



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.73 OF 2007

(consolidated with HCCC No. 76 of 2007 – HCCC No. 80 of 2007)

KASSIM SHARIFU MOHAMED.....PLAINTIFF/APPLICANT

=VERSUS=

FOUR ISLAND BAY LIMITED.....DEFENDANT/APPLICANT

R U L I N G

Introduction

1. What is before the court is the Application dated 24th February 2015 by the Plaintiffs in Malindi HCCC No.s 76 of 2010 - HCCC No. 80 of 2007. all these files were consolidated.
2. In the Application, the Plaintiffs are seeking for leave of the court to amend their respective Plaints.

The Plaintiffs'/Applicants' case:

3. According to the Affidavit of the Director of the Plaintiffs' companies, he has obtained documents which indicate that parcel land known as Kilifi/Jimba/1146 ought to be in Registry Map Sheet No. 12 and not sheet number 14 as shown in the title deeds issued to Kalumas Company Limited.
4. It is the deposition of the Plaintiffs' director that he is in possession of a copy of the Title Deed of Kilifi/Jimba/1145 and 1126 which adjoins plot 1146 which shows that the same is on Registry Map Sheet No. 12.
5. Consequently, it was deponed, the Director of Survey, the Director of Land Adjudication and Settlement as well as the District Land Registry, Kilifi need to be enjoined in the consolidated suits to clarify the issue given that the Plaintiffs' case is that Title Kilifi/Jimba/1146 which is said to have overlapped the Plaintiffs is non-existent on both the Registry Map Sheet No. 12 and 14 respectively.
6. It is the Plaintiffs' directors' averment that he has come across a copy of an Affidavit sworn by Adolfo Guzzini in Malindi Misc. Civil Application No. 12 of 2001 wherein Emmanuel Charo Ting who is said to be the original allottee of Kilifi/Jimba/1146 features thereby making him a necessary party.

Defendant's/Respondent's Application

7. The Defendant's director deponed that the Application has been made too late in the day; that the Applicants have not shown that the evidence he intends to produce right now was not available at

the commencement of this suit and that the evidence that the Applicants are seeking to introduce is irrelevant and immaterial.

Submissions:

8. The Plaintiffs' advocate reiterated his clients' case in his written submissions which I have already summarised above.
9. Counsel submitted that Order 8 of the Civil Procedure Rules grants to this court wide discretionary power to allow pleadings at any stage for the purpose of determining the real question in issue and that the Defendants will not suffer any prejudice if the Application is allowed.
10. The Defendant's advocate on the other hand submitted that the prejudice that the Defendant shall suffer is the delay in bringing the application; that the suit has been partly heard and that the documents being sought to be relied upon were always available to the Plaintiffs.

Analysis and findings:

11. The Plaintiffs in this matter filed HCCC No. 76-80 of 2007 on 9th October 2007. In the Plaints, the Plaintiffs claimed for perpetual injunction to restrain the Defendant from trespassing in their parcels of land being plot number 118, 114, 117 and 116 in Watamu Township.
12. In its Defence in the five matters, the Defendant averred that it is the absolute proprietor of parcel of land known as Kilifi/Jimba/1146.
13. According to the Defence, the Plaintiffs' plots do not fall within the Kilifi/Jimba adjudication area but Kilifi Township.
14. The Plaintiffs have now filed an Application seeking to enjoin other parties to the suit as Defendants, to wit, the Director of Land Adjudication and Settlement, the Land Registrar, Kilifi, Kalumas Company Limited and Emmanuel Charo Tinga on the ground that they have come across documents linking the three to the dispute herein.
15. The documents which the Plaintiffs have come across necessitating the current Applicant include Registry Map Sheet Not 12, 14 and an Affidavit by Adolfo Guzzini in Miscellaneous Application Number 12 of 2011.
16. The record shows that when this matter came up for directions on 23rd July 2013, the court directed the Defendant to file its documents within 7 days.
17. On 27th February, 2014, the court again directed all the parties to file their documents and witness statements in all the consolidated matters within 30 days. The matter proceeded for hearing on 13th May 2014 when PW1 testified.
18. Considering that the suits have been in abeyance for the last eight (8) years, I do not understand why the Plaintiffs have now realised that the Director of Surveys, and the Director of Land Adjudication and Settlement and Kalumas Limited should be enjoined as Defendants in the suit.
19. If the Plaintiffs' position is that they have come across new evidence, then all they need to do is to pray to be allowed to file a further list of documents and witness statements and not to include new parties to a matter which has been partly heard.
20. The overriding objective of the Civil Procedure Act and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Consequently, when the court is called upon to invoke the provisions of Order 8 of the Civil Procedure Rules which gives the court the discretion to allow amendment of pleadings before Judgment, the court should be alive to the above overriding objectives.
21. The re-opening of pleadings in this matter by allowing the Plaintiffs to enjoin other parties to the suit, eight years down the line, and in a matter which is part heard, is contrary to the provisions of Section 1A and 1B of the Civil Procedure Act.
22. The Plaintiff knew, or ought to have known its case and the Defendant's case at the time of pretrial directions and should have filed the current Application before PW1 testified. No good reason has been given why the so called new evidence was not put on record in good time considering that the two Registry Map Sheets and the Affidavit of Adolfo Guzzini are public documents.
23. For those reasons, I find the Application dated 24th February 2015 unmeritorious and I dismiss it with costs.

Dated and delivered in Malindi this 2nd day of **October** 2015.

O. A. Angote

Judge