



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT GARISSA

ELC APPEAL CASE NO. 3 OF 2018

BASHIR FARAH HASSAN.....APPELLANT

VERSUS

MINISTRY OF LANDS MANDERA COUNTY.....1ST RESPONDENT

NOOR YUNIS.....2ND RESPONDENT

ALI HASSAN.....3RD RESPONDENT

OMAR MOHAMED.....5TH RESPONDENT

RULING

INTRODUCTION

The Applicant via a Notice of Motion under certificate of urgency dated 23rd October, 2020 is seeking the following orders;

- i. Spent.**
- ii. That this Honourable Court be and hereby strikes out the names of the 4th and 5th Respondents from this suit.**
- iii. That the costs of this application be provided for.**
- iv. That the court gives any other order it deems fit for the interest of justice.**

GROUND UPON WHICH THE APPLICATION IS PREMISED

- i. That the presence of the 4th and 5th Respondents has no legal basis or benefit to the Honourable Court neither are they crucial or necessary in order to enable the court effectually and completely all questions involved in the suit.**
- ii. That the presence of the 4th and 5th Respondents has no legal basis or benefit to the Honourable Court neither are they crucial or necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.**
- iii. That the said Respondents have been improperly joined and there is no nexus between them and the Appellant's case as they are not party to the suit this has subjected them to unnecessary, expensive and tedious court process.**
- iv. That it is in the interest of justice that the 4th and 5th Respondents be struck out from the subject suit.**

APPLICANT'S STATEMENT OF FACTS

The Applicant swore an affidavit in support of the said application and deposed as follows;

- a. That we do not have any financial or legal interest in this suit and request the Honourable Court to strike out their names from the case.**
- b. That they have never been party to the agreement for sale that led this suit yet the Appellant has maliciously enjoined them into**

this legal tussle to shame and disrepute their good names before the right thinking members of the society and damage their reputation as administrative officers.

c. That there is no connection between them and the Appellant and the Appellant's case has subjected them to unnecessary, expensive and tedious court processes.

RESPONDENT'S STATEMENT OF FACTS

The Respondent did not file grounds of opposition or replying affidavit to the said application. However, the Applicant through Ali Hassan who swore the supporting also filed a replying affidavit in opposition to their own application.

LEGAL ANALYSIS

I have considered the Notice dated 23rd October, 2020 and the supporting affidavit. I have also considered the applicable law. This is an appeal from the ruling and/or order of the Senior Principal Magistrate at Manderu Hon. P.N. Areri delivered on 25th June, 2018. The mandate of the first appellate court is to re-evaluate the facts and findings of the trial court to determine whether it was based in a misapprehension of the evidence or no evidence at all or wrong principles of the law.

The power to either enjoin or strike out the name of a party as a Defendant or an Interested Party in a suit is a residual power of the trial court on an application by any of the parties or on its own motion. The question whether to have a party enjoined as a party or have his name struck out is determined by the facts of the case. The facts or pleadings will disclose what role if any the party sought to be enjoined or the party sought to be struck out played in the dispute before the court. Whether the 4th and 5th Defendants played any role in the dispute before the trial court can only be discerned from the proceedings and the decision by the trial court. It is trite law that this Honourable Court sitting on appeal has no residual power or jurisdiction to vary or reverse any case in appeal on account of any misjoinder of parties or any defect in form not affecting the merits of the case. Section 79A of the Civil Procedure Act Cap 21 Laws of Kenya provides as follows;

“No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the court.”

It is clear from the provisions of the law that the appellate court cannot alter or vary any decree on account of misjoinder of parties or any other error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the court. This appeal has not even been admitted as this court has not perused the proceedings and the decision/order being appealed against from the Magistrate Court. The Applicants ought to have raised the issue earliest opportunity as a preliminary point before the trial court. Since the issue was not taken up by the parties before the trial court, this Honourable Court sitting as an appellate court has no power to determine the same at this stage. In any event, the Applicants have not indicated what prejudice they are likely to suffer which cannot be compensated by an award of damages if the application is not granted.

The upshot of my finding is that the Notice of motion dated 23rd October, 2020 lack merit and the same is hereby dismissed. Suffice to say that the authorities cited by the Applicant do not assist them as they are distinguishable. It is so ordered.

Read, delivered and signed in the Open Court this 27th day of November, 2020.

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E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. M/s Mohamed holding brief Ndege for Appellant
2. Mr. Duwane for Respondent.
- 3.

Fardowsa:

Court

Assistant