



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ENVIRONMENT AND LAND
CIVIL SUIT NO. 134 OF 2012

ANIKET PROPERTY INVESTMENT LTD.....PLAINTIFF

-VERSUS-

HAMADI JUMA MWAKIBIBO & 8 OTHERS.....DEFENDANTS

RULING

1. The chamber summons for determination is dated 14th January 2015 commenced by the proposed defendant hereinafter referred to as the applicant. It is brought under the provisions of section 1A & 1b of the CPA and order 1 rule 3, 10(2) & (4) and rule 25 of the Civil Procedure Rules 2010. In this summon, the applicant seeks to be joined as a 9th defendant and if this be granted, the parties herein be directed to serve him with pleadings in regard to this suit to which then he has a right to file a statement of defence.

2. The application is supported by the grounds on the face of it and the affidavit in support sworn by James Abian Mugoya Isabirye. Mr Mugoya deposed that he is the managing director of the applicant. The applicant owned land parcel No Kwale/Diani Beach/Block 25 whose title was unlawfully cancelled and subsequently subdivided into plot Nos 203, 205 and 1536 – 1543. The proposed 9th defendant file suit No HCCC 211 of 2006 against current 1st defendant and two others to safe guard his proprietary interest. Mr Mugoya deposed further that this suit was fraudulently and without his knowledge withdrawn. The applicant avers that he has since challenged decisions emanating from that withdrawal.

3. The applicant contends that all parties herein are aware of his claim in the subject property having participated in the withdrawn suit. It is their case that for this Court to effectually determine all issues relating to the ownership of the suit property, it is important to join him in this proceedings. The applicant annexed to the supporting affidavit proceedings in HCC No 211 of 2006 between itself and Hamadi Juma Mwakibibo, the A. G, Stephen Odiaga & Co advocates and Aniket Property & Investments Ltd. It urged the Court to grant the orders sought.

4. The application is vehemently opposed both by the plaintiff and the 1st – 8th defendants. The plaintiff filed grounds of opposition. In the grounds in brief, the plaintiff states the applicant is not a proper party to be joined in these proceedings and that it does not have any claim as against the applicant. The 2nd defendant through a replying affidavit sworn by Kwame Kariuki, it is deposed that the 2nd defendant acquired Kwale/Diani Beach/1543 lawfully and legally from the 1st defendant. He also deposes the applicant is not a proper party to be joined as he has no legitimate claim to this suit since his title was legally cancelled by Kwale Land Disputes Tribunal in 2005.

5. The parties then argued the application orally. Mr Jengo advocate holding brief for Mr Masika advocate for the applicant submitted that this Court has power to grant the orders sought suo moto or when moved by a party. He submitted that the applicant is a necessary party as he owns the land in dispute and on 28.6.2005 the Kwale Land Disputes Tribunal purported to cancel the title of the proposed defendant. Further that the titles in dispute herein is whether the applicant lost his title appropriately or not since the land disputes tribunal did not have authority to cancel the title. That the facts contained in the supporting affidavit has not been contested by the plaintiff. Lastly he submitted that HCCC No 211 of 2006 was withdrawn and not heard on merits therefore the filing of this application is not an abuse of the Court process.

6. Mr Kagram advocate for the plaintiff opened his submissions that this suit was to abide the Court's ruling in HCC No 211 of 2006 that required the present plaintiff to be joined in that suit. Secondly that the applicant has not shown or proved his interest in suit property and the reliefs sought do not touch on the applicant. Thirdly the plaintiff bought the suit land after the applicant's suit was withdrawn. The applicant's advocate Mr Masika participated in the withdrawn suit and that the applicant has not disclosed the other cases which are pending. Lastly that this application is asking the Court to sit on appeal on a decision of a Court of concurrent jurisdiction. Further that it is against public policy for them to seek to be joined when they have preferred an appeal. He urged this Court to disallow the application.

7. Mr Ndambiri advocate for 2nd, 4th, 5th and 6th defendants associating himself with the plaintiff's submissions added that the applicant has not established his proprietary interest in the suit parcel Kwale/Diani/1543. Mr Ndambiri also submitted that 2nd defendant has filed documents proving ownership of the suit property. He states that his clients would be prejudiced if the applicant is joined in this case as it would delay the prosecution of this case as there will be a confusion on the issue in dispute. He asked the Court to disallow the application as lacking in merit since the Court in Judicial Review Case No 57 of 2012 had issued injunctive orders barring any dealings on suit parcels Nos 203 and 1536 – 1543. The state counsel for the 7th & 8th defendants adopted the submissions opposing the motion. I have noted the response given by Mr Jengo to these submissions.

8. An important question was raised by the plaintiff and the 2nd – 8th defendants as to whether the applicant had proved his proprietary interests in the suit property to warrant him being joined in these proceedings. In the amended plaint dated 11th July 2012 the suit titles referred to be in dispute are Kwale/Diani Beach/203 and 1536 – 1543. The orders sought are seeking to restrain the 1st – 8th defendants from trespassing, selling, leasing, alienating it at the suit properties and a declaration that plot 203 belongs to the plaintiff and the rectification of the register to be made accordingly. The applicant deposes that he owned the original No Kwale/Diani Beach/25 from which the present suit parcels were created. The applicant has not annexed any records from the land registry to prove this link. On the face of the applicant's pleadings, this Court cannot make a conclusion on the link/claim put forth by the applicant.

9. The applicant also pleaded that it is a necessary party to these proceedings which proposition is opposed. The applicant annexed the pleadings and ruling in HCCC No 211 of 2006 which was withdrawn (albeit illegally) and attempts to re-instate it refused. The applicant has not denied that he preferred an appeal against this ruling. The pleadings annexed did not include the plaint so again the Court is unable to deduce what the subject matter was in dispute in that case. That that case is also pending in the Court of appeal and so this Court cannot tell what the outcome it would be but I agree the same was not determined on merits thus no determination was made as to the authenticity or otherwise of that plaintiff's title.

10. Is the applicant a necessary party in this suit? To answer this, the first limb is already set out in paragraph 8 above that no documents were shown to create any nexus between the applicant and the suit properties. Secondly, the applicant on his own admits his title was illegally cancelled by Kwale Land Disputes Tribunal. The matter before Court now is not an appeal against the decision of that tribunal. This would be a wrong forum to question the legality or otherwise of the cancellation of the plaintiff's title. In my view the proper forum would be a suit commenced by the applicant to challenge that cancellation and probably apply to stay these proceedings but not to seek to be joined as a defendant. In

any event Mr Kagram stated that such an order was made in the withdrawn suit where this case was to await the out come of the ruling that was delivered. My answer therefore is that the applicant is not a necessary party.

11. Would the applicant suffer any prejudice were his matter before the Court of appeal succeed ? Mr Ndambiri submitted that there is in existence orders in J.R No 57 of 2012 restraining any dealings on the suit properties. Further the doctrine of lis pendence estoppes parties to a suit from dealing with subject matter in dispute that would render the resultant decree nugatory. I therefore see no prejudice being occasioned to the applicant as he pupports in paragraph (vi) of the grounds on the face of the application.

12. In conclusion, I find the applicant does not meet the categories of people to be joined as parties to a suit under Order 1. I find no merit in this application and hereby dismiss it with costs both to the plaintiff and the defendants.

Ruling date and delivered at Mombasa this 8th day of October, 2015.

A. OMOLLO

JUDGE