

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 200 OF 2001

MANEE HAMUDE SHIBIBY 1ST PLAINTIFF

MUMTAZ ATHMAN AHMED 2ND PLAINTIFF

VERSUS

COMMISSIONER OF LANDS..... 1ST DEFENDANT

ABDULAMAJID AHMED 2ND DEFENDANT

RULING

Chamber Summons dated 18th December 2002 is brought under Order 1 Rule 10(2) and (4) and 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is seeking four orders and an order for costs. The first Order it is seeking is that the Municipal Council of Mombasa be joined as a Defendant in this suit. The second order is for leave to amend the Plaintiff in the manner shown in the proposed plaintiff which was annexed to the Affidavit in support of the application. Next order sought was that the proposed amended plaintiff be adopted as a properly filed amended plaintiff in this suit and lastly that the Defendants do file their amended replies and/or Defence, if any within 15 days from the date of the court's order granting the Plaintiffs leave to amend their plaintiff. The grounds for seeking the same orders are two and are first that the amendment is necessary for the purpose of determining the real questions in controversy between the parties and that the plaintiff be amended as proposed in the Draft amended plaintiff and that the amendment sought is not prejudicial to the Defendants. The supporting Affidavit is sworn by the first Applicant and it states in a summary that 1st Plaintiff and Second Plaintiffs are the respective owners of Plot Nos.245/X/MI and 246/X/MI both of which are fronting a private road which provides access to the said premises; that the aforesaid road has been demarcated and alienated or allocated to the 2nd Defendant and the same is now Plot No.434/XMI; that the same road is within the Municipal Council of Mombasa and is held by the Council either under the Street Adoption Act and/or in trust and/or with condition that the same shall be used as a road for the benefits of the owners of the adjoining properties as access to their properties; that as the unprocedural alienation of the same road to the 2nd Defendant has directly affected their rights, the Municipal Council should be joined in this suit as Defendant for effectual and complete determination of the real questions in controversy. He also states that the plaintiff should be amended for the questions involved in the suit to be fully adjudicated upon by the court and lastly that the deponent was not seized of the facts necessitating the amendment when the plaintiff was filed. The second Plaintiff's affidavit is short and is only supporting the allegations in the First Plaintiff's affidavit.

The Defendants opposed the application. Second Defendant filed a Replying Affidavit whereas first Defendant filed no affidavit nor ground of opposition. The second Respondent's Affidavit states in a summary form that the proposed amendment obscures and complicates the issues and has no relevancy to the controversy between the parties; that the amendment shall delay the conclusion of the suit to his detriment; that the proposed amendment is irrelevant and will not help in determining the real questions in controversy between the parties and that the application is made malafides.

I have considered this application anxiously. What disturbs me seriously in this application is that accepting for the sake of argument that what the Plaintiffs allege in the application and in the grounds and Affidavit that Mombasa Municipal Council is either by adoption or in trust the holder of the access road

to the premises of the Plaintiff, the which road has now been demarcated and allocated to 2nd Defendant (wrongly or unprocedually) by the First Defendant, how is joining Mombasa Municipality going to save the situation it being that according to the pleadings before me they are no longer the holders of the same road reserve. In any case what do the Applicants want the proposed third Defendant to be ordered to do? The amendment sought to be introduced does not seek any judgment against the Municipal Council. I say so because clearly the judgment sought in the original plaint remains the same in the amended Draft plaint. That is the plaint the applicants are seeking in the 2nd and 3rd prayer in the application to be treated and adopted as a proper plaint. In my humble opinion, I do find it inconceivable that a Defendant should be sued without any judgment being sought against him. I do with respect agree with the Respondent's counsel that the Applicant has not shown which question in controversy the intended amendment will help in determining. I also do feel that with or without the Municipality as a party, the real question of whether or not to annul the title alleged to have been illegally and unprocedurally issued would still be decided. It appears to me that if the property was meant for access road then whether it was developed or not it would still have been shown as a road reserve in the Lands Registry notwithstanding its non development.

I do feel that the first prayer lacks merit for it is seeking to join a party as a defendant without even seeking any judgment against it. That joinder of the Defendant sought will in my mind do no more than cloud issues and delay the expeditious trial of this suit.

The prayer for amendment was meant to facilitate the joinder of Municipal Council. It ceases to have any ground once the joinder is rejected and as clearly obvious, without the joinder and the amendment being allowed, prayers 3 and 4 cannot be available any more.

The sum total of all the above is that the entire application fails. It is dismissed with costs to the Respondent.

Dated and delivered at Mombasa this 5th Day of March 2003.

J.W. ONYANGO OTIENO

JUDGE