



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 46 OF 2010

SAMUEL CHARO KITSAO & 34 OTHERS.....PLAINTIFFS

VERSUS

MOMBASA CEMENT LIMITED.....DEFENDANT

RULING

1. I have before me two applications for hearing. The First Application dated 12th February 2019 and filed by Mombasa Cement Ltd (the Defendant) prays for an order of temporary stay of execution of the Judgment delivered herein on 11th October 2018 as well as an order setting aside the said Judgment and re-opening the defence case for hearing.

2. The application which is supported by an affidavit sworn by the Defendant's Operations Manager one Javed Mohamed Sidik is premised on the grounds inter alia:-

a) That the Defendant has a good defence on record raising triable issues;

b) That the Defendant has been in occupation of the suit property for more than ten years and its quarrying activities would come to a halt if it vacates the properties;

c) That there is in place Judgment delivered in Mombasa HCCC No. 185 of 1991 in which the suit properties were declared to be a Wakf of the Mazrui and their Successors;

d) That there was a pending application dated 31st December 2012 which had sought to bring forth the issue of the pending Judgment to the attention of the Court but it has not been dealt with; and

e) That the Plaintiff shall not suffer any prejudice if the Judgment is set aside and that the Defendant's failure to attend Court when the matter came up is excusable.

3. The Second Application dated 25th February 2019 is filed by an entity known as the Trustees of the Mazrui Community (Welfare and Development) Wakf Lands Trust (the Proposed Interested Parties) seeking to be enjoined to the suit as Interested Parties or Defendants. The Proposed Interested Parties also pray for the Judgment delivered herein on 11th October 2018 to be set aside and that the Court Registry does supply them with copies of all pleadings and documents filed herein.

4. The Second Application which is supported by an Affidavit sworn by the Trustees Chairman one Salim Al-Amin Suleiman Mazrui is premised inter alia on the grounds that:-

a) The Applicants are vested with the management of all that property in Takaungu, Kilifi County, known as LR No. 4226;

b) On 19th July 2012 vide a Judgment issued in Mombasa High Court in Constitutional Case No. 134 of 1991, the Court declared:

i) That the Mazrui Lands Trust (Repeal) Act of 1989 which had purported to divest the Applicants of the said property was illegal, unconstitutional, null and void for all purposes.

ii) That the said land belongs to the Mazrui exclusive of all others.

iii) That the adjudication exercise (then carried out by the Government) was illegal and void ab-initio.

c) That the instant Judgment herein purports to dispossess the Mazrui of their land and to disregard their right to be heard in the case.

5. Both applications are opposed. In respect of the First Application, the Plaintiffs have through a Replying Affidavit sworn by their Advocate Patrick Shujaa Wara accused the Defendants of being guilty of laches. The Plaintiffs aver that the Defendants have not given any reason why they failed to prosecute the application dated 31st December 2012. They similarly accuse the Defendant of failing to give a reason for the delay in filing the present application given their knowledge of the proceedings of 4th December 2018.

6. The Plaintiffs further aver that the Defendant has not given any satisfactory reasons to account for the absence of its witnesses in Court on the date fixed for hearing of the defence case and on several other days before that. They further aver that the Judgment delivered herein does not in any way conflict with that delivered in **Mombasa HCCC No. 185 of 1991** and urge this Court to dismiss the application.

7. In regard to the Second Application, the Plaintiffs assert through a Replying Affidavit sworn by the 1st Plaintiff Samuel Charo Kitsao that the Proposed Interested Parties have not demonstrated how their presence was necessary for the effectual determination of the dispute herein. They assert that the Proposed Interested Party is a total stranger to the dispute and that its presence will only serve to convolute the matter which has already been heard and determined.

8. I have perused and considered the two applications as well as the responses thereto. I have similarly considered the written submissions and authorities as placed before me by the Learned Advocates for the parties.

9. In the First Application herein, the Defendant urges this Court to set aside the Judgment delivered herein on 11th October 2018 and to re-open the defence case for hearing. In support of that application the Defendant relies on a Supporting Affidavit sworn by its Operations Manager Javed Mohamed Sidik who avers inter alia that on 4th December 2018 when the matter came up for defence hearing, he was unavailable as his wife had been taken ill.

10. Order 10 Rule 11 of the Civil Procedure Rules provides that:-

“Where Judgment has been entered under this Order the Court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just.”

11. The Court in this respect has unfettered discretion to set aside or vary its Judgment. This discretion must however be exercised judiciously. As was stated in **Shah –vs- Mbogo (1968) EA 93**, the discretion is intended to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but not to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

12. In the matter before me, the Defendant’s Operation Manager avers that he was aware of the hearing date of 4th December 2017. He however asserts that he was prevented from attending the hearing as his wife had been ailing for some time and her condition had suddenly worsened on the date when the matter was to be heard.

