



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 225 OF 16 (OS)

ABDALLA ALI ABDULRHAMAN.....APPLICANT

VERSUS

THE MINISTER OF LANDS, PLANNING MOMBASA COUNTY....1ST RESPONDENT

THE CHIEF OFFICER, MINISTER OF PLANNING.....2ND RESPONDENT

THE COUNTY SURVEYOR, MOMBASA COUNTY.....3RD RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA.....4TH RESPONDENT

THE REGISTRAR MOMBASA DISTRICT.....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

AND

MAHMOOD HAIDERLU KHIMJI.....1ST INTERESTED PARTY

SUKAII MAHMOOD KHIMJI.....2ND INTERESTED PARTY

RULING

1. The Application before me for determination is the Notice of Motion dated 20th June, 2018 brought under Section 3A and 80 of the Civil Procedure Act, Order 45 Rule 1 and 2, Order 40, Order 51(1) of the Civil Procedure Rules. The intended 3rd to 7th Interested Parties/Applicants are seeking orders:

1. Spent

2. That the Honourable Court be pleased, to enjoin the 3rd,4th, 5th,6th and 7th intended interested party as parties in this matter.

3. That once enjoined, pending the hearing and determination of this Application inter parties, this Honourable Court be pleased to stay the execution and implementation of orders of 15th June 2017 and issued on 23rd June 2017.

4. That pending the hearing and determination of this suit, this Honourable court be pleased to review, set aside and vacate its orders of 15th June 2017 and issued on 23rd June 2017.

5. That pending the hearing and determination of this suit, the 3rd to 7th Respondent and their families be allowed to continue using the access road through LAND REFERENCE NO.MOMBASA/BLOCK XVI/107 leading to their residential premises situate on LAND REFERENCE NO.MOMBASA/BLOCK XVI/108.

6. That the costs of the Application be provided for.

2. The Application is premised on the grounds on the face of the motion and supported by the affidavit of Hashim Ahmed Khator sworn on 20th June, 2018. The Applicants aver that they are tenants and/or lessees of premise situate on LAND REFERENCE NO.MOMBASA/BLOCK XVI/108 belonging to the Applicant herein, and that they have lived on the said premises on diverse dates commencing from the year 2002. That since they moved into the premises, they have been accessing it through an access road on LAND REFERENCE NUMBER MOMBASA/BLOCK XVI/160-107. They aver that sometime in or about March 2017, to their bewilderment; they came across an order issued by this court wherein it was ordered that the access road leading to their residential premises and which they have been using since time immemorial was to be closed. The Applicants state that they were never aware of the proceedings before this court until sometimes on or about 6th February 2018. It is the Applicants contention that if the orders of 15th June 2017 are executed and enforced and the access road is permanently blocked, the Applicants and their families will be permanently locked inside the compound with no access for ingress and egress, and that their constitutional rights to fair treatment, liberty and human dignity shall be infringed without having been granted the right to be heard. That they will be directly affected by the said orders contrary to the rules of natural justice and infringement of their constitutional rights. They aver that they are likely to suffer damage and harm. It is the Applicants' contention that it is fair and just that they be joined to the suit in order to avoid multiplicity of suits being filed in court and to enable the court adjudicate the matter effectively, adding that there will be no prejudice suffered by any party if the orders sought are granted. The Applicants states that it is only fair and just that the orders of 15th June 2017 be reviewed and ultimately set aside and vacated for being issued in error, irregularly, through concealment of information and without the involvement of primary parties who have been adversely affected by those orders.

3. In opposing the Application the 1st and 2nd Interested Parties filed a Notice of Preliminary Objection dated 15th February, 2019 on the grounds that:

- 1. The Notice of Motion is misconceived and bad in law and the Honourable Court cannot grant the prayers sought.**
- 2. The Honourable Court has no jurisdiction to sanction joinder of parties to the suit in violation of its own orders.**
- 3. The Intended Interested Parties are mere busybodies and have no capacity or legal capacity or interest in the Plaintiff's suit.**
- 4. The Notice of Motion is an abuse of the court process designed to defeat, derail and delay the fair and expeditious determination of these proceedings before the court.**

4. Both parties filed written submissions through their respective advocates in support of their opposing positions. I have considered the Application and the submissions filed as well as the authorities cited.

5. The first prayer sought in the Application is for leave to enjoin the Applicants as Interested Parties in these proceedings. Order 1 Rule 10 (2) of the Civil Procedure 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 effectively and completely to adjudicate upon and settle all the questions involved in the suit, be added. ”

6. The court has discretion to order the name of a person who ought to be enjoined whether as plaintiff or defendant, or whose presence before the court may be necessary, to enable the court effectually and completely adjudicate upon and settle all questions involved in the said suits. The question herein is whether the Applicants, ought to be enjoined as Interested Parties.

