



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 9 OF 2015

MAISHA BORA LIMITED.....PETITIONER

VERSUS

1. THE LAND REGISTRAR, KILIFI COUNTY.....1ST RESPONDENT

2. THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

3. HAJILA BAJILA GUYO.....3RD RESPONDENT

RULING

1. By a Notice of Motion application dated and filed herein on 7th July 2019, one Willy Dadi Bajila (the Proposed 4th Respondent) as well as the 3rd Respondent pray for orders as follows:-

3. That the Honourable Court does grant leave to the firm of Musyoki Mogaka and Company Advocates to come on record for the Proposed 4th Respondent and (the) 3rd Respondent instead of Binyenya Thurania and Company Advocates.

4. That the Honourable Court does grant leave to the Proposed 4th Respondent to be added to these proceedings.

5. That the Honourable Court be so ordered in the interim to place conservatory orders against the 1st Respondent from transferring, disposing off and or making any changes in its register in terms of the property being LR Nos. Chembe/Kibabamshe/397 and Chembe/Kibabamshe/440.

5. That the Honourable Court be pleased to review, vary and or set aside the Judgment dated 19th April 2018 and or subsequent decree dated 22nd May 2019 in this matter.

7. That the Honourable (Court) does stay and revoke all proceedings in this matter.

8. That the Honourable Court be pleased to order the 1st Respondent to uphold and or register the orders of the Honourable Court in Miscellaneous Application No. 31 of 2008 dated 18th November 2018.

9. That this Honourable Court be pleased to issue such further Orders as it deems fit and just in the circumstances.

10. That the costs of this application be provided for.

2. The application which is supported by two affidavits sworn by the said Willy Dadi Bajila and Hajila Bajila Guyo (the 3rd Respondent) is premised on the grounds:-

i) That this Court was gravely and fatally misinformed in this matter and the facts as set out are critically and or fatally flawed to the extent that a grave miscarriage of justice has occurred;

ii) That the subject matter herein was the subject of previous proceedings in Malindi Miscellaneous Judicial Review Application No. 31 of 2008;

iii) That the Court did grant orders of Mandamus against the Respondents compelling them to register the 3rd Respondent as the legal owner of LR Nos. Chembe/Kibabamshe/397 and Chembe/Kibabamshe 398 on 13th November 2008;

iv) That the 1st Respondent was served with the said orders on 1st January 2009 but did not comply with the same and instead registered the Petitioner as the owner of the property on 12th February 2009;

v) That evidence on the above was not brought to the Court's attention in this Petition as the 3rd Respondent is illiterate and was unaware of the existence of this matter until recently;

vi) That the Applicant herein did not employ the services of Binyenya Thurairaja & Company Advocates to represent her in this matter; and

vii) That the Applicant through her father and grandmother only recently learned that the property herein was never registered into her name and it is in the interest of justice that the orders sought be granted.

3. The application by the two is however opposed. By a Notice of Preliminary Objection dated 1st July 2019, Maisha Bora Ltd (the Petitioner) objects to the application on the grounds that:-

1. The Court has become functus officio;

2. That the application for review has been brought after an unreasonable delay;

3. That litigation must come to an end;

4. That the only avenue available to the Applicant is to prefer an appeal to the Court of Appeal, if still within time.

4. The application is further opposed by the firm of Advocates presently on record for the 3rd Respondent. In a Replying Affidavit sworn and filed herein by Binyenya Benjamin Advocate a Partner in the Law Firm on 25th June 2019, Counsel avers that Hajila Bajila Guyo (the 3rd Respondent) together with one of her sons visited his offices at Mwembe Resort on 27th November 2015 in the company of one Nelson Bofa (now deceased) and personally gave her instructions to act for her in this matter.

5. Counsel further avers that on the strength of the 3rd Respondent's instructions, he prepared a Notice of Appointment of Advocates, a Notice of Change of Advocates and two Replying Affidavits, one in reply to the Notice of Motion dated 2nd July 2015 filed by the Petitioner and the second one in reply to the Petition. He further avers that the 3rd Respondent appended her thumb print to the two Affidavits and that he proceeded to lodge the same in Court on 30th November 2015.

