



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 25 OF 2014

GENESIS FOR HUMAN RIGHTS & 2 OTHERS.....PLAINTIFFS/APPLICANTS

-VERSUS-

ELIZABETH MADAFALI ARUNGA & 3 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. The 1st and 2nd defendants have moved the Court with their application dated 7th November 2014 and brought under Order

2 rule (4), (9) and 15 (b) (c) and (d) of the Civil Procedure Rules and Section 1 3 and 3A of the Civil Procedure Act. In the motion the applicant prays

2. That all interim orders if any be vacated
3. This suit be struck out and dismissed together with the application dated 10.2.14
4. That in the alternative the plaintiffs do give security for costs for the entire suit herein
5. Costs of the application be provided for

2. The application is supported by the affidavits sworn by both 1st and 2nd defendants. The 1st defendant deposes the land belonged to her late husband Charles Arunga. She acquired it by way of transmission and later sold it to the 2nd defendant. In paragraph 6 of her supporting affidavit, she it is inconceivable for the plaintiff to claim the plot is a public utility. The 1st defendant deposed further that an access which became No 1916/1 while the 1st defendant's plot became 1916/2 via subdivided number 13587.

3. The 1st defendant continued that the plaintiffs have no locus to bring this suit in any capacity neither do they have any public interest verifiable in law over the suit plot number 1916/2. The 1st defendant also deposed that the plaintiffs have not shown any evidence of leave to institute on behalf of alleged residents of the said area near Shilla bar or on behalf of any stated public users of the land in issue. She urged the Court to dismiss the application dated 10.2.2014 and the suit. The 2nd defendant added that it is Shilla bar who is using the plot and who has put up a signage advertising the bar. He deposed that access to the bar is guaranteed. He also urged the Court to dismiss the suit.

4. The application is opposed by plaintiffs although only the 4th plaintiff has filed a replying affidavit which they have called "supporting affidavit". The 4th plaintiff began by deposing that the 1st and 2nd defendants have changed advocates three times. He continued that the defendants/Applicants engaged a County Surveyor who prepared a report without involving all the parties in the dispute. He also deposes the suit of public interest and parties should be involved

- every step of the way. The 4th plaintiff deposed that the 1st and 2nd defendants are attempting to misrepresent facts. He urged the Court to dismiss the application.
5. The parties advocates filed submissions to the application which basically gave a summary of the facts contained in the affidavits. I have read and considered them while reaching this determination. The plaintiffs submit plot 1916 was surrendered for a road. The plaintiffs also wondered that if the plot had not been surrendered why was certificate of title issued. He owns plot 1917 neighbouring plot 1916 and the defendants' annexures were manipulated to enable them take back the plot.
 6. The current application raises several issues. On the first prayer requesting for vacation of interim orders; I have perused the record and note that as at 7.11.2014, the presiding judge confirmed there were no interim orders existing. This prayer is thus spent. The second issue is on locus of the plaintiffs to bring the suit. The 1st defendant has explained on how she acquired the land from her late husband. The plaintiffs pleaded this is a public utility plot. However they have not annexed any documents to support this averment nor a list of the public that are using the plot for parking. Any fact that is put forth and not devised is preserved as admitted.
 7. Further the 1st and 2nd defendants have sought that the plaintiffs do provide for security for costs. The 4th plaintiff has made no mention of this both in the affidavit in reply or in the submissions. The 2nd defendant has deposed that he began developing this plot before being stopped by the 4th plaintiff. However the issue for security for costs will not be necessary if prayer (3) is allowed. I have perused through the entire pleadings filed in Court by the plaintiffs showed the suit is brought on behalf of residents of Kiembeni Estate Mombasa County as a public utility.
 8. The 1st, 3rd plaintiffs are registered as civil societies. They have not expressed any interests in the disputed plot besides pleading that the residents of Kiembeni have used the plot as a parking area uninterrupted since 1988 without disclosing to this Court who these residents are and without leave of the Court to bring a representative suit, this suit has no legs to stand on. Further this was a private property from 1980 and the owners thereof are entitled to protection to article 40 of the Constitution. I do therefore find merit in the motion dated 7.11.14 and allow it in terms of prayers 3 and 5. The application dated 10.2.14 together with the suit filed is dismissed for want of locus standi and lack of leave to bring representative suit.

Ruling dated and Delivered at Mombasa this **18th** day of **September 2015**

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A. OMOLLO

JUDGE