



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 85 OF 2011

FRANCIS NG'ETHE GAKURU.....PLAINTIFF

VERSUS

MOSES WAMBUA KILILE.....DEFENDANT

AND

1. REGIONAL SURVEYOR-LAMU COUNTY

2. LAND REGISTRAR-LAMU COUNTY

3. LAND ADJUDICATION OFFICER

LAMU.....INTENDED INTERESTED PARTIES

RULING

1. The suit herein was initially filed at the Lamu Resident Magistrates Court on 18th January 2010. In the Plaintiff's complaint filed at the Magistrates Court, the Plaintiff contended that his parcel of land Plot No. 356 Hindi Magogoni Settlement Scheme initially measured 20 acres but due to encroachment thereon by the Defendant, the land now measures only 12 acres. Despite a complaint made to the Lands Adjudication and Settlement office on 8th October 2009, the Defendant had declined to vacate the disputed portion hence the suit which was subsequently dismissed and was filed afresh at the High Court in Malindi in July 2011.

2. Thereafter on or about 8th May 2017, the Defendant filed the Notice of Motion application presently before me seeking orders as follows:-

1. That this Honourable Court be pleased to grant the Defendant/Applicant herein leave to enjoin the Regional Surveyor-Lamu County, Land Registrar-Lamu County, and Land Adjudication Officer-Lamu County as Interested Parties in the suit herein since it is necessary for the said intended interested parties to be enjoined for determination of the real matter in dispute in the suit filed herein by the Plaintiff.

2. That upon granting Prayer 1 above, this Honourable (Court) be further pleased to order and direct the 1st intended interested party to produce and/or file in Court the Registry Index Map(RIM) of Lamu/Hindi/Magogoni Area and in particular the respective area on which Land Parcel Numbers 356 and 748 are located for clarification and explanation on why Parcel No. 748 and other neighbouring parcels are not coinciding with the said RIM and a further order for the correction and rectification of the correct position of the Defendant/Applicant's Land Parcel Number Lamu/Hindi Magogoni and the confirmation of the proper acreage of the Plaintiff's parcel number 356.

3. That upon determination, correction and rectification of the RIM, this Court be pleased to issue and make such appropriate directions on the determination and final disposal of the case or make any such procedural orders.

4. That this Honourable Court do give directions on the issue of costs.

3. However by a Replying Affidavit filed herein on 30th October 2017, the Plaintiff avers that his claim is based on trespass and there is no need to enjoin any other parties herein. It is the Plaintiff's case that the Defendant has encroached upon his land and the issue before the Court will not in any way be assisted by the determination, correction or rectification of the RIM.

4. I have considered the application and the response thereto. 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 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.

5. As it were, even the Court may on its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or is one whose presence is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit.

6. But the Joinder of parties may be refused where the same will lead into practical problems of handling the existing cause of action together with the one of the party being enjoined; where it is unnecessary or will just occasion unnecessary delay or costs on the parties in the suit. In other words, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor is whether a common question of fact or law would arise between the existing and the intended parties.

7. In the Plaintiff filed at the High Court on 1st July 2011, the Plaintiff seeks possession, damages, a declaration that the Defendant is not entitled to the Plaintiff's land as well as a permanent injunction restraining the Defendant from entering, remaining in or using the land.

8. The basis of the Plaintiff's claim as filed in this Court is the contention that on 16th June 2011, the Defendant who owns Lamu/Hindi/Magogoni/748 entered his land Lamu/Hindi/Magogoni/356 and took possession of seven acres thereof. According to the Plaintiff, the Defendant did so on the wrongful claim that the seven acres are part of what the said Defendant had bought from one Joyce Muthoni Murioki, previously the proprietor of Plot No. 748.

9. In his Defence and Counterclaim filed herein on 6th September 2011, the Defendant denies encroaching upon the Plaintiff's land and denies knowledge of encroachment upon the alleged seven acres.

10. In his Counterclaim, the Defendant asserts that he purchased Plot No. 748 Lamu Hindi Magogoni from the said Joyce Muthoni Murioki (now deceased) and craves a permanent injunction to issue restraining the Plaintiff from interfering with his parcel of land.

11. In the circumstances of this case, I do not see any useful purpose that will be served by joining the three Government Agencies mentioned herein into this private dispute. There is absolutely no cause of action being proposed or relief sought from the said agencies save for the contention that they can help in clarifying the boundaries of the acreage thereof

12. That is not to me a case that requires the mentioned agencies to be enjoined. While the parties may cause the said parties to be summoned to clarify on any issues under their docket, I see absolutely no reason why the agencies should be enjoined herein, more so, so late in the day.

13. In the circumstances, I find no merit in the application dated 8th May 2017. The same is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

J.O. OLOLA

JUDGE