



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO.189 OF 2015

HARJI DHANJI VARSANI

SAID MBARAK AWADH.....PLAINTIFFS

VERSUS

1. HAMISI MRINZI KOIKOI

2. JAMAL ABEID KHAMISI

3. ABDULHAKIM ABEID KHAMISI

4. MOHAMED ABEID KHAMISI

5. NATIONAL LAND COMMISSION

6. THE CHIEF LAND REGISTRAR

7. DIRECTOR, LAND ADJUDICATION AND SETTLEMENT

8. DISTRICT LAND ADJUDICATION KILIFI

9. DISTRICT LAND REGISTRAR KILIFI.....DEFENDANTS

RULING

1. I have before me for determination a Notice of Motion application brought under the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. By the said application dated 8th December 2017 but filed herein on 17th April 2018, one Dzuha Chiro Dzombo prays to be enjoined in this suit as an Interested Party.

2. The application which is supported by an affidavit sworn by the Applicant himself is premised inter alia on the grounds:-

i. That the Applicant is the Administrator of the estate of the late Dzuha Dzombo Chironda who was the owner of Plot No. Kawala A. Kadzozzo/32.

ii. That the Plaintiffs are not the registered owners of the suit land and since the estate of the deceased is unrepresented in the suit, it is unable to defend its interests herein.

3. The application is opposed. By Grounds of Opposition dated 10th August 2018 and filed herein on 21st September 2018, the Plaintiff asserts that:-

1. The Intended Interested Party has not demonstrated in his application that he ought to be enjoined as an Interested Party in this suit. He has not demonstrated that his presence in this suit will help determine the issue at hand.

2. The Intended Interested Party has not demonstrated any interests he holds in the suit property at the centre of this suit(sic) and thus his presence will not help determine the issues at hand in this suit.

4. The 2nd, 3rd and 4th Respondents are equally opposed to the application. In a Replying Affidavit sworn by the 3rd Defendant Abdulhakim Abeid Khamis and filed herein on their behalf, on 9th July 2018, they assert that the three of them are the registered owners of the said Plot of land. They have produced a copy of the title in their name and deny that the Plaintiff has any proprietary interest thereon.

5. I have perused the said Application and the Grounds of Opposition thereto. I have equally perused and considered the submissions filed herein by the Learned Advocates for the respective parties as well as the authorities to which they referred me.

6. Order 1 Rule 10(2) of the Civil Procedure Rules provides that:-

“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. Arising from the foregoing, for one to qualify to be enjoined in proceedings under the said provision, he must not only be a necessary party but also a proper one against whom a remedy must flow to or from the other side. It is now trite that such a party must be one whose presence is necessary for the Court to effectually and completely adjudicate the matter and without whose presence any resultant decree cannot be enforced.

8. As was stated by Mabeya J quoting from a renowned English authority in ***Jan Bolden Nielsen –vs- Hersman Philipus Steyn & 2 Others (2012) eKLR:-***

“The party to be enjoined must be someone whose presence is necessary as a party. What makes a person a necessary party?...The only reason which makes a person a necessary party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party....

It is not enough that the intervener should be commercially or indirectly interested in the answer to the questions; he must be directly and legally interested in the answer to the question. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally, that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something in which he is legally interested.”

9. In the matter before me, the Applicant avers that he is the Administrator of the Estate of Dzuha Dzombo Chironda who according to him was the owner of Plot No. Kawala A. Kadzonzo/32. In his Further Affidavit filed on 16th October 2018, he has annexed a copy of a Ruling delivered on 31st March 2014 by the High Court at Mombasa in Miscellaneous Application No. 128 of 2010(JR) in support of the contention that his father owned the land.

10. In the said matter in which the Applicant’s father was apparently one of the Interested Parties, the Honourable Justice Edward Muriithi cites a letter from the Kilifi District Land Adjudication Officer and states as follows at paragraph 27 of his Ruling:-

27. By his conclusion in the letter of 28th February 2011, the District Land Adjudication Officer holds that:-

“It is necessary to note that this was an adjudication area where interest and rights over land was ascertained to people who owned land customarily as per Land Adjudication Act, Cap 284, Laws of Kenya. Therefore, during the adjudication process rights and interests of this Plot should have been associated to the locals who are family members of the late Dzuha Dzombo Chironda. There is every indication that the Plot has been under care of somebody who is one Hamisi Kokoi Mrinzi which is agreeable to all Interested Parties. From the foregoing, the land parcel No. 32 should be under the names of Hamisi Mrinzi Kokoi.”

It is on the basis of this latter finding that the 2nd-25th Interested Parties appear to found their claim to the parcel of land.”

11. I have perused and considered the above paragraph in the Learned Judge’s Ruling and I am unable to see how the same supports the Applicant’s claim. As it were, the Land Adjudication Officer did not expressly state that the land in question belonged to the Applicant’s father and/or that it should be registered in his name. At any rate, the Learned Judge went on to dismiss the Interested Party’s claims to the land at paragraph 28 thereof as follows:-

*28. If the Interested Parties seek to represent the interest of the deceased owner of the land, the law of succession as expounded by the 5-Judge bench of the Court of Appeal in **Troustic Union International & Another –vs- Jane Mbeya & Another CA No. 145 of 1990**(per Apollo CJ, Kwach, Cocker, Omollo and Tunoi (JA) which is binding upon this Court, require that they be appointed as his personal representative or administrators of his estate. In the absence of their appointment as such personal representatives, they lacked capacity to agitate his rights before the land adjudication officer or before the Court in these proceedings.”*

12. From a perusal of the application before me, I did not find any evidence that the Applicant has title to the suit property and/or that he is in occupation of any part thereof. At any rate, I note that this suit was filed in 2015 and that the Applicant cites a Limited Grant of Administration issued to him on 24th November 2014. No reason has been given why this application was not filed earlier or when the Applicant became aware of these proceedings.

13. In the circumstances, I did not find any merit in the application dated 8th December 2017 as filed herein on 17th April 2018. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 30th day of July, 2019.

J.O. OLOLA

JUDGE