



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 84 OF 2018

VIVO ENERGY KENYA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

HAWA SAID.....1ST DEFENDANT/RESPONDENT

SAMWEL OTIENO NYANYA.....2ND DEFENDANT/RESPONDENT

AND

ILHAM ABDALLAH (As a Co-adminstratrix to the Estate of

Said Mohamed Ali (Deceased).....INTENDED 1ST CO-DEFENDANT/RESPONDENT

RULING

1. Before me for determination is an amended motion on notice filed on 5/12/2018 and dated the same. It is stated to be brought under Sections 1A, 1B, 3, 3A, 63(e) and 100 of the Civil Procedure Act, Order 1 rule 10, Order 31 rule 2, and Order 50 of Civil Procedure Rules. For good measure, Article 159(2) of the Constitution of Kenya and Sections 3 and 19 of the Environment and Land Court Act are also invoked. The Applicant – **ILHAM ABDALLAH MOHAMMED** – is not a party to the suit but she seeks to join as a Defendant together with another – **FAUZI SAID AHMED ALI**. The parties to the suit are **VIVO ENERGY KENYA LIMITED**, as Plaintiff, and **HAWA SAID** and **SAMWEL OTIENO NYANYA**, as 1st and 2nd Defendants respectively.

2. But the application is not only about enjoining the parties aforementioned as Defendants; it has other prayers. On the face of it, the application has seven (7) prayers. Of these, prayer 1 is spent and the prayers for consideration now are 2, 3, 4, 5, 6 and 7. The prayers are as follows:

Prayer 2: That leave be granted to enjoin **ILHAM ABDALLAH MOHAMMED** and **FAUZI SAID ALI** as 1st co-defendants as the joint administrators to the estate of **SAID AHMED ALI (Deceased)** pursuant to a grant dated 30/11/2009 issued in Busia High Court HC Succession No. 186 of 2008 (in the Estate of **SAID AHMED ALI (Deceased)**).

Prayer 3: That the said **ILHAM SAID ABDALLAH MOHAMED**, **HAWA SAID ALI** and **FAUZI SAID ALI**, the Co-administrators to the estate of **SAID ALI AHMED (Deceased)** be at liberty to instruct separate counsels at their discretion.

Prayer 4: That pending hearing and determination of this application, an order of stay of proceedings do issue staying the following matters:

(a) Busia CMCC No. 112 of 2014: **HAWA SAID Vs RICHARD ONYANGO ODIEDO & others**.

(b) Busia CMCC No. 99 of 2018: **HAWA SAID Vs VIVO ENERGY KENYA LIMITED**.

Prayer 5: That in the alternative and pending hearing and determination of this application, an order do issue to transfer and consolidate the below matters with this suit.

(a) Busia CMCC No. 112 of 2014: HAWA SAID Vs RICHARD ONYANGO ODIEDO & others.

(b) Busia CMCC No. 99 of 2018: HAWA SAID Vs VIVO ENERGY KENYA LIMITED.

Prayer 6: That this honourable court do grant leave to ILHAM ABDALLAH MOHAMED and FAUZI SAID ALI and/or co-1st Defendants, the administrators to the estate of SAID AHMED ALI (Deceased) to file a statement of defence and witness statements within a reasonable time as the court may deem fit.

Prayer 7: That costs of the application be in the cause.

3. The application is anchored on various grounds, among which are that the parties sought to be enjoined are co-administrators of the estate of SAID MOHAMED ALI (Deceased) and the Applicant, ILHAM, is a step-mother to 1st Defendant; that there have been disputes in the family relating to handling of the estate of the late SAID MOHAMED ALI which includes the land parcel in this suit; that the administrators, who include 1st Defendant, are not in agreement as to how to defend this suit; that the late SAID MOHAMED ALI was the original owner of the land then known as BUKHAYO/BUGENGI/5106, which was fraudulently and unlawfully subdivided into several land parcels after which some parcels were amalgamated to form the land parcels stated in this suit; that the law requires joinder of all administrators of a given estate in a suit and suing only one or some makes a suit defective; that the suit herein is against the estate of a deceased person and all administrators would carry equal liability if the Plaintiff succeeds; and that for justice to prevail, the three administrators should be enjoined in the suit.

4. The supporting affidavit that came with the application reiterated and/or amplified the grounds.

5. The Plaintiff filed grounds of opposition on 24/6/2019 and together with the grounds also came submissions. According to the Plaintiff, the Applicant has not advanced any ground that warrants granting of the orders sought. It was stated, *inter alia*, that the Plaintiff has no claim against the Applicants and has not sought relief against the estate of SAID ALI AHMED. Further, it was stated that a non-party to a suit cannot apply for transfer and/or consolidation and that some of the orders sought are against persons who are not party to the proceedings.

6. The 1st Defendant responded by filing grounds of opposition on 21/6/2019. The application was said to be omnibus as it is seeking five different substantive orders. It was stated that in a different case, the 1st Defendant, who is the Applicant's daughter in law, enjoys injunctive orders against the Plaintiff herein and if orders of stay sought by the Applicant herein are granted, the order would work against the Applicant's own interests as the Plaintiff has no restraining order against it and would therefore be free to deal with the land as it pleases.

7. I have not seen the 2nd Defendant's response to the application. I have not seen his submissions also. What I have are submissions of the Applicant, the Plaintiff, and the 1st Defendant. The submissions were filed in lieu of oral arguments.

8. The Applicant's submissions were filed on 11/2/2019. According to the Applicant, the 1st Defendant is sued as an administrator of the estate of the late SAID AHMED ALI. But she is not the only administrator. Two others, the Applicant and one FAUZI SAID AHMED ALI, also are and, pursuant to provisions of Order 31 rule 2 of Civil Procedure Rules, these two should have been sued as well. This, according to the Applicant, is the basis upon which the application is brought. To persuade the court, the case of **R Vs PRINCIPAL SECRETARY IN CHARGE OF Internal Security office of the President Ex parte James Mwangi Nyambura [2014] eKLR** was cited where Odunga J. cited with approval the decision in **Willis Ochieng Odhiambo Vs Kenya Tourist Development Corporation & Another: HCC No. 51 of 2007, Kisumu**. The position in the cases is that where there are more than one executor or administrators in a suit, all of them must be joined as parties to the action.

9. According to the Applicant (see para 9 of submissions) **"The Plaintiff by choosing to sue Hawa Said did not do so in her personal capacity but as co-administrator of the deceased estate. Thus the Plaintiff's case remains defective until when both the Applicant and FAUZI AHMED SAID are enjoined in the suit"**.

10. The Applicant emphasised that the intended joinder should not be as interested parties. Joinder as interested parties has its own limitations. It was pointed out, for instance, that an interested party cannot file a counter-claim and the Applicant intends to lodge one. It was emphasised too that the three administrators of the estate of the late Said Ahmed Ali can only be sued as one entity and not as separate individuals.

11. Crucial also to the Applicant is that proceedings in other suits should be stayed or, as alternative, be transferred to this court and consolidated with this suit so that they can be handled together. Several reasons were given to justify the need for this. One of the reasons is that the other suits are in sub-ordinate courts and the maximum monetary jurisdiction in these courts does not exceed 20,000,000/=. Yet the land in question was said to have been bought by the Plaintiff for 31,500,000/=. This court was said to be the one possessed of such monetary jurisdiction. The other reason is that simultaneous litigation at magistrates' courts and this court may expose this court to embarrassment or ridicule as conflicting orders may be issued. It is in fact said that there are already conflicting injunctive orders in force. A third reason was advanced that the parties are the same in the pending cases. The subject matter is also the same and so are the learned counsel for the parties. The court was ultimately asked to allow the application.