7. In the case of **Joseph Leboo & 2 Others –v- Director of Forest Service & Another (2013) eKLR** Munyao J stated as follows :

“I think courts need to be careful before making an order for a person to be enjoined as a defendant where the Application for that joinder is not emanating from the Plaintiff. This is so as to avoid thrusting upon the Plaintiff a party against whom the plaintiff does not intend to sue, or the plaintiff feels he has no cause of action against, or even if he does, has opted not to pursue the action. It is important, unless there will be great prejudice to an existing party, or a clear lacunae in the proceedings, for court not to seem to be choosing a defendant for the plaintiff to sue. This is because the choice of whom to sue is that of the plaintiff and there may be cogent reasons as to why a litigant had opted not to sue some other persons. Even in the absence of any reason, the choice to sue ought not to be disturbed without the presence of compelling reasons. Joining a defendant to the proceedings on an Application which is not coming from the plaintiff, may also compel the plaintiff to pursue a cause of action that the plaintiff, for his own reasons, or lack of any, of which there is perfect freedom, the plaintiff has opted not to pursue. Where there is an Application for a person to be enjoined as a defendant, and the plaintiff objects to such joinder, the court should even be more cautious before making an order for such joinder. It ought to be clear that the remedy sought by the plaintiff in the proceedings actually ought to be directed against the party sought to be enjoined, or that the remedy the plaintiff seeks cannot be granted, or the proceedings cannot be properly conducted without the person sought to be enjoined as a party.

8. In the originating summons dated 15th August 2016, the Applicant seeks an order granting the Applicant an access order granting reasonable access to PLOT TITLE NO.MOMBASA/BLOCK XVII/108. The Applicant avers that he is the owner of PLOT NO MOMBASA/BLOCK XVII/108. In the affidavit in support of the originating summons, the Applicant deposed that he stays in the said plot with his entire family. Subsequently, owners of neighbouring plots were joined in the suit as interested Parties. Proceedings have been taken in the matter. Indeed some orders have been subject of proceedings in the court of Appeal. The Applicants have stated that they are tenants on the premises on PLOT NO.MOMBASA/BLOCK XVII/108 and that they have lived thereon on diverse dates from the year 2002. The

record shows that on 14th May 2012, Mureithi, J directed the Land Registrar, Mombasa to ascertain the boundary between the suit plot and neighbouring plots. Indeed the Land Registrar visited the properties and submitted to court a report dated 15th June 2012. After considering the Land Registrar's report the court made some orders which culminated in court of Appeal Civil Application No. 24 of 2016. That Application in the Court of Appeal was dismissed on 15th July 2016. If indeed the Applicants herein were tenants and lived on the suit premises from the year 2002 as alleged, it means they all along knew the existence of this suit and this Application is an afterthought. This is so because at some point, there was a site visit by the Land Registrar as directed by the court. Moreover, in my considered view, the Applicants' rights, if any, can adequately be covered by the owner of the premises they occupy as tenants. In my view, the joinder of the Applicants as sought will embarrass and delay the finalization of the suit. The proposed interested parties in my view are not necessary parties to be enjoined in the suit.

9. The other issue for determination is whether the court should review and set aside the orders made on 15th June 2017 and issued on 23rd June 2017. Section 80 of the Civil Procedure Act gives power of review while order 45 sets out the rules. The rules restricts the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds:

a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made, or;

b. On account of some mistake or error apparent on the face of the record, or,

c. For any other sufficient reason and whatever the ground, there is a requirement that the Application has to be made without unreasonable delay.

10. The order sought to be reviewed was made on 15th June 2017 and this Application was filed on 20th June 2018. This was a delay of about one year. I have looked at the affidavit in support of the motion and the submissions by the Applicants. The Applicants have not explained what occasioned the delay which in my view was inordinate. In the absence of any explanation, the same is not excusable. Further, the court has declined to join the Applicants to the suit, therefore the orders for review or setting aside cannot issue. Moreover, the reasons given are not convincing and I am unable to believe the Applicants. In my view, no new and important matter or evidence has been produced to warrant the review. There is no error or omission on the part of the court either. B33y reason of the foregoing, I find that the Application has not passed the test for grant of an order for review. In addition, it is my view that the Application for stay of execution is not merited.

11. The upshot is that the notice of motion dated 20th June 2018 lacks merit and is hereby dismissed with costs to the 1st and 2nd Interested Parties..

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 26th day of September, 2019.

C. K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE