



Kagwe Tea Factory Limited v Kipchoim & 84 others; Kenya Forest Service & 3 others (Interested Parties) (Environment & Land Case 58 of 2018) [2023] KEELC 297 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 297 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 58 OF 2018
YM ANGIMA, J
JANUARY 19, 2023**

BETWEEN

KAGWE TEA FACTORY LIMITED PLAINTIFF

AND

GRACE JELAT KIPCHOIM & 84 OTHERS DEFENDANT

AND

KENYA FOREST SERVICE INTERESTED PARTY

DIRECTOR OF SURVEYS INTERESTED PARTY

DEPARTMENT OF LAND ADJUDICATION & SETTLEMENT INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

A. Introduction

1. By a plaint dated October 25, 2018 and amended on March 17, 2021 the Plaintiff sought various reliefs against the Defendants resulting from the sale of 82 parcels of land (the suit properties) it intended to purchase from the 1st – 82nd Defendants in 2016. Among the reliefs sought were a declaration that the suit properties were part of Marmanet Forest which was a gazetted central forest; a declaration that the sale agreements for the sale of the suit properties were void for fraud, illegality and non-disclosure of material facts; a declaration that the 1st – 82nd Defendants were in breach of the sale agreements; an order for cancellation of the titles to the suit properties; and an order for the refund of the 10% deposit and other monies paid to the 1st – 82nd Defendants among other reliefs.



B. The 1st Interested Party's Application

2. By a notice of motion dated December 18, 2019 brought under Order 1 rule 10 of the [Civil Procedure Rules, 2010](#) (the Rules), Sections 1A 1B & 3A of the [Civil Procedure Act](#) (Cap 21), the inherent jurisdiction of the Court and all other enabling provisions of the law, the 1st Interested Party sought the following orders:
 - a. That the Honourable Court be pleased to direct the 1st Interested Party to be enjoined as the 2nd Plaintiff.
 - b. That the Honourable Court be pleased to direct the Plaintiff to amend the plaint, so that the Kenya Forest Service be enjoined in the suit as co-Plaintiff and their designation as the 1st Interested Party to change.
 - c. That the Honourable Court be pleased to direct the Plaintiff to amend the body of the plaint to reflect the position in 2 and 3 above.
 - d. Any other relief that the court may deem fit in the interest of justice.
 - e. Costs of the application.
3. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Evans Kegode Aluda on December 18, 2019 and the exhibits thereto. It was contended that the 1st Interested Party was a statutory body mandated to conserve, protect and manage all public forests in the Republic of Kenya. It was further contended that the suit properties were part and parcel of Marmanet Forest which was still a gazetted forest under the law and that due process was not followed in the alienation of the forest. It was further contended that the 1st Interested Party would like to re-claim the forest land comprised in the suit properties hence it was necessary to join it as a 2nd Plaintiff to the suit to enable the court to adjudicate upon and settle all the issues in controversy in the suit.

C. Response by the 2nd and 4th – 82nd Defendants

4. The 2nd, 4th – 82nd Defendants filed grounds of objection dated June 2, 2020 in opposition to the said application on 3 main grounds. First, that the application was filed without a resolution of the 1st Interested Party approving its presentation. Second, that the supporting affidavit was sworn by a person without any authorization by a resolution in violation of the [Companies Act, 2015](#). Third, that there was no resolution of the Interested Party appointing the firm of Ngaywa and Kibet Partnership LLP to act for it in the matter.
5. There is no indication on record of the rest of the parties having filed responses to the application. On its part, the Plaintiff had informed that court that it was not opposing the application.

D. Directions on Submissions

6. When the application was listed for directions it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their written submissions. The record shows that the 1st Interested Party filed its submissions on October 3, 2022 whereas the 2nd, 4th – 82nd Defendants filed theirs on June 18, 2020.



E. The Issues for Determination

7. The court has considered the application dated December 18, 2019, the grounds of objection in opposition thereto are well as the material on record. The court is of the opinion that the following Issues arise for determination herein:
 - a. Whether the 1st Interested Party's application dated December 18, 2019 is fatally defective.
 - b. Whether the 1st Interested Party has made out a case for joinder as a 2nd Plaintiff in the suit.
 - c. Whether the suit should be amended further as prayed.

F. Analysis and Determination

a. Whether the 1st interested party's application dated December 18, 2019 is fatally defective