12. The Plaintiff's submissions were filed on 24/6/2019. It was submitted, *inter alia*, that the plaint originating the suit speaks to allegations against the Defendants in their personal capacity. The Plaintiff was said not to have sought relief against any other persons save for the Defendants. And the claim itself is not directed at any estate of a deceased person.

13. The application as filed was faulted for seeking to enjoin one Fauzi Said Ali who has not sworn any affidavit in its support and is not shown to have authorised his inclusion in the application. It was emphasised that it is the Plaintiff who has the right to decide and choose whom to sue. The Plaintiff submitted that the court cannot take it upon itself to direct who is to be sued. In deciding the issue of joinder the

Plaintiff asked the court to be guided by provisions of Order 1 rule 10 of Civil Procedure Rules which, *inter alia*, require that the party to be enjoined be one who is found necessary for effectual and complete determination of the issues in a suit. According to the Plaintiff, those sought to be enjoined in this suit are not such necessary parties.

14. For guidance and persuasion, the Plaintiff cited the cases of **Alliance Media (Kenya) Ltd and Another Vs City Council of Nairobi [2014] eKLR, Doune Farms Limited Vs Richard Soi & 4 others: ELC No. 86/2002, Nakuru**, and **Evanson Waitiki Vs Kenya Power & Lighting Company Limited: ELC No. 87/2012, Mombasa**.

15. As regards consolidation and transfer, it was submitted that the affidavit in support of the application has not shown grounds to merit transfer or consolidation. The matters were also said to involve some parties who were not served with this application. The Applicant herself was said not to be a party to the suits she is seeking to transfer and/or consolidate. She was said to be a stranger and the Plaintiff wondered how a stranger can be allowed to transfer or consolidate the suits.

16. The 1st Defendant submissions were filed on 24/6/2019. It was submitted, *inter alia*, that the application is Omnibus given the large number of prayer it seeks. In general terms the submissions of the 1st Defendant reiterate and amplify what the 1st Defendant's grounds of opposition contain. And the submissions are in general accord with the submissions of the Plaintiff particularly on the issue of joinder.

17. I have considered the application, the responses made, and the rival submissions. I have had a look into the pleadings too and the decided cases available. It is clear that the Applicant and another want to become parties to the suit. They want also to stay other suits in subordinate courts said to be related to this one or in lieu thereof, have them transferred to this court and consolidated with this suit. The other prayers are less significant and would appear to be aimed at achieving effective entry and presence of the Applicant and her friend into the suit.

18. I will first address the issue of joinder. The premise of the application is that the 1st Defendant is sued as an administrator of the estate of the late Said Ahmed Ali. The Applicant and her friend are also such administrators and the argument is that they too needed to be sued. All the factual and legal arguments advanced are based on this premise. It may be necessary to point out that if this premise were correct, the arguments based on it are advanced in an admirably erudite manner.

19. The Plaintiff however takes a totally different view. To the Plaintiff, the Defendants are sued in their personal capacities and no estate of a deceased person is involved.

20. To me, the capacity in which the Defendants are sued is, or should be, clearly discernible from the plaint itself. And even a cursory look at the plaint shows clearly that the Defendants are not sued as administrators of any estate. The Defendants are simply sued because of their alleged interference with the Plaintiff's quiet possession and enjoyment of the land through others. If one may put it differently, the Defendants are accused of committing acts of trespass through others. The issue of disputed ownership is not manifest in the plaint. The Plaintiff is already a registered owner. The 1st Defendant has not yet filed a defence and the defence of the 2nd Defendant does not seem to me to be a contestation of Plaintiff's ownership.

21. Given this scenario, it becomes difficult to understand or appreciate how the Applicant came up with the premise or notion that the estate of a deceased is involved. The fact of the matter, given what the pleadings on record contain, is that the premise espoused by the Applicant is false. The seemingly erudite arguments therefore based on the premise amount to nothing more than legal sophistry. The Applicant has created a false premise and depended on it for her application.

