

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 263 of 2003

REHMAT ESMAIL KHAMISA.....PLAINTIFF

VERSUS

1. YUSUF MUSA KHAMISA.....1ST DEFENDANT

2. ZAINAB MUSA KHAMISA.....2ND DEFENDANT

R U L I N G

In a summons dated 5.8.2004, Sadik Esmail Khamisa, Ahmed Esmail Khamisa, Abdulhamid Esmail Khamisa, Kulsum Esmail Khamisa, zubeda Esmail Khamisa and Maimoona Esmail Khamisa applied to be joined as plaintiffs to this suit. These applicants filed a joint affidavit they swore on 5th August 2004 to support the application.

When served with the summons, the defendants herein Yusuf Musa Khamisa and Zainab Musa Khamisa resisted the same by filing grounds of opposition.

Let me start by stating that the only way facts deponed in an affidavit can only be discounted or disputed or controverted by filing a replying affidavit. In this matter, the defendants have filed grounds of opposition to dispute facts averred under oath. That in my view does not answer the facts deponed on affidavit. Consequently, I will consider the facts deponed in the applicants' joint affidavit of 5.8.2004 to be uncontested hence the gospel truth. In that affidavit, the applicants claim that they are entitled to claim and share plots Nos.243 and 293 by virtue of Wakfs created and executed by Mohamed Khamisa, Haji Saleh Essak and Hajarabai Khamisa on 14th February 1942. the applicants have accused the defendants unlawfully and fraudulently excluding them from getting their rightful shares or benefit therefrom. They now seek to be joined as plaintiffs in this suit so that they can prove their claim.

The defendants on their part are of the view that the applicants have not shown that there existed a wakf in which they are beneficiaries. It is further the submission of the defendants' counsel that the applicants' claim can only be agitated under order XXXVI of the Civil Procedure Rules and not through this a plaint like in this case. The defendants are of the view that the applicants' entry to the suit will further delay the hearing and final determination of the case.

It is trite law that the purpose of either adding or substituting parties to a suit is geared towards enabling the court effectually and completely adjudicate upon and settle all questions involved in the dispute. In the instant application the applicants' claim is said to be that of beneficiaries. They want to be added to this suit as plaintiffs so that they can seek to be given their rightful or benefit.

However, the suit before this court is by way of a plaint in which the main prayer is framed as follows:

“A mandatory injunction to issue and require the defendant herein, its agents and or servants acting on their behalf to unconditionally and forthwith remove and or demolish the barriers/walls erected on the stairs leading to the first and bathrooms of the building standing on plot No.243 XVIII/M.I. at Mwembe Tayari.”

It is quite apparent that the applicants' presence will necessitate the amendment of the plaint to accommodate their claim. This will obviously delay the matter which has been pending for long. I agree with the submissions of Mrs. Moolraj – for the defendants that there is no nexus between the applicants' claim and that which is now being sought in the plaint.

I have already said that I am in agreement that in the absence of any evidence in form of a replying affidavit to discount the applicants' averments under oath, I am of the view that the applicants' interest beneficiaries of a Wakf may exist. Again I agree with the submissions of Mrs. Mooraj learned advocate for the defendants that the applicants can only press for their rights under Order XXXVI of the Civil Procedure rules, which is by way of an Originating summons as opposed to a plaint.

In the end the summons dated 5/8/2004 is incompetent and with no merit. Consequently, the same is struck out and dismissed with costs to the defendants.

Dated and delivered at Mombasa this 12th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Miss Jadeed h/b Kasman for the applicant.

N/A for Respondent.