



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 332 OF 2009

MATHEW M. KITSAO & 43 OTHERS PLAINTIFFS

VERSUS

CHANDAN JETHANAND GIDOOMAL.....1ST RESPONDENT

PREM JETHANAND GIDOOMAL2ND RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA..... 3RD RESPONDENT

AND

HON. TOBIAS SAMBA.....PROPOSED INTERESTED PARTY

RULING

(Application to enjoin an individual as interested party; suit being one for adverse possession; the defendants who are the applicants claiming that the intended interested party who is a member of county assembly is inciting the public to interfere with the land; whether that entitles the respondent to be interested party in the suit; held that he is not a necessary party for the determination of the issue of adverse possession thus does not qualify to be an interested party; application dismissed)

1. The application before me is that dated 13 August 2018 filed by the defendants in this suit who wish to enjoin one Hon. Tobia Samba as an interested party. The application also seeks orders for a temporary injunction to restrain the proposed interested party from wasting, damaging or trespassing into the suit property which is Plot No. 49 and 50/XI/MI until the suit is determined. The application is based on grounds inter alia that the proposed interested party is the area Member of County Assembly, which is Tudor Ward, and that he has resulted into inciting innocent members of the public who are not parties to this suit to destroy, invade and trespass into the suit properties. The application is supported by the affidavit of Prem Jethanand Gidoomal, the 2nd defendant, and is opposed.

2. The case itself is one for adverse possession over the suit land and it is resisted by the applicants (as defendants). There have been numerous applications which have stalled the hearing of the main suit. In the supporting affidavit, Mr. Gidoomal has deposed that the proposed interested party is a public figure. He has deposed that he contracted a contractor to build a perimeter wall and also act as caretaker. He has averred that in May 2018, the proposed interested party called a gathering in the suit properties and started inciting members of the public. He claims that the proposed interested party is also inciting persons through social media to invade the land

3. The proposed interested party/respondent has opposed the application by filing Grounds of Opposition and a Replying Affidavit. It is averred that the application contravenes Order 1 of the Civil Procedure Rules. He has deposed in his affidavit that there is no evidence that he has been inciting members of the public. He has further deposed that as MCA it is within his powers to protect the rights of people of Tudor ward.

4. The plaintiffs on their part filed a replying affidavit sworn by Mathew Kitsao. They have opposed the application for joinder. They have denied that the proposed interested party has incited anyone.

5. I invited counsel to file submissions and I have seen the submissions of counsel.

6. This being an application for joinder of a party proposed to be an interested party I stand guided by the provisions of Order 1 Rule 10 (2) which provides as follows :-

(2) 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 to 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.

7. It will be seen from the above that the court has wide discretion to enjoin a person to the suit. The court will need to be persuaded that the presence of the party is necessary in order for the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

8. This suit, as I mentioned earlier, is one for adverse possession and it is opposed. Now, would the addition of the proposed interested party assist this court to adjudicate on the dispute ? Absolutely not. The proposed interested party is not claiming the land. The land is being claimed by the plaintiffs. How then can his presence be necessary ?

9. It appears to me that the application has been filed because the defendants are not happy with the manner in which the intended interested party has conducted himself. The respondent may be annoying, but that does not make him a necessary party to the suit. The defendants can proceed to file a report with the police if there have been inciting remarks, or indeed, are at liberty to file suit directly against him for recourse. But clearly, to me, the presence of the respondent is not going to assist this court in arriving at the final decision on whether or not the plaintiffs have proved adverse possession. I am not thus not persuaded to introduce him to this suit as interested party. Having declined to introduce him into the case, I am unable to make any further orders against him and the prayers for injunction against him thus fail. As I mentioned, the applicants are at liberty to file a separate suit against him if they feel that he is interfering with their proprietary rights and the same will be considered on merits.

10. Obiter, I think the respondent should also mind his actions and keep away from this dispute which is already pending determination in court. The fact that he is an MCA does not give him any licence to be intermeddling with private disputes in court between individuals. He also needs to keep his distance from the dispute.

11. For the above reasons, I see no merit in this application and it is hereby dismissed but I make no orders as to costs.

12. Orders accordingly.

DATED AND DELIVERED THIS 10TH DAY OF NOVEMBER, 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.