22. Additionally, it is important to emphasise the undoubted right of a Plaintiff to choose whom to sue. That right is not to be interfered with lightly. And the general control and conduct of the suit should generally be left to the parties named in it. In this matter itself, the applicant wants to join the suit and register her presence in a big way. She would like some allegedly related suits stayed and/or transferred or consolidated. Never mind that she is not a party to the suits. It seems to me that the Applicant wants to usurp control of the suits from the parties named in it.

23. All said and done, I am in general agreement with the Plaintiff's position on the issue of joinder.

24. The Applicant's other focus is staying of the other suits and/or transfer and consolidation of the same suits here. A glaring weakness in the application is that not all the necessary information about the other suits was available to enable the court to make an informed decision one way or the other. The starting point in my view should have been availing the pleadings in the other suits so that the court can appreciate where the Applicant is coming from. The applicant only mentioned the cases without availing sufficient details. And on this basis alone, she expects the court to give an order of stay, transfer and/or consolidation. Even assuming that the court was minded to allow joinder it would have been very difficult to grant this other prayer based on the information available.

25. Besides, and as pointed out by the Plaintiff, that prayer should be made generally by the parties or any of them. The Applicant herein is not a party and her hurry seems to be such that she cannot even wait to become one. This is not the Applicant's suit; it is the Plaintiff's suit. And only two other people can be allowed without much difficulty to cause stay, transfer and/or consolidation. These two people are the defendants named in it.

26. The 1st Defendant submitted that the application is omnibus. A crucial consolidation regarding suits and/or applications is that they should be filed with effective adjudication in mind. As filed, the application has several prayers ranging from joinder, stay of proceedings, transfer, consolidation, representation by counsel, and filing of defence and witness statements. A seasoned legal practitioner would readily tell you that a prayer for joinder would require its ruling or determination. And so also would be prayers for stay of proceedings, transfer and/or consolidation. They all require different legal and factual exposition. When you lump all of them together in one application, you make the application unwieldy and therefore unsuitable for effective adjudication.

27. May be an example of existing jurisprudence may suffice to illustrate this: In **Rajput Vs Barclays Bank of Kenya Ltd & 3 others: [2004] 2 KLR 393**. The plaintiff had filed an application containing a number of prayers namely: to restrain a firm of auctioneers from distraining for rent on his goods; an order that the Defendants had no authority to evict him pending hearing of the suit; an order granting him leave to institute contempt proceedings against the 4th Defendant; leave to amend the plaint; and finally the suit to be heard on priority basis. The Defendant opposed the application for reasons, *inter alia*, that the application was omnibus in that it carried a multiplicity of prayers all of which could not be possibly decided.

28. The court held, *inter alia*, that the application was an all-cure omnibus application. The application was incapable of proper adjudication by the court because each of the relief sought apart from being governed by different rules, was also subject to different judicial principles which needed to be raised and considered by the court. That alone made the application incurably defective and a candidate for striking out.

29. This decided case is on all fours with this one. In my view, the Applicant lacked tact and failed to appreciate the law properly. An obvious starting point would have been to seek a foothold in the suit by being enjoined. Once inside, the other prayers could be sought. As things stand now, the application is obviously omnibus and is a suitable candidate for dismissal or striking out. If the Applicant is aggrieved by any of the parties, filing a suit would do. She cannot graft herself into their cases.

30. The upshot, when all the foregoing is considered, is that the application herein is one for dismissal and I hereby dismiss it with costs to both the Plaintiff and the Defendants.

Dated, signed and delivered at Busia this 12th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff/Respondent: Absent

1st Defendant/Respondent: Absent

2nd Defendant/Respondent: Absent

Co-Defendant/Respondent: Absent

Counsel for the Plaintiff: Present

Counsel for the Respondents: Present

Counsel for the Co-Defendant/Respondent: Present

Court Assistant: Nelson Odame