8. The court has considered the material and submissions on record on this issue. The 2nd, 4th – 82nd Defendants (the Defendants) contended that the instant application was fatally defective for want of at least 3 resolutions under the *Companies Act, 2015*. It was submitted that a resolution was required to authorize the appointment of the 1st Interested Party's advocate, another to authorize the deponent of the supporting affidavit to swear it and yet another one to authorize the filing of the application. The Defendants cited the cases of *Kenya Commercial Bank Ltd -vs- Stage Coach Management Ltd* [2014] eKLR and *Mohamed Suleiman Shee & Another -vs- Suleiman Omar Chala & 2 Others* [2018] eKLR in support of that submission.
9. The court has noted that the 1st Interested Party did respond to the issue of company resolutions in its written submissions. However, the court has an obligation to consider and determine the issue on the basis of the applicable law. The Defendants did not cite any particular provision of the *Companies Act, 2015* which was allegedly violated by the 1st Interested Party. It was not even demonstrated that the Interested Party is an entity incorporated under the *Companies Act* or that the *Companies Act, 2015* applied to it. So far as the court is aware the 1st Interested Party is a statutory corporation established under the *Forest Conservation and Management Act, 2016* (FMCA) which is a state corporation within the meaning of the *State Corporations Act*.
10. The 1st Interested Party is not an ordinary company established under the *Companies Act, 2015* hence the Defendants' reference to the Act is misconceived and irrelevant. The court is not aware of any legal requirement for a state corporation to pass a resolution for the appointment of an advocate to represent it in legal proceedings. That is not even the business of the board of directors of the state corporation. The procurement of legal services is a function of management which should be undertaken in accordance with the applicable public procurement law.
11. In any event, the authorities cited by the Defendants appear to be based upon the ancient Ugandan case of *Bugerere Coffee Growers Ltd -vs- Ssebaduka and Another* [1970] EA 147 which is no longer good law both in Uganda and in Kenya. In the case of *Arthi Highway Developers Limited -vs- West End Butchery Limited and 6 Others* [2015] eKLR the Court of Appeal held that:
 - “ 44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from the Uganda High Court which has been followed and applied in this country for a long time: *Bugerere Coffee Growers Ltd -vs- Ssebaduka and Another* [1970] EA 147....



45. To their credit, the appellants' Advocates have cited another authority from the Supreme Court of Uganda decided in April, 2002, confirming that the principle enunciated in the Bugerere Case has since been overruled by the Ugandan Supreme Court. The authority is Tatu Naiga and Emporium, -vs- Virjee Brothers Ltd Civil Appeal No 8 of 2000. The Ugandan Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere Case was no longer good law as it had been overruled in the case of United Assurance Co Ltd –vs- Attorney General SCCA No 1 of 1998. The latter case was restated the law as follows:

“It was now settled, as the law that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct counsel to file proceedings on behalf of the company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that company.”

b. Whether the 1st interested party has made out a case for joinder as a 2nd plaintiff in the suit

12. The court has considered the material and submissions on record on this issue. The 1st Interested Party contended that it was necessary to join it in the proceedings as a 2nd Plaintiff by reason of its statutory mandate of protecting and conserving gazetted forests to enable the court to determine the real issues in controversy effectually. The 1st Interested Party's factual foundation was not challenged by the Defendants who opposed the application since they filed only a statement of grounds of objection.

13. The legal provisions on joinder of parties are contained in Order 1 rule 10(2) of the Rules as follows:

“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.”

14. The 1st Interested Party cited the cases of *Rubina Ahmed and 3 Others –vs- Guardian Bank Ltd (sued in its capacity as a successor in title to First National Finance Bank Ltd)* [2019] eKLR and *Nderitu Wachira Receiver and Manager of Bulleys Tanneries Ltd (Under receivership) & 4 Others –vs- Saraji Enterprises Ltd and Another* [2016] eKLR in support of the application and urged the court to allow the same. In the former case, the Court of Appeal quoted the following passage from its earlier case in *JMK –vs- MWM and Another* [2015] eKLR on the issue of joinder of parties:

“Commenting on this provision, the learned authors of Sarkars Code of Civil Procedure (11th Ed Reprint, 2011 Vol 1 p 887), state that:

“This section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.

.....

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. Sarkar's Code, (supra) quoting as authority, decision of Indian Courts on the



provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in *Tang Gas Distributors Ltd –vs- Said & Others* [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceedings has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

15. The court is satisfied that the 1st Interested Party has made out a case for joinder as a Plaintiff in the instant proceedings. The court is satisfied that it has a legal interest and legal mandate to conserve, protect and manage gazetted forests in Kenya. The court is satisfied that it has a legal mandate to seek recovery of the properties it believes were illegally alienated from Marmanet Forest. The court is further satisfied that it is not only a necessary party but one whose presence shall assist the court in effectually and completely adjudicating upon all the questions in controversy.

c. Whether leave should be granted for amendment of the suit as prayed

16. The court has already found that the 1st Interested Party has made out a case for its joinder as a 2nd Plaintiff in the proceedings. In the premises, it would follow that a consequential amendment shall be necessary to reflect the 1st Interested Party as the 2nd Plaintiff to the suit and to enable it to plead its case as may be necessary for recovery of the suit properties. The court is thus satisfied that the leave sought for amendment of the plaint ought to be granted.

G. Conclusion and Disposal Order

17. The upshot of the foregoing is that the court is satisfied that the 1st Interested Party’s application has merit and the same should be allowed. Consequently, the notice of motion dated December 18, 2019 is hereby allowed in the following terms:
- a. The 1st Interested Party, Kenya Forest Service, is hereby joined as a 2nd Plaintiff in the suit.
 - b. The Plaintiffs shall file and serve an amended plaint within 14 days from the date hereof.
 - c. The Defendants and the remainder of the Interested Parties shall be at liberty to amend their respective pleadings within 14 days upon service of the further amended plaint.
 - d. Costs of the application shall be in the cause.
 - e. The suit shall be mentioned on February 28, 2023 for pre-trial directions.

It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU THIS 19TH DAY OF JANUARY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Njuguna for the Plaintiff

N/A for the 1st Defendant (deceased)

Mr. Gitonga for the 2nd, 4th – 82nd Defendants

Mr. Kaburu for the 3rd Defendant



C/A - Carol

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Y. M. ANGIMA

JUDGE

