



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 66 OF 2015**

**(CONSOLIDATED WITH ELC CASE NO. 36 OF 2015)**

**AMIR AHMED AND 2 OTHERS.....PLAINTIFFS**

**VERSUS**

**KATANA CHAI AND 55 OTHERS.....DEFENDANTS**

**AND**

**KADZUHONI PRIMARY SCHOOL BOARD OF MANAGEMENT**

**–KADZUHONI PRIMARY SCHOOL.....INTENDED DEFENDANTS**

**RULING**

1. Before me for determination is the Notice of Motion dated 23<sup>rd</sup> January 2020. The said Motion brought herein by the Honourable the Attorney General prays for Orders: -

***2. That this Honourable Court be pleased to grant leave to enjoin Kadzuhoni Primary School and Board of Management Kadzuhoni Primary School as Defendants to this suit.***

**3.....**

***5. That this Honourable Court be pleased to stay the eviction or further interference of the Applicants occupation of the suit property by the Plaintiffs and/or their agents pending the hearing and determination of this suit.***

***6. That an order for stay be granted as the Court may deem fit.***

***7. That upon inter-partes hearing, this Honourable Court be pleased to set aside the entire proceedings and Judgment in ELC 166 of 2015, the suit herein.***

***8. That upon inter-partes hearing, this Honourable Court be pleased to set aside the entire proceedings and/or vary the Judgment dated 9<sup>th</sup> April 2019 in ELC 66 of 2015 to the extent that it affects ownership rights of the Applicants herein to parcel of land LR No. 11883.***

***9. That upon inter-partes hearing, this Honourable Court be pleased to permanently restrain the Plaintiffs and/or their agents from interfering with the Applicants quiet possession of the suit property or in any way causing disturbance to the Applicant's right***

***to occupy the suit property.***

***10. That this Honourable Court may give directions regarding the determination or disposal of this matter.***

***11. That the costs of this Application be provided for.***

2. The application which is supported by an affidavit sworn by the Kadzuhoni Primary School Head Teacher Fredrick Mangale is premised on the grounds: -

- i) That on 9<sup>th</sup> April 2019, Judgment was delivered herein in favour of the Plaintiffs with the Defendants being directed to vacate and demolish any structures erected on the land;*
- ii) That in the said parcel of land there exists Kadzuhoni Primary School, a registered Public Primary School with an enrolment of about 837 pupils;*
- iii) That on or about 13<sup>th</sup> July 2019, the Plaintiffs demolished part of the structures of the Primary School and it took the efforts of the County Education Officers and Community leaders to stop further demolition of the School premises;*
- iv) That a perusal of the pleadings and the Court proceedings shows that the School was not enjoined as a party to the proceedings;*
- v) That the School which was established on the suitland in 1983 was not served with any Court orders or notice in execution of the decree;*
- vi) That in the year 2001, the 3<sup>rd</sup> Respondent Jamila Shariff Abdurehman gave consent for the construction of the School, on 5<sup>th</sup> March 2001, the School applied to the Ministry of Lands for sub division of LR No. 11883 as per the consent and has since enjoyed uninterrupted possession;*
- vii) That as a result, the School was condemned unheard in contravention of the principles of natural justice and is now apprehensive that the execution of the decree will lead to demolition of its 20 permanent classrooms on the land and thereby jeopardize the education of the 837 students;*
- viii) That the Applicants stand to suffer irreparably if the proceedings and orders issued are not set aside or raised; and*
- ix) That accordingly in the interest of justice and fairness, the orders sought herein ought to be granted.*

3. The application is opposed. In a Replying Affidavit sworn by the 1<sup>st</sup> Plaintiff Amir Marei Ahmed as filed herein on 15<sup>th</sup> July 2020, the Plaintiffs aver that the entire application is misinformed and misguided as it falls short of the test for review under Order 45 of the Civil Procedure Rules.

4. The Plaintiffs deny that they have demolished any part of the School and assert that the alleged intervention by the County Officials was only meant to frustrate the lawful eviction of the Defendants who were already declared to be squatters by the Court in the Judgment of 9<sup>th</sup> April 2019.

5. The Plaintiffs accuse the Applicants of feigning ignorance of the Court Proceedings yet they have been part of the proceedings in **Malindi ELC Case No. 36 of 2015** which suit was consolidated with the present suit. The Plaintiffs assert that at any rate, the Applicants have always had constructive knowledge of this suit and ought to have applied earlier to participate in the proceedings herein.

6. The Plaintiffs aver that Mr. Hare Ruwa, the 8<sup>th</sup> Plaintiff in **ELC No. 36 of 2015** is and was the Treasurer of the Applicants' Board of Management and hence the Applicants have always been constructively represented in the proceedings.

