



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.30 OF 2011

(CONSOLIDATED WITH HCCC NO. 22 OF 2011)

SOFT WHITE BEACH LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

1. JOSEPH KASHURU MUMBO.....1ST DEFENDANT/RESPONDENT

2. MASUMBUKO YERRY KOMBE.....2ND DEFENDANT/RESPONDENT

3. THE HON. ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT

4. THE CHIEF LAND REGISTRAR.....4TH DEFENDANT/RESPONDENT

5. THE DISTRICT LAND REGISTRAR KILIFI.....5TH DEFENDANT/RESPONDENT

AND

JOSEPH NICHOLAS MURAGE (As Administrator of the Estate of

Benard Chiori Murage).....PROPOSED INTERESTED PARTY/APPLICANT

RULING

1. By this Notice of Motion application dated 25th July 2019, Joseph Nicholas Murage the Proposed Interested Party suing as the Administrator of the Estate of his father Benard Chiori Murage prays for Orders framed as follows:-

1.

2. That the Honourable Court be pleased (to) set down and or fix the Application herein on priority basis at the earliest possible date in view of the pending Judgment to be delivered on 21st November 2019;

3. That the Honourable Court be pleased to issue an Order allowing the Applicant herein to be enjoined as an Interested Party in these proceedings and or suit;

4. That the Court be pleased to arrest and or suspend the Judgment pending before it over the present suit, slated to be delivered on 21st November 2019;

5. That upon grant of Prayer (3) above, the Applicant herein be duly served with all the pleadings in the present suit.

6. That the trial proceedings and or case herein be reopened, and the Applicant/Proposed Interested Party be allowed to participate, tender evidence and make submissions before Judgment can be delivered.

7. That the costs of this application be provided for.

2. The application is supported by the Applicant's Affidavit and is premised on the grounds, inter alia that:-

i) This matter is currently pending Judgment which was set to be delivered on 21st November 2019;

ii) The suit property is registered in the name of the said Benard Chiori Murage(now deceased), who is the Applicant's father;

iii) At the time the deceased passed away, the title deed issued to him on 22nd September 1978 was charged to KCB Bank for a sum of Kshs 500,000/- which charge subsists to-date;

iv) By a decision communicated via a Gazette Notice dated 17th July 2017, the National Land Commission (NLC) confirmed that the property belonged to the Applicant's father. That decision shows that parties in these proceedings were before the National Land Commission and were therefore aware of the interests of the Deceased on the suit property;

v) The Interested Party was appointed as the Administrator of the Deceased's Estate on 21st June 2019 and upon carrying out a search at the Kilifi Lands Registry with the intent of registering the confirmed Grant and the other instruments, he was informed that there were no records available and that there existed this law suit in which the Court had ordered status quo excluding the Estate of the deceased;

vi) That it is therefore imperative that the delivery of Judgment be arrested and that the Applicant be enjoined for purposes of presenting to the Court all the document held by the Deceased's estate in relation to the suit property; and

vii) The Estate of the Deceased has a huge stake in this suit as any order issued herein affecting the suit property shall affect their proprietary rights and they stand to lose a very valuable asset in violation of their right to property as enshrined in the Constitution.

3. The application is opposed. In a Replying Affidavit sworn by its Director Zipporah Nyaguthii Gitonga and filed herein on 7th October 2019, the Plaintiff Company avers that the application has come too late in the day as this suit has been in the Courts for the past eight years. The Plaintiffs further assert that the Applicant became aware of these proceedings as far back as 25th October 2013 but they never took any action to be enjoined in these proceedings.

4. The Plaintiff further asserts that this matter is fully heard and is pending delivery of Judgment and that there is no justification why the process should be reversed as it will be extremely expensive on the part of the Plaintiff.

5. Similarly Masumbuko Yerry Kombe, the 2nd Defendant herein is opposed to the application. In a Replying Affidavit sworn and filed herein on 9th October 2019, he equally asserts that the application before the Court has been made too late in the day. It is his case that the application is misconceived and that there is no plausible explanation for the inordinate delay in instituting the application.

6. I have considered the application and the responses thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties.

7. The application before me is expressed to be brought under Article 47, 48, 50(1) and 159 of the Constitution as well as Sections 1A, B, 3 and 3A of the Civil Procedure Act. Given that the Judgment sought to be arrested and or suspended is yet to be delivered, the main prayer for consideration before the Court is the Applicant's prayer that he be enjoined in these proceedings as an Interested Party and that he be allowed to participate by tendering his own evidence as regards the ownership of the suit property.

8. 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 or series of acts or transactions 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.

9. Indeed, the Court may even on its own motion add a party to the suit where such party is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit. Thus joinder of parties is permitted by law and there is no dearth of authorities that point to the fact that it can be done at any stage of the proceedings.

10. However an application for joinder of parties may also be declined where it is clear to the Court that such joinder will lead into practical problems of handling the existing cause of action together with the one of the party being joined or where it is deemed to be unnecessary or likely to just occasion unnecessary delay or costs on the parties to 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 therefore is whether a common question of fact or law would arise between the existing and the intended parties.

11. In the matter before me, the Plaintiff filed this suit on 13th April 2011. In their Complaint as filed, the Plaintiff is seeking a declaratory order that it is the indefeasible and absolute proprietor of Plot Numbers Chembe/Kibabamshe/651 and 652 which was a Sub-division of Plot No. Chembe/Kibabamshe/393. The suit was subsequently consolidated with Malindi HCCC No. 22 of 2011 wherein the 2nd Defendant is the Plaintiff. In the said suit the 2nd Defendant also claims to be the registered owner of Plot No. Chembe/Kibabamshe/393.

12. It is the Plaintiff's case that they bought the suit property in the year 2006 from a company known as La Marina Limited. The said Vendor had in turn bought the properties from the original two allottees who were allocated between 1998 and 2001 when the two portions were sub-divided from Plot No. 393.

13. The 2nd Defendant however asserts that the Letters of Offer dated 30th June 1999 and issued to Lucas Kadenge and Japhet Charo Chome are not genuine documents. It is his case that the Parcel No. 393 was originally allocated to one Joseph Kashuru Mumbo (sued herein as the 1st Defendant) vide a Letter of Offer issued on the same 30th day of June 1999. The 1st Defendant was then issued with a Title Deed on 19th January 2003 before he sold the same to the 2nd Defendant on 1st December 2008 for a sum of Kshs 10,000,000/-. The 2nd Defendant thus denies that the parcel was subdivided into Plot Nos. 651 and 652 as stated by the Plaintiff.

14. On his part, the Proposed Intended Party Applicant avers that his father Bernard Chiori Murage is the registered owner of LR No. Chembe/Kibabamshe/393. In support of his case, he has annexed a copy of Certificate of Title (annexture JNMI to the Supporting Affidavit) that indicates that his father was indeed issued with a title for the said parcel of land on 22nd September 1978.

15. While he does not state whether he wants to be enjoined herein as a Plaintiff or Defendant, it was clear to me that the Applicant is asserting that he has a better claim to the suit property given the existence of the title deed and the fact that it was charged to the Kenya Commercial Bank for a loan.

16. Citing the Gazette Notice by the National Land Commission that the land initially belonged to his father, he faults the parties herein for failing to inform the Court of his father's interest on the land despite their knowledge of that fact. It is his case that his father died in 1982 and that he only learnt of the father's interest in August 2018 while he was clearing out some documents from his late father's cabinet.

17. According to the Applicant he then became interested in finding out what became of the property but he was prevented from coming to Court earlier given the fact that certain relevant files had gone missing in the High Court Family Division at Nairobi. His interest in the suit property got fortified when in the course of his research he came across, inter alia a Ruling delivered herein by the Honourable Angote J delivered on 23rd October 2013 wherein the Learned Judge noted that the suit property had never been sub-divided nor had the Registry Index Map been amended to reflect the alleged sub-division.

18. Having gone through that decision by the Learned Judge, it is the Applicant's contention that he should be allowed to enjoin these proceedings, produce the documents in his custody and for the officials of the Ministry of Lands and the Department of Land Adjudication to be summoned to come and authenticate the Letters of Allotments used in issuing the titles held by the parties in the present suit.

19. It was however clear to me from a perusal of the material placed before me that while the Plaintiff's father may have been issued with title for the said LR No. Chembe/Kibabamshe/393, there was no nexus or claim between him and the parties before the Court. I say so because it was clear to me that both parties herein trace their connection to the suit properties from Letters of Allotment issued in 1999 and the titles issued thereafter, the title referred to by the Applicant was issued much earlier.

20. The explanation for this is evident in the very Ruling cited by the Applicant as delivered by the Honourable Angote J on 25th October 2013. At Paragraphs 12 to 15 of the Ruling the Learned Judge observes as follows:-

“12. The dispute herein is the double allocation of (a) parcel of land known as Chembe/Kibabamshe/393. It is just one of the many disputes within the Chembe/Kibabamshe Settlement Scheme which have been filed in this Court.

13. According to the Letter dated 17th May 2000 annexed to the Plaintiff's Supporting Affidavit by the Malindi District Surveyor addressed to the Director of Surveys Jimba and Chembe Kibabamshe Sections were adjudicated and registered way back in the 1970s.

14. Later on, some of the parcels of land were found to have been erroneously adjudicated as they fell within Government land. The titles were nullified and the parcels of land reverted to the Government.

15. In the mid-1990s, an exercise was embarked on identifying squatters within the parcels with a view of allocating them land in the Settlement Scheme. The beneficiaries were issued with Letters of Offers on the basis of the then existing Registered Index Maps. The Survey department carried out mutations in favour of the allottees for the specific parcels of land....”

21. Arising from the foregoing, it was clear to me that the nullification of the titles as summarized by the Learned Judge is the reason the Applicant and his family had previously not laid any claim to the land. That indeed must be the reason the Applicants relations who were previously the Administrators of his father's Estate neither included the disputed parcel of land in the inventory of the estate nor claimed the same over the long period of time that has since lapsed.

22. In my considered view, the Applicant would have no claim against any of the parties in the existing suit even where it were established that the subsequent allocation of the suit property by the Government was without any basis. In such instance, it is my view that the Applicant's remedy if any lies in seeking compensation from the Government and such relief would not be compatible with the existing cause of action and the reliefs sought herein by the existing parties.

23. For those reasons, I did not find merit in the application dated 25th July 2019. The same is dismissed with costs to the Plaintiffs and the 2nd Defendant.

Dated, signed and delivered at Malindi this 5th day of December, 2019.

J.O. OLOLA

JUDGE