



REPUBLIC OF KENYA

High Court at Malindi

Civil Case 38 of 2012

SAID ADAM KAZUNGUPLAINTIFF

VERSUS

KIBOKONI PROPERTIES LIMITEDDEFENDANT

R U L I N G

1. In relation to the plaintiff's Notice of Motion filed on 15th February, 2012. I have considered all the affidavits filed and the respective submissions. Consequently it has become apparent that the suit property herein, CHEMBE/KIBABAMSHE/404 has been the subject of protracted civil disputes pitting several parties including, the parties herein against one another, at different times.

2. Secondly, arising from proceedings in the civil disputes, the applicant herein is charged in two cases being Cr. 301/11 and 686/11 before the magistrate's court in Malindi. The offences allege forgery and malicious damage by the applicant in relation to the suit property. The criminal cases are due for further hearing on 22nd November, 2012 and 27th November, 2012, respectively.

3. I have also called for and perused the files in respect of the civil aspect of the dispute, namely;

A (i) HCC 2/07 and consolidated with HCC 9/2012 now partly heard before this court. The parties therein are:

1. Estate of Mohamed Ishaq
2. Mohamed Amin
3. Mohamed Yunis
4. Kibokoni Properties

-versus-

1. Passaglia Giuseppe
2. Giodano Allievi
3. Gabriella Toscano
4. Daniella Olmo D' Alessandro

AND

1. Giordano Allievi
2. Gabriella Toscano

VS

1. Kibokoni Properties Ltd.

A(ii) Giordano Allievi and Gabriella Toscano appear to claim under the title of Daniella Almo D' Allessandro, a major shareholder in SICA Ltd. which company allegedly bought the suit property from Adam Kazungu Nzamba, the father of the present applicant and subsequently sold it to Allievi and Toscano. Giuseppe Passaglia and Kibokoni Properties Ltd. claim title through purchase from the estate of Ishaq, Mohamed Amin, Mohamed Yunis and Robert Kaingu Maitha, and consequently the settlement consent in HCC 53/06 and 15/05.

B. HCC 15/05 Passaglia Giuseppe -vs- Attorney General & 7 others later consolidated with HCC 53/06 Sidi Kitsao Kidzao -vs- John Kimani Mwangi. Settlement consents in this matter were the subject of Judicial Review proceedings in Msc. Civil Application No 13/2009 and resulted in a ruling dated 15th June, 2010. The court directed that an entry on the subject title, registered in favor of the applicant herein on 28th September, 2009 be canceled, on the basis that the said registration was procured through a forged order. This was the genesis of the criminal charges against the applicant.

C. CMCC 459/10 Kibokoni Properties Ltd. vs Said Adam Kazungu. An injunction was granted against the applicant on 21st December, 2010 restraining him from entering upon the suit property etc.

1. It is my considered view that in light of the foregoing, the present suit and the Lower Court suit CMCC 459/10 fall within the purview of Section 6 of the Civil Procedure Code. Section 6 provides:

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

A perusal of the two suits discloses that the “matter in issue in the present suit is also directly and substantially in issue” in the previous suit instituted in the Lower Court. This is also true for HCCC 2 of 2007 as consolidated with HCCC 9/2012. The present suit therefore appears to be a collateral attack on Kibokoni Ltd and other related claimants parallel to the proceedings in HCC 2/07 and 9/2012 in light of relationship between A.K Nzamba through whom the applicant claims and the 2nd to the 4th Defendants in HCCC 9/12 and plaintiffs in HCC 9/2012 namely Giordano Allievi, Gabriella Toscano and Daniella D' Allessandro.

5. Clearly, the parties are the same and or related as contemplated in Section 6 of the Civil Procedure Act. The two previous suits and CMCC 459 of 2010 and HCCC 2 of 2007 and HCCC 9 of 2012 are still pending. It would appear that no further step has been taken in the previous suit before the Lower Court since 21st December, 2010, while HCCC 7/2007 is now parheard. Of course, the law has since changed thereby removing land disputes of this nature from the jurisdiction of the Lower Court. These developments however, cannot be an excuse for the applicant herein to file yet another suit in the High Court during the pendency of the previous suits.

6. In view of the history of this matter, I think such an action is tantamount to an abuse of the court process leading to unnecessary proliferation of suits and backlog. I do therefore decline to entertain the present suit pending the hearing and determination of HCCC 2 of 2007 as consolidated with HCCC 9/2012, and appropriate disposal of CMCC 459/10. This suit is accordingly stayed.

Costs in the cause.

Delivered and signed at Malindi this **31st** day of **October, 2012** in the presence of Mr. Obaga holding brief for Mr. Kenga and Mr. K'opere for respondent.

Court clerks – Leah & Evans

C. W. Meoli
JUDGE