



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO.92 OF 2020

CHUNKY LIMITED.....1ST PLAINTIFF

CURLY WURLY LIMITED..... 2ND PLAINTIFF

VERSUS

CHIEF LAND REGISTRAR.....DEFENDANT

RULING

(Application by two persons seeking to be enjoined to this suit as defendants; plaintiffs filing suit seeking cancellation of titles; the titles being under the registration of the applicants yet applicants not parties to the suit; suit for cancellation of title cannot proceed without the title holder being a party for he has a right to be heard; application allowed)

1. The application before me is that dated 23 October 2020 filed by Kahia Transporters Limited and Trade Lead Limited. The applicants seek orders that they be enjoined to this suit as the 2nd and 3rd defendants respectively and that the plaint be amended accordingly. The applicants further seek an order for stay of this suit on the basis that there exists the suit Mombasa ELC Petition No. 9 of 2018 which is said to be pending. The application is opposed by the plaintiff.

2. By way of background, this suit was commenced through a plaint which was filed on 29 July 2020 with the sole defendant being the Chief Land Registrar. In the plaint, the plaintiffs pleaded that they are the registered proprietors of the land parcels MN/I/909 and MN/VI/910 (the suit properties). It is pleaded that through Gazette Notice No. 149 published on 9 January 2015, the Government issued a notice of intention to compulsorily acquire the suit properties for the construction of the Mombasa-Nairobi Standard Gauge Railway. They plead that a stay order was made on 8 November 2017 stopping compensation to them. They claim that some fake deed plans were used to create fake titles used to launch a claim for compensation. They pleaded existence of the suit *Mombasa Petition No. 202 of 2018, Julius Kea Mbawa vs Director of Criminal Investigations, Director of Surveys, Chunky Limited and Curly Wurly Limited*, where the petition in that case sought to compel the release of reports by the Director of Criminal Investigations and Director of Surveys to resolve the ownership dispute over the Plot No. 909. In this suit, the plaintiffs have sought orders of revocation of the deed plans over the properties MN/VI/5141, MN/VI/5153 and MN/VI/5154; revocation of these titles; costs of the suit and interest.

3. In this application, the applicants aver that they are the registered proprietors of the Plots MN/VI/5141, MN/VI/5153 and MN/VI/5154. It is averred that there exists a boundary, ownership and title dispute, between the plaintiffs and the applicants and that there are already other matters in court being Mombasa ELC Petition No. 9 of 2018, Mombasa HCCC No. 273 of 2017, Mombasa ELC No. 405 of 2017, Constitutional Petition No. 202 of 2018, Constitutional Petition No. 64 of 2017 and ELC No. 40 of 2019. In the supporting affidavit sworn by Osman Ahmed Kahia, it is deposed that the titles that the plaintiffs hold are fake and that it is the title of the applicants which are genuine. He has deposed that the plaintiffs are well aware that the applicants have filed the suit Mombasa ELC Petition No. 9 of 2018 yet they have failed to disclose to this court the many pending matters over the same subject matter. To his affidavit, he has annexed copies of the titles held by the applicants, the petition in Mombasa HCCC Petition No. 34 of 2017, Chunky Limited & Curly Wurly Limited vs Patrick Ndune & 11 Others; the plaint in Mombasa ELC No. 273 of 2017, Kahia Transporters Limited vs Chunky Limited and Curly Wurly Limited; the plaint in Mombasa ELC No. 405 of 2017, Kahia Transporters Limited and Trade Lead Limited vs National Land Commission; the petition in Mombasa HCCC No. 202 of 2018, Julius Kea Mbawa and Director of Criminal Investigations and Others (including Chunky Limited, Curly Wurly Limited, Kahia Transporters and Trade Lead Limited as 1st – 4th interested parties); the Petition in Mombasa HCCC Petition No. 64 of 2017, Salim Kobo Godani & Others vs The Ministry of Education & 2 Others (Chunky Limited as 3rd respondent); Mombasa High Court Petition No. 40 of 2019, Colfax Limited and the National Land Commission & Others.

4. The plaintiffs have opposed this application through a replying affidavit sworn by Harji Govind Ruda, a director of Chunky Limited. He has gone at lengths to contend that it is the titles held by the plaintiffs which are genuine and those held by the applicants are not. He has averred that although there exists other suits, the causes of action are different and that this action only seeks cancellation of the deed plans and title deeds erroneously issued.

5. I invited counsel to file written submissions. I have seen the submissions filed by Mr. Omwenga, learned counsel for the applicants, and Mr. Borona, learned counsel for the plaintiffs and I have taken these into consideration before arriving at my decision. The defendant's counsel, indicated that he would not be participating in this application.

6. It is apparent from the plaint that the plaintiffs seek orders for revocation of the deed plans and titles to the land parcels MN/VI/5141, 5153 and 5154. The said titles and deed plans are registered in the names of the applicants. I do not see how the plaintiffs can proceed to have a suit seeking such orders if the owners of these deed plans and titles are not made parties. The court cannot proceed to revoke titles and deed plans of persons where such persons are not parties to the suit. If the court proceeds with such a matter, without the owners of the titles and deed plans being parties, then the court will have denied the said persons a right to be heard. The owners of the titles and deed plans certainly have a right to be heard before any dispute touching on the veracity of their titles and deed plans is determined. Thus, where there is a suit by a party, seeking cancellation of title or deed plan of another person, that other person is a necessary party, and must be made a substantive defendant in such suit. It was very wrong, if not out-rightly mischievous, for the plaintiffs to have filed this suit without having the applicants as defendants. I have no hesitation to make the order that the applicants be enjoined to this suit as substantive defendants. I thus order the amendment of the plaint within the next 14 days to reflect this position. If no such amendment plaint is filed, then this suit, as it exists, will be struck out.

7. I am aware that within this application, parties tried their best to demonstrate that the titles they hold are genuine and that the titles for the other parties are fraudulent. That is not the issue before me and I need not address myself on those claims.

8. There is the prayer within this application for stay of suit. I note that the existing defendant has raised a preliminary objection that this suit ought to be struck out as being *res judicata*. We will deal with the issue of stay, or dismissal, of suit, at a later stage. For now, let the applicants first be enjoined and the plaint be amended accordingly. After service of the amended plaint, the applicants, who will be defendants, can proceed to file their pleadings and fully participate in this suit.

9. The plaintiffs ought to have known better. It is incredulous for one to seek cancellation of a title of a person, yet the said person is not made a party to the suit. The plaintiffs will thus bear the costs of this application.

10. Orders accordingly.

DATED AND DELIVERED THIS 11TH DAY OF MAY, 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA