaintiff asserted that the agents of the Applicant encroached on its property and constructed kiosks and is seeking for a prohibitory injunction restraining the Defendants, their servants or agents from encroaching and trespassing on the portion of the suit property.

26. The Plaintiff’s claim shows that the Plaintiff indeed has a direct and real interest against the Applicant herein, as well as a right of relief against him in case his claim succeeds. I say so because the 2<sup>nd</sup> Defendant has been sued not only as an MCA, but also in his individual capacity.

27. The 2<sup>nd</sup> Defendant has also admitted that as at the time of the alleged infringement, she was a member of the County Assembly of Nairobi, and was involved in advising her voters on the issue of upgrading the kiosks that were on the suit property and or road reserve. That being the case, this court is persuaded that the 2<sup>nd</sup> Defendant/Applicant is a necessary party in this suit.

28. In addition, this suit has already proceeded for hearing in which the Plaintiff presented two witnesses. The 2<sup>nd</sup> Defendant chose not to adduce any evidence or call witnesses. Consequently, it is late in the day for the 2<sup>nd</sup> Defendant to apply to be excused from the proceedings. The only prudent thing for this court to do is to settle the suit on its merits, taking into consideration the pleadings and evidence that has been adduced by the parties.

29. For those reasons, the application dated 21<sup>st</sup> February 2022 is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**



Mr. Kamanda for 2<sup>nd</sup> Defendant

Mrs Katana holding brief for Mr. Kithi for 1<sup>st</sup> Defendant

Mr. Walubengo for Plaintiff

Court Assistant - Valentine