6. Counsel further states that he was then served with another Affidavit upon which he contacted the late Nelson Bofa who again attended his office with the 3rd Respondent. The 3rd Respondent then provided Counsel with an Original Statement of Account for her Equity Bank Account for the purposes of responding to the Petition.

7. Mr. Binyenya Advocate further avers that on the instructions of the 3rd Respondent, he also instituted **Malindi ELC Case No. 149 of 2018** wherein the 3rd Respondent as Plaintiff has sued the Petitioner herein and three other persons. He accordingly affirms that he had the 3rd Respondent's full instructions to conduct this Petition on her behalf.

8. I have perused the application and the various responses thereto. I have also carefully perused and considered the submissions made by the Learned Advocates for the parties and the authorities to which they referred this Court.

9. There are two main prayers before this Court for consideration. The first prayer is that of the 4th Proposed Respondent to be enjoined in these proceedings while the other is the prayer for review, variation and/or setting aside of the Judgment delivered herein on 19th April 2018.

10. I say so because I did not understand the Replying Affidavit filed herein by Mr. Binyenya Advocate to be in opposition to the take over of the brief from himself by Messrs Musyoki Mogaka & Company Advocates. Instead, the same deals with the assertions made by the Applicant herein to the effect that the Law Firm Binyenya & Thurairaja Advocates acted without instructions for the 3rd Respondent herein.

11. As it were, 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.

12. However, while joinder of parties is permitted by law and may be done at any stage of the proceedings, the same 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, where it is unnecessary, or where, it will just occasion unnecessary delay or costs on the parties.

13. In **Pravin Bowry –vs- John Ward & Another (2015) eKLR**, the Court of Appeal considered the applicable principles for an application such as the one before me. Citing with approval the decision by the Supreme Court of Uganda in **Deported Asians Property Custodian Board –vs- Jaffer Brothers Ltd (1991)EA 55(SCU)**, the Court observed that:-

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the cause or matter....”

For a person to be enjoined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of the two things have to be shown. Either it has to be shown that the orders which the Plaintiff seeks, would legally affect the interests of that person and that it is desirable for avoidance of a multiplicity of suits, to have such person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the Defendant cannot effectually set a defence he desired to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

14. The instant Petition was instituted on 2nd July 2015. Upon hearing the parties and their submissions, Judgment was rendered herein on 19th April 2018. The Proposed 4th Respondent does not state anywhere the reasons why he seeks to be enjoined in the already concluded proceedings save for a brief statement at Paragraph 11 of his Supporting Affidavit to the effect that his grandmother (presumably the 3rd Respondent) is illiterate and has never been aware until recently of the existence of this Petition.

15. With respect I did not think that the fact that the 3rd Respondent is illiterate would suffice to give the 4th Proposed Respondent a stake in these proceedings. The Applicant ought to have demonstrated that he has an interest in the subject matter of the suit and that he stands to be affected by any orders that may be made herein. Alternatively, he ought to have shown that he is a necessary party and that his presence would enable the Court to effectually and completely adjudicate and settle all the issues in the suit.

16. In the premises, I was not satisfied that the Applicants have demonstrated that the 4th Proposed Respondent has sufficient interest in the subject matter of the dispute and/or that he is liable to be affected by any order that this Court can make at this stage. The application for joinder is accordingly declined.

17. In respect of the application for review, Order 45 Rule 1 of the Civil Procedure Rules sets out the grounds upon which the Court can consider an application for review as follows:-

“Any person considering himself aggrieved:-

a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) By a decree or order from which no appeal is hereby allowed; and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the Court which passed the decree or made the order without unreasonable delay.”

18. According to the Applicants, the 3rd Respondent is illiterate and was until recently unaware of the existence of this Petition. The Applicants aver that the said 3rd Respondent did not at any point in time employ the services of the Law Firm Binyenya Thurairaja & Company Advocates and hence those Advocates or any other person failed to bring to the notice of the Court the fact that there was an order of Mandamus issued in ***Malindi High Court Miscellaneous application No. 31 of 2008***.

19. The Applicants aver that the said orders issued on 13th November 2008 had compelled the 1st Respondent herein to register the 3rd Respondent as the legal owner of LR Nos. Chembe/Kibambashe 397 and 398 and that the failure to bring the same to the notice of the Court has resulted in a miscarriage of justice.

