



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 186 OF 2013

RAPAM LIMITED.....PLAINITFF

VERSUS

KAZUNGU NGALA..... DEFENDANT

RULING

(Application for joinder as interested party; plaintiff having purchased land in a public auction and seeking vacant possession against the former registered proprietor; defendant claiming that the auction sale was illegal; applicant alleging that he has his own distinct right over the suit land and wishing to be enjoined; cause of action of applicant clearly separate from the issues between the plaintiff and the defendant; presence of applicant not necessary for the determination of the dispute between the plaintiff and defendant; avenue is for the applicant to file his own separate suit; application dismissed)

1. The application before me is that dated 21 March 2019 filed by one Hassan Rhuke Dhido who seeks orders that he be enjoined to these proceedings as co-defendant and/or interested party.
2. This suit was commenced by way of a plaint filed on 23 August 2013. The plaintiff has pleaded in the plaint that she purchased the land parcel LR No. 2129/I/MN (original number 1244/3) in a public auction, conducted on 22 May 2009 by M/s Garam Investments (Auctioneers) under instruction from Kenya Tourist Development Corporation as chargee. The said plot was previously owned by the defendant. The plot was subsequently transferred to her on 24 November 2010. She has pleaded that despite now being the owner, the defendant has prevented her from taking possession. In this suit she principally seeks orders of vacant possession and for the defendant to be permanently restrained from the land.
3. The defendant filed defence where he has averred that he was unaware of the auction and that in any event the selling price was at an undervalue. He pleaded that the value was Kshs. 9 million at the time of sale yet the property was sold for Kshs. 4.1 Million. He filed a counterclaim seeking a declaration that the transfer of the suit land to the plaintiff was fraudulent and illegal and has sought orders of cancellation of the plaintiff's title.
4. In this application, the applicant claims that he has been in possession of a portion of the suit land and that he got into possession when the property was leased to him in 1965 by the British Standard Portland Cement Company Limited. He claims that the lease allowed him to build a mud and wattle residence and a retail shop. He contends that the defendant clandestinely made an application to be issued with a title deed without disclosing that he had been allotted a section of it. He has averred that he has an interest in part of the property measuring 40 X 70 feet and thus his presence in these proceedings is crucial.
5. The plaintiff has opposed the application inter alia by stating that the applicant's interest lapsed and that his claim, if any, is time barred. The defendant on the other hand filed a Replying Affidavit stating that the applicant is a trespasser and the structures erected by him are illegal.
6. I invited counsel to make written submissions which they did and I have taken these into consideration before arriving at my decision.
7. It will be noted that the applicant seeks to be enjoined in this dispute as interested party and/or defendant. The application has been brought inter alia pursuant to 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.

8. It will be observed that the court has wide discretion to allow the joinder of a party to proceedings. However, the presence of that person must be necessary in order to enable the court adjudicate all questions involved in the suit.

9. The dispute between the plaintiff and defendant revolves around an auction sale by chargee. The issues that need to be determined between the plaintiff and defendant is whether the sale should be upheld or cancelled, and whether title should remain with the plaintiff or revert back to the defendant. I do not see how the presence of the applicant is going to assist the court resolve that dispute. In my view, what the applicant wants is to agitate a separate claim for part of the land which has nothing to do with the manner in which it was sold to the plaintiff. If that is the case, then what the applicant needs to do is to file his own separate suit and seek a determination of his issues. His cause of action is indeed distinct from the dispute between the plaintiff and defendant and his presence in this suit is thus not necessary.

10. I am therefore not persuaded to allow the application for the above reasons, and this application is hereby dismissed with costs.

11. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 7th day of November 2019.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Mwamboje for the applicant.

Ms. Layooo holding brief for Mr. Lewa for the plaintiff.

Ms. Arika holding brief for Ms. Asige for the defendant.

Court assistant; David Koitamet.