



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 53 OF 2015**

**PIRY JOHNSTONE MUYE.....PLAINTIFF**

**VERSUS**

**SHARIF OMAR MOHAMED alias JAFFER SHARRIF.....DEFENDANT**

**AND**

**JAFFER SHARIFF OMAR.....APPLICANT**

**RULING**

1. I have before me for determination two applications. The first one dated 7<sup>th</sup> May 2020 has been filed by one Jaffer Shariff Omar (hereafter the Applicant) praying for orders that this Court be pleased to unconditionally discharge, set aside or vary the orders of the Honourable Justice Angote issued herein on 21<sup>st</sup> April 2016 and that the Applicant be henceforth enjoined in this suit as an Interested Party and be allowed to participate in these proceedings.

2. That application is supported by the Applicant's affidavit and is premised on the grounds: -

- i. That the Applicant is the registered owner of all that parcel of land known as LR No. 22036 measuring 0.3664 Ha and situated in Kilifi;***
- ii. That it has become apparently evident that the Plaintiff sued the wrong defendant in the suit filed on 8<sup>th</sup> April 2015;***
- iii. That consequent to the push and pull between the Plaintiff and the question of who the Defendant was or ought to be, the Plaintiff obtained the orders of injunction which orders the Applicant now seeks to have set aside;***
- iv. That the Plaintiff has always threatened the Applicant and his employees claiming the Applicant's property belongs to him;***
- v. That the orders issued herein on 21<sup>st</sup> April 2016 were irregular and were obtained upon misrepresentation;***
- vi. That the Applicant is reasonably apprehensive that the Plaintiff will continue to interfere with his use of the property using the said orders despite overwhelming evidence that the Applicant is the registered owner and in possession thereof; and***
- vii. That the Plaintiff has continued to mobilize and arm his children and extended family to block the Applicant's activities on the property and it is now clear that the Plaintiff is not only uncertain about the name of the defendant but also the description of the suit property.***

3. Piry Johnstone Muye – the Plaintiff is however opposed to the application. In his sworn Replying Affidavit filed herein on 23<sup>rd</sup> July 2020, the Plaintiff asserts that the Applicant's application is misconceived, incompetent, frivolous and that it amounts to a gross abuse of the Court process.

4. The Plaintiff avers that the Applicant is already a party to this suit pursuant to the orders to amend the Plaintiff's name issued herein. The Plaintiff asserts that the Applicant is the one and the same Defendant herein and that he has a penchant of playing semantics with his name so as to appear as several different people when in actual sense he is the same person.

5. Accordingly, the Plaintiff has instituted the second application dated 21<sup>st</sup> July 2020 praying for orders; -

**3. That this Honourable Court be pleased to withdraw Kilifi ELC No. 29 of 2020; Jaffer Sharif Omar –vs- Piri Johnstone & 5 Others to this Honourable Court and consolidate the same with this suit for trial and disposal;**

**4. That this Honourable Court be pleased to make any other or such further orders as it may deem fit and just to make to meet the ends of justice; and**

**5. That costs of this Application be provided for.**

6. The second application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds: -

**a. That the Plaintiff filed this suit against the Defendant way back in 2015 over the parcel of land known as Plot No. 7733/III/MN/22036 Kijipwa;**

**b. That the Plaintiff's case has been fully heard and all that is pending is the hearing of the Defence Case;**

**c. That in the year 2018 the Defendant came up with a new title being Title No. 113/III/MN over the same property and has filed a suit at Kilifi Chief Magistrates Court being ELC No. 29 of 2020 wherein he has sued the Plaintiff together with his family members seeking orders of eviction from the property; and**

**d. That it is in the interest of justice and to maintain some sanity to have the suit filed in the Kilifi Court transferred and consolidated with the suit herein for hearing and final determination.**

7. In response to the second application, the Applicant denies that he has always feigned ignorance of the Plaintiff's claim. In a sworn Replying Affidavit filed herein on 16<sup>th</sup> September 2020, the Applicant avers that the Plaintiff has never sued him and that he is aware the Plaintiff lays claim to a different property known as Plot No. 7733/III which he claims was sub-divided sometime on 12<sup>th</sup> March 2018 when the Plaintiff moved the Court to amend his pleadings.

8. The Applicant further avers that he only came to know about this suit when the Plaintiff encroached on his portion of land on or about 9<sup>th</sup> January 2018 and not in the year 2015 when it was filed. He asserts that the subject matter in this suit is separate and distinct from the subject matter in the Kilifi Case which is LR No. 1136/III/MN.

9. I have perused and considered the two applications and the respective responses thereto. I have equally perused and considered the submissions and authorities placed before me by the Learned Advocates appearing for the two parties.