20. In response to the application however, the 3rd Respondent’s former Counsel Benjamin Binyenya has sworn a Replying Affidavit in which he disputes the Applicant’s contention that they were unaware of these proceedings until recently.

21. Counsel avers that contrary to the Applicants assertion that the 3rd Respondent never instructed his law firm, the 3rd Respondent had in the company of her son and one Nelson Bofa visited his offices at Mwembe Resort, Malindi on 27th November 2015 and personally gave him instructions to act for her in this matter.

22. Mr. Binyenya Advocate further avers that on the strength of those instructions he prepared a Notice of Appointment of Advocates and two Replying Affidavits one for the Petition and the other in response to an application filed by the Petitioner. Counsel further asserts that the 3rd Respondent not only thumb-printed the Affidavit before he filed the same but also that the 3rd Respondent subsequently visited his office on another date and gave him a copy of her Bank statement from Equity Bank that was required for filing of a response to another affidavit filed by the Petitioner.

23. I have looked at the Affidavits said to be of the 3rd Respondent and other documents annexed to Counsel’s Replying Affidavit. The Applicants herein as it were did not file a further or Supplementary Affidavit in rebuttal of the same. At Paragraph 22 of her Supporting Affidavit to this Application however, the 3rd Respondent alludes to the same and avers that according to her, she was only attending to the instructions of the Acting Chief and giving out her finger prints in the guise that she was told to do so in order to be issued with her Title Deed.

24. Unfortunately, I did not think the 3rd Respondent was being candid. The details in the Affidavits reveal a person who knew what the dispute was and what she was responding to. That must be the reason she does not give the name of the Chief who purportedly misled her or the person who was assisting her to get the Title Deed. In the result, I found the allegations against her former Advocates unfortunate and was unable to buy into her version that she was unaware of these proceedings, in her words, “until recently.”

25. As I understood it, the discovery of any new matter or evidence has to be in reference to an important or relevant material to such an extent that if it had been brought on record at any time before the Judgment was delivered or the decree issued, it would have had a material impact and could have altered the decision.

26. Furthermore, the absence of such important matter or evidence at the time of the decision must not be the result of some negligence on the part of the applicant. That must be the reason the applicant is required by law to strictly prove that such matter or evidenced was not within her knowledge or could not be adduced even after exercising due diligence.

27. In the matter before me, the alleged important matter or evidence is an extract of an Order issued in **Malindi High Court Miscellaneous Application No. 31 of 2008**. A perusal thereof shows that the parties were only the 3rd Respondent and the Kilifi Land Registrar. On 18th November 2008 following a Letter of Consent by the parties, the Court is shown to have ordered:-

“1. That Judicial Review Orders of Mandamus do issue directed against the Respondent compelling and commanding the Respondent by himself, herself, employees and/or agents to forthwith register the ex-parte Applicants as the absolute proprietor of Plot No. Chembe/Kibabamshe/397 and Chembe/Kibabamshe/440

2. That there be no order as to costs.”

28. As it were, the Respondent referred to in the Order was the Kilifi Land Registrar. A reading of the Honourable Justice Angote’s Judgment delivered herein on 19th April 2018 reveals that the said decision was in fact the focus of his Judgment. After repeating the order verbatim as stated hereinabove, at Paragraph 13 of his Judgment, the Learned Judge concludes at paragraph 17 of the Judgment as follows:-

“17. Although the 3rd Respondent has argued that the Petition is an abuse of the Court process because the Petitioner bought the suit land pendente lite (during the pendency of the suit) the evidence before me shows that the person who sold the suit land was not a party to the Judicial Review Miscellaneous Application No. 31 of 2008.”

29. Arising from the foregoing, it was evident to me that there was absolutely no important matter or evidence that was not placed before the Court that would warrant a review and/or setting aside of the Judgment delivered herein on 19th April 2018.

30. Accordingly the application before me dated 7th July 2019 is misconceived and without basis. The same is dismissed with costs to the Petitioner and the Law Firm of Binyenya Thurania & Company Advocates.

Dated, signed and delivered at Malindi this 17th day of June, 2020.

J.O. OLOLA

JUDGE