7. While conceding that they allowed the Applicants to construct the School on some six acres of land that was to be agreed on, the Plaintiffs accuse the Applicants of unilaterally setting up the School at an area which was to be used for salt mining. The Plaintiffs aver that they do not intend to evict the said School but only to relocate the same to another designated portion.

8. I have given full consideration to the application and the response thereto. I have equally considered the submissions and the authorities placed before me by the Learned Counsel for the parties- Ms Munyuny for the Applicants and Mr. Okoth for the Plaintiffs/Respondents.

9. The Applicants- Kadzuhoni Primary School and the Board of Management Kadzuhoni Primary School seek to be enjoined as Defendants in this suit. In the main, they also pray for the Court to set aside and or vary the proceedings herein as well as the Judgment of this Court dated 9<sup>th</sup> April 2019 to the extent that it affects the ownership rights of the Applicants to that parcel of land known as LR No. 11883.

10. Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise.

11. Indeed, the Court may on its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or if the presence of such a party is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit. But joinder of parties may be refused where such joinder will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary or will just occasion unnecessary delay or costs on the parties in the suit.

12. It is however important to state that a party who desires to join proceedings must lay the basis for such an application. An applicant,

especially in a case like this where the Court has rendered its decision, ought to justify why the application for joinder is being made at that particular time. This will enable the Court to determine if the application is being made in good faith.

13. In the application before me, the Applicants do not state when they came to learn about these proceedings. Instead, the Head Teacher of Kadzuhoni Primary School avers as follows at paragraphs 2 to 5 of the Supporting Affidavit.

***2. That I am aware that on the 9<sup>th</sup> April 2019 the Plaintiffs obtained a Judgment and a Decree issued by this Honourable Court granting them vacant possession of the parcel of land LR No. 11883. Annexed herein and marked "FM1" is a Copy of the Decree and Judgment.***

***3. That on or about 13<sup>th</sup> July 2019 while executing the Decree issued herein, the Plaintiffs and/or persons acting under their instructions demolished part of the structures of Kadzuhoni Primary School and it took efforts of County Education Officers and Community leaders to stop further demolition of the School premises. Annexed herein and marked "FM2" is a photo showing the demolished walls of two classrooms and the roof.***

***4. That the Applicant, Kadzuhoni Primary School was not served with any Court order and/or notice by the Plaintiff in execution of the Decree.***

***5. That the Applicants were not served with any pleadings or informed of the suit filed by the Plaintiffs herein as a result the School was condemned without an opportunity of being heard which offends the principles of natural justice.***

14. From the material placed before me, it was apparent that following a request by the Defendants/Judgment Debtors in this suit in the year 2002, the Plaintiffs gave consent for the construction of the Applicant School on what the Defendants' acknowledged was the Plaintiffs' property. That much is indeed acknowledged at paragraphs 8 and 9 of the Applicant's Supporting Affidavit.

15. It was also apparent from the material placed before the Court that the parties never agreed conclusively on the site where the School was to be located even though construction thereof commenced shortly thereafter on the suitland. A perusal of the Plaintiffs List of Documents reveals the minutes of a meeting held at the School prior to the institution of this suit on 19<sup>th</sup> March 2014 attended by the School Committee, the then Head Teacher Rehema Rashid and area leaders. A perusal of those minutes reveals that among the issues discussed was how the suit herein would impact on the school and it was agreed that boundaries be placed marking the extent of the School.

16. It was equally clear from a perusal of the pleadings in ***ELC Case No. 36 of 2015*** consolidated with this suit that the basis of the claim for adverse possession by the Plaintiffs therein was the fact of the establishment of the School. The Applicants have infact not denied that the 7<sup>th</sup> Plaintiff in the said ***ELC Case No. 36 of 2015*** is the Treasurer of their Board of Management as stated by the Plaintiffs herein.

17. The Applicants have accordingly not laid any basis for seeking to be enjoined in these proceedings so late in the day. While the Plaintiffs had agreed to give land for the construction of the School, the Applicants and the Plaintiffs have not agreed on the extent thereof and the Applicants have no documentation in support of their claim that they own the suit property or any portions thereof. It is also apparent that the Applicants are not being honest as they were all along aware of the existence of this suit and I am unable to see how their being enjoined herein will help this Court to effectively and effectually determine issues. The issues between the parties have since been determined.

18. Accordingly, I find no merit for the application for joinder. That being the case, I need not consider the application to set aside the proceedings and Judgment of this Court delivered on 9<sup>th</sup> April 2019. The application dated 23<sup>rd</sup> January 2020 is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021.**

**J.O. OLOLA**

**JUDGE**