10. In regard to the First Application, Jaffer Shariff Omar seeks to be enjoined as an Interested Party in these proceedings and for the orders issued herein on 21<sup>st</sup> April 2016 to be varied and or set aside to enable him participate in these proceedings. The Plaintiff is however of the view that the said application is unnecessary as the Applicant and the Defendant herein are one and the same person using two different names whenever it suits him,

11. There was however nothing placed before me by the Plaintiff to demonstrate that the Applicant- Jaffer Shariff Omar is the same person as the Defendant named herein as Shariff Omar Mohamed. Indeed, from a perusal of the record, it was apparent that the Applicant is but a brother to the Defendant herein. That much is clear from a perusal of the Applicant's Replying Affidavit filed herein on 22<sup>nd</sup> May 2018 in response to an application dated 5<sup>th</sup> March 2018 filed by the Plaintiff. At paragraph 5 of the said Replying Affidavit, the Applicant avers as follows: -

**"5. That there is neither agency nor any other established legal relationship between Shariff Omar Mohamed and Jaffer Shariff Omar as alleged or at all except that Shariff Omar Mohamed is my biological brother. (Annexed herein and marked "JSO – 2" is a copy of the Identity Card and Passport)."**

12. As it were, I did not find anything from the Plaintiff refuting that statement by the Applicant. That position is indeed buttressed by the Defendant in his Replying Affidavit filed herein on 16<sup>th</sup> September 2020 from which it is clear the two are brothers engaged in their own legal tussles in another case filed in Nairobi. Having so clarified the position, the insistence by the Plaintiff that the Applicant and the Defendant are one and the same person without the production of any evidence to that effect is strange and certainly misleading. This Court refuses to take the Plaintiff seriously on that score.

13. As the Supreme Court stated in *Trusted Society of Human Rights Alliance –vs- Mumo Matemu & 5 Others (2014) eKRL*: -

**"...an interested party is one who has an identifiable stake in the proceedings, though he or she was not a party to the cause *ab initio*. He or she will be affected by the decision of the Court when it is made, either way. Such a person feels that his interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her own cause."**

14. In the matter before me, the Applicant avers that he is the registered owner of all that parcel of land known as LR No. 22036. The Plaintiff does not deny that the property he claims herein is the very same one registered in the name of the Applicant. I am accordingly persuaded that the Applicant has placed sufficient material before the Court to demonstrate that he stands to be directly affected by any orders that may be issued in these proceedings. Accordingly, I find and hold that the Applicant should be enjoined as the 2<sup>nd</sup> Defendant in

these proceedings.

15. The Applicant has also asked this Court to discharge the orders of injunction issued herein by the Honourable Angote J, on 21<sup>st</sup> April 2016. As was stated in ***St Patricks Hill School Ltd –vs- Bank of Africa Kenya Ltd (2018) eKLR***: -

*“.....this Court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”*

16. As it were, interim injunctions are not meant to be punitive of a party to a proceeding. They are meant to preserve the state of things pending the investigation of the dispute by the Court. In the matter before me, it is apparent that the orders have been in place for some five years since they were issued. However, while it is apparent that the Plaintiff may have initially instituted the suit against the wrong party, the Applicant has not demonstrated how the said orders have prejudiced him for the time they have been in existence.

17. While it is indeed true that such orders of injunction ought to be conclusively determined expeditiously, there was nothing placed before me to demonstrate that the Plaintiff has gone to sleep after obtaining the orders. From the record the Plaintiff has prosecuted his case and as at the time the two applications were filed, only the defence case was pending for hearing.

18. Given that the Plaintiff resides on the suit property, it was evident to me that a discharge of the said interim injunctive orders would be quite prejudicial to the Plaintiff as the discharge may be used as a pretext to evict the Plaintiff from the suit property. In the circumstances, and in order to preserve the state of things as they have been, I decline to discharge the orders issued herein on 21<sup>st</sup> April 2016.

19. In the second application before the Court, the Plaintiff urges the Court to be pleased to withdraw ***Kilifi ELC Case No 29 of 2020; Jaffer Sharif Omar –vs- Piri Jonhstone & 5 Others*** to this Court and to consolidate the same with this suit for trial and disposal. In response to the second application, the Applicant contends that the parties involved and the subject matter in the two cases are different.

20. The jurisdiction to consolidate suits arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arise in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason, it is desirable to make an order consolidating the suits.

21. I have looked at the pleadings herein and those filed in the Kilifi Magistrates Court. In the matter herein, the dispute relates to a parcel of land described by the Plaintiff in the Amended Plaint dated 6<sup>th</sup> June 2019 as Plot No. 7733/III/22036 – Kijipwa which parcel has since been sub-divided into LR No. MN/III/2238, LR No. MN/III/3237 and LR No. 11217 Mainland North as situated in Kikambala within Kilifi County.

22. The parcel of land in contention between the Applicant herein and the Defendant together with four others is however described as LR No. 11365/III/MN. The Applicant herein accuses the Plaintiff and other four individuals of trespassing onto the said property on 16<sup>th</sup> April 2020. Nothing was placed before me to demonstrate that those parcels of land were one and the same.

23. In the circumstances, I did not find any basis for the request for the transfer and consolidation of the two suits.

24. In the premises, the Plaintiffs application is dismissed while the Applicant’s Motion dated 17<sup>th</sup> May 2020 succeeds in terms of Prayer No. 4 thereof.

25. The costs of the two applications shall be in the suit.

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

**J.O. OLOLA**

**JUDGE**