



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 155 OF 2006

ALI MOHAMED MWINZAGU & OTHERS.... PLAINTIFFS

VERSUS

KAINGU MANGI & OTHERS..... DEFENDANTS

RULING

(Plaintiff suing some persons and unnamed others inter alia for vacant possession; plaintiff wishing to execute a decree against all persons in possession of the land; applicants claiming that they are in possession of land but were never sued and that the plaintiff cannot execute the decree against them; applicants now wishing to be enjoined to the suit; no utility in the joinder as the case is already concluded; plaintiff can only execute the decree against the persons who were specifically named in the decree and exclude others; if plaintiff wished to have all persons in occupation of the land affected by the decree, he ought to have advertised the suit pursuant to the provisions of Order 1 Rule 8 which was not done; nobody else affected by the decree except for the persons specifically named)

1. The application before me is that dated 1 August 2018 filed by 13 individuals. They want orders that they be enjoined in this suit as affected parties.

2. To put matters into context, this suit was commenced on 13 July 2006 by way of a plaint which was later amended. The plaintiff averred that he holds a grant over the estate of Ahmed Mohamed Nassib who is registered as owner of 70/182 share of the plot No. 966 (Original No 205/2) Section 1, Mainland North. He pleaded that on 7 July 2006 the defendants (6 persons named and others) entered into the suit property and allocated themselves individual portions. He sought orders that they be permanently restrained from the land, an order that they demolish their structures, and vacant possession. The defendants did not enter appearance nor file a defence. The matter proceed ex-parte before Odera J, who delivered judgment on 18 December 2009 which was in favour of the plaintiff. What is pending is execution of the decree.

3. In this application, the applicants allege that the plaintiff sued non-existent parties but wishes to execute the same against the applicants. In other words, the applicants claim that they are the ones in possession of the suit land but were never sued by the plaintiff but the plaintiff wants to use the decree herein to evict them.

4. The application is opposed by the plaintiff who filed Grounds of Opposition. It is mentioned that this court is functus officio and joinder of persons can only be allowed before judgment.

5. Counsel were invited to file written submissions which they did and I have considered the same before arriving at my decision.

6. I do not contest the general position that a party may be added to proceedings if his presence is considered to be necessary which is what is provided for under Order 1 Rule 10 (2). I however note that this matter is concluded and what remains is execution of the decree. I think the issue here is whether the decree may be executed against the applicants or whether it only ought to be executed against the persons who were specifically named as defendants. I am aware that among the defendants were persons described as "others" but they were never specifically identified.

7. It is trite and I need not cite any authority, that a suit must be against a specific person or persons, and where the persons cannot be identified with precision, then it behoves upon the plaintiff to advertise the suit as provided for in Order 1 Rule 8 which provides as follows :-

8(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.

8. From the above, it will be seen that where a plaintiff wishes to sue a large group of people who may not be individually identified because of their number, such plaintiff needs to give notice of the case, and if he cannot serve all persons, make a public advertisement of the suit. For example, if a person owns a piece of land and there are many squatters and the plaintiff does not know all of them, what the plaintiff needs to do is advertise that he has filed a case against this group of squatters living in the particular land, and such persons will be subject to any judgment of the court and will be affected by any execution of the decree. That way, the persons occupying the land are at liberty to defend the suit, and if they do not do so, they are bound by any judgment entered, whether or not they were individually named.

9. In this particular case, there was no advertisement of the suit to all occupants of the suit land. It follows therefore that the judgment and decree can only affect the persons who were specifically named in the suit. There are only six persons named and thus the plaintiff can only execute the decree against these six people, and no more. There is a mention of "others" as defendants, but if there was no advertisement, and these "others" were not informed of the suit, this judgment cannot affect them and the plaintiff cannot execute the decree against them.

10. Turning to the question whether I should order a joinder of the applicants to this suit, I do not see what benefit such joinder will make to the case. This case is already concluded as against the persons named as defendants. If the applicants feel that they want to agitate a case, they will need to file a case of their own. As matters stand, and as I have explained above, they are not affected by the judgment of this court, and execution of the decree ought not to affect them.

11. I have seen that the decree as extracted provides that it is against the six specified defendants and others. Since there was no advertisement of the suit, to include other persons not specifically named, the decree cannot be executed against any person who is not among the six named defendants. It follows that the decree must be rectified so that it shows that execution is only against the named six persons, and nobody else.

12. Given the above, I order as follows :-

i. That the decree extracted be rectified so that it reads that it is only against the 6 named defendants and the same should exclude the word "others" or "other persons".

ii. That the plaintiff is only at liberty to execute the decree against the 6 persons who were specifically named as defendants and the plaintiff cannot execute the decree against other persons, who are not amongst the named 6 persons.

iii. That there is no utility to be served by enjoining the applicants as parties to this suit since this suit is already concluded and the judgment and decree does not affect them and the prayer to be enjoined is hereby dismissed.

13. I make no orders as to costs on the subject application.

DATED, SIGNED and DELIVERED at MOMBASA this 5th day of November 2019.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Hamza for the applicants.

Mr. Mulisho holding brief for Mr Kilonzo for the plaintiff/respondent.

Court assistant; David Koitamet