



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 109 OF 2010

STEPHEN SAFARI & 171 OTHERS.....PLAINTIFFS

-VS-

GURAUT SINGH KANDOLT & 3 OTHERS.....DEFENDANTS

RULING

1. The Application for consideration is the Notice of Motion dated 6th March 2018 in which Joyce Riziki Kenga and 54 others mainly seek to be enjoined in the suit as Plaintiffs. The Application is brought under Section 1A (1), (2) and (3), 1B (a)(b)(c) and (d) and 3A of the Civil Procedure Act and Order 1 Rule 10 of the Civil Procedure Rules. The Application is based on the grounds that the Applicants are residing and have been in actual possession of the Suit Property and are seeking to be recognized and registered as owners of the property known as **PLOT NO.350/II/MN** bearing **CR. No.1267** by Adverse Possession.

2. The Application is supported by the Affidavit of Joyce Riziki Kenga sworn on 6th March 2018 in which she deposes that the Applicants have been excluded from the 167 people named as Plaintiffs in the Suit yet they reside, occupy and live on the Suit Property and that they risk being evicted if orders are given without their participation in the proceedings.

3. The Plaintiffs have filed Grounds of Opposition and Replying Affidavit by Stephen Safari on 23rd March 2018. It is the Plaintiffs' contention that the Applicants were not living on the Suit Property at the commencement of the Suit and that they only became involved in the Suit as contemnors, having allegedly disobeyed the Court orders of 16th September 2013. The Plaintiffs further aver that allowing the Application would be prejudicial to them since the Suit has progressed to an advanced stage. It is also the Plaintiffs contention that the Application is misconceived, lacks merit, frivolous, vexatious and an abuse of the process of Court and that the same is premature and bad in law. They further contend that the Applicants have come to Court with unclean hands because they are still in disobedience of the injunctive orders of 16th September 2013.

4. The Application is also opposed by the 26th Respondent, Mohamed Hatimy who filed a Replying Affidavit sworn by himself on 7th May 2018 in which he deposes that the Applicants do not reside on and are not in possession of the Suit Property and that the Applicants only want to delay the Suit. It is further his contention that the Application is invalid as the authority to plead and appear attached to the Supporting Affidavit has not been signed by all the Applicants.

5. Both the Applicants and the Respondents filed written submission through their respective advocates in which they mainly outlined their respective facts as outlined in the affidavits and the law. I have carefully considered the arguments advanced by all the parties in this matter and the relevant law as well as the authorities cited.

6. Order 1 Rule 10(1) and (2) of Civil Procedure Rules provides as follows:

(1) Where a suit has been instituted in the name of the wrong persons as Plaintiffs, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the Court may at any stage of the Suit, if satisfied that the Suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any person to be substituted or added as Plaintiff upon such terms as the court thinks fit.

(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 questions involved in the suit, be added.

7. In the Originating Summons dated 16th April 2010, the Plaintiffs claim that they have acquired 55.0 acres of land on **PLOT NO.350/II/MN** by Adverse Possession after staying and/or occupying and/or residing on the plot for over 12 years. By the Notice of Motion dated 12th March 2014, the Plaintiffs sought to have the Applicants herein committed to civil jail for allegedly disobeying the orders issued by the court on 2nd August 2010 and on 16th September 2013 by constructing and or putting up structures on the Suit Land. The applicants contend that they are staying and/or residing on the Suit Property and that they have been excluded from the 167 people named as plaintiffs. They now seek to be enjoined in the Suit as Plaintiffs.

8. From the pleadings and the Application before court, it is clear that the dispute is over **PLOT NO.350/II/MN** which the Applicants allege that they have been staying and/or occupying and that their names have been excluded as Plaintiffs. The issue therefore is whether the Applicants may be joined as Plaintiffs. Order 1 Rule 10 of the Civil Procedure Rule allows the Court to Order that the name of any person who ought to have been joined as a Plaintiff may be added in order to enable the Court effectively and completely adjudicate upon and settle all questions involved in the Suit.

9. It was submitted by the Respondents that the Application be disallowed because the Applicants were not living on the land and that adding them would delay the finalization of this Suit. In my view such a direction would be inconsistent with the overriding objective of the Civil Procedure Act which is to facilitate just, expeditious, proportionate and affordable resolution of disputes. Disallowing the Application would mean the Applicants would have to file a separate Suit over the same subject matter which would escalate costs. It would make an un-proportionate demand on time and other resources of the Court in dealing with the same issue more than once and cause a delay which cannot be conducive to fair trial of the dispute. This being a land matter and the Applicants having claimed that they are in possession of the suit land, I feel their claim for whatever it is worth ought to be heard on merits. Moreover the Plaintiffs had in their application for contempt dated 12/3/2014 alleged that the applicants have constructed and/or put up structures on the suit land. This in my view is