13. That averment is unfortunately not supported by any evidence. The Defendant has not attached any medical or other evidence to support the position that the wife to its Operations Manager had been ailing for some time or indeed on or around the date when this matter came for hearing.

14. A perusal of that day’s Court record shows that the Defendant’s Counsel had indicated to the Court at 9.00 a.m. that they would be ready for hearing. The matter was then confirmed for hearing at 11.30 a.m. However, when that time arrived, Counsel for the Defendant informed the Court that their witness had not yet arrived as expected and asked for an adjournment. The Advocate made no indication that the wife to the witness was unwell.

15. A further perusal of the record herein shows that the Plaintiff’s case was closed on 22nd June 2015. Thereafter, this matter would be adjourned at least on eight (8) different occasions with the Defendant claiming that their director and witness one Ashok Patel (and not the deponent of the Supporting Affidavit) was either ill or abroad. On 17th July 2017, the said witness was said to have passed away and the matter was again adjourned to enable the Defendant to substitute a new witness.

16. On 18th October 2019, when the matter next came for hearing, the Defendant was not in Court and the matter was adjourned after the Court was told that their Counsel had taken her child to hospital. The matter was then adjourned to 4th December 2017 when again the Defendants sought another adjournment that was declined.

17. Even though they were aware that their case was closed on the said date, no application to re-open the same was made on account that their witness’ wife was unwell. It was only after more than one year and after Judgment had been rendered and execution commenced that they came to this Court on 14th February 2019 claiming that the witness had been unable to attend Court for the reason given.

18. Unfortunately for them, the record herein does not make their case believable. The numerous applications made for adjournment after the Plaintiffs closed their case coupled with the delay in making this present application is to me a demonstration of the deliberate attempts made to delay and obstruct the conclusion of this matter. The allegation that their witness could not attend Court due to the illness of his wife is unsupported by any evidence and is clearly an afterthought.

19. In the circumstances I agree with the Plaintiff's Submissions that the Defendant has failed to demonstrate an excusable mistake, inadvertence, accident or mistake or error either on its part or on the part of its Counsel on record to warrant the exercise of this Courts discretion in the Defendant's favour.

20. The application dated 12th February 2019 lacks merit and the same is dismissed.

21. In respect of the Second Application, the proposed Interested Party seeks to be enjoined to the suit on account that it is the registered proprietor of Plot No. 4236 Kilifi and that there is Judgment delivered on 19th July 2012 in ***Mombasa High Court Constitutional Case No. 185 of 2011*** which declared that the land belongs to them.

22. Rule 10 (2) of Order 1 of the Civil Procedure Rules provides that:-

"The Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added." (Emphasis mine).

23. That being the case, the onus then is on the applicant to show that there are proceedings pending before a Court and that its presence in that suit is necessary to enable the Court to effectually and completely adjudicate upon all the issues arising in that suit. Such an applicant must similarly demonstrate that it has a stake or interest in the proceedings and that it stands to be adversely affected by the Judgment of the Court unless it is allowed to appear and articulate its case.

24. Courts will however decline to allow joinder of parties where such joinder will lead into practical problems of handling the existing cause of action together with the one of the party being enjoined; where it is unnecessary, or where it will just occasion unnecessary delay or costs on the parties in the suit.

25. I have looked at the application and the record herein. In their consolidated suits herein as filed on 13th May 2010 and 14th February 2011, the Plaintiffs were seeking an order of injunction to restrain the Defendants from inter alia fencing the said properties, cutting down their trees and preventing them from accessing their land. They further sought a mandatory injunction to compel the Defendant to pull down its fence erected over the land claimed by the Plaintiffs.

26. On the other hand, the Defendant pleaded among other things that it had purchased some of the parcels of land from some of the Plaintiffs and denied any encroachment on the Plaintiff's parcels of land. This Court heard the dispute between the two parties and made its determination on 11th October 2018.

27. As it were, the Proposed Interested Party was not a party to the already concluded proceedings and I did not hear them claim that they had been mentioned in the Judgment and/or that the Plaintiff/Decree-holders had sought to execute the Decree against them. Other than their claim to ownership of LR No. 4236 I was unable to discern how their joinder into these proceedings would help the Court to effectually and completely adjudicate a matter that has already been concluded as between the protagonists that were hitherto before me.

28. From the Supporting Affidavit as filed before me, I was unable indeed to discern any conflict between the Judgment issued in ***Mombasa HCCC No. 185 of 1991*** and the determination herein.

29. In the premises, I did not find merit in the Proposed Interested Party's application either and the same is equally dismissed.

30. The Plaintiffs shall have the costs of the two applications.

Dated, signed and delivered at Malindi this 27th day of May, 2020.

J.O. OLOLA

JUDGE