



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI

ELC MISC APP NO. 10 OF 2017

1. WINNIE MWAKA MJAMBILI

2. MARK AFANDE MJAMBILI(Suing as the Administrator of the estate
of the **PETER BAMBULA MJAMBILI**.....**APPLICANTS**

VERSUS

1. AISHA SAID AMRI

2. NATIONAL LAND COMMISSION.....**RESPONDENTS**

RULING

1. I have before me for determination a Notice of Motion application dated and filed herein on 9th October 2017. The three Applicants, Mwanajuma Juma, Fatuma Juma and Mwanapili Said pray for orders that:-

1. Spent

2. Pending the hearing and determination of this application, this Honourable Court be pleased to stay any further action in the suit herein.

3. Upon inter-partes hearing, this Honourable Court be pleased to grant leave to enjoin Mwanajuma Juma, Fatuma Juma and Mwanapili Said as parties to this suit;

4. Upon inter-partes hearing, this Honourable Court be pleased to set aside the proceedings in the suit herein.

5. Costs of this Application be provided for.

2. The Application is supported by an Affidavit sworn by Mwanajuma Juma and is based on the grounds that:-

i. The 1st Defendant and the above named interested parties are the rightful surviving heirs to the Estate of Amuri Wakalama Haji who is the registered owner of the suit property;

ii. The Interested Parties have great interest in the suit property and therefore it is only fair that they be joined as parties to this suit;

iii. The Interested Parties presence before the Court is necessary in order to enable the Honourable Court to effectively and completely adjudicate upon and settle all questions involved in this suit; and

iv. This suit is slated for Judgment on the 11th October 2017 and unless the orders sought in this application are granted, the Interested Parties/Applicants are likely to suffer irreparable loss and damage.

3. In a Replying Affidavit filed herein on 16th October 2017, the 2nd Applicant, Mark Fande Mjambili responds that :-

i. The Court is 'Functus Officio' and therefore lacks the jurisdiction to entertain the application.

ii. *That the application is misconceived and bad in law in as much as*

a. **The Interested Parties were not a party to ELC Civil Case No. 150 of 2015 and the Application is therefore incompetent and malafides.**

b. **The Court is being required to sit on Appeal in respect of its own determination and Judgment delivered, executed and implemented.**

iii. **That the Application is made to circumvent and defeat the cause of justice and to induce the Court to act in vain;**

iv. **That the Application is an abuse of the Court process and has no merit and should be dismissed and she (sic) is guilty of misleading the Kadhi's Court to obtain the said order which is improper.**

4. In his further response, the 2nd Applicant avers that the deceased died in 1932 and the Limited Grant of Letters of Administration were only obtained on 5th October 2017 way after the Judgment dated 24th June 2016 was delivered and a declaration made that the property be returned to Peter Bambula Mjambili in ELC No. 150 of 2015.

5. I have considered the Application and the response thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties herein.

6. Order 1 Rule 10(2) under which the Applicants have come to Court provides for addition and substitution of the parties as follows:-

“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 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 to effectually and completely adjudicate upon and settle all the questions involved in the suit be added.”

7. Commenting on this provision, the Learned Authors of Sarkar's Code of Civil Procedure (11th Edition Reprint, 2011 Volume 1 page 887) state that:-

“The Section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

8. The Court of Appeal adopted the same approach in *Central Kenya Ltd –vs- Trust Bank & 4 Others CA No. 222 of 1998* when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:-

“.....all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

9. As the Court of Appeal however held in *JMK –vs- MWM & Another(2015)eKLR*:-

“.....Order 1 Rule 10(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code (Supra) quoting as authority, decisions of Indian Courts on the provision, express the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in *Tang Gas Distributors Ltd –vs- Said & Others(2014)EA 448*, stated that the power of the Court to add a party to proceedings can be exercised to any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after Judgment where damages are yet to be assessed; that it is only when a suit or proceedings has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

10. In the matter before me, it is not in dispute that the proceedings which the Interested Parties seek to join and to have set aside were concluded in Malindi ELC Civil Case No. 150 of 2015 when the Honourable Justice Angote rendered his Judgment on 24th June 2014.

11. In the Supporting Affidavit of Mwanajuma Juma, the Applicants have not stated any reason why they failed to be enjoined in ELC 150 of 2015 prior to its conclusion. Indeed, other than stating that they are, in addition to the 1st Respondent, the heirs of the Estate of Amuri Wakalama Haji, who died in 1932, no explanation is offered whatsoever as to why they only sought the Grant of Letter of Administration in 2017 long after the said case was concluded.

12. In the result, I do not find any merit in enjoining the Applicants to this matter at this stage. Neither do I find any reason to set aside the proceedings in ELC 150 of 2015.

13. Accordingly, the Application dated 9th October 2017 is hereby dismissed with costs.

Dated, signed and delivered at Malindi this 25th day of May, 2018.

J.O. OLOLA

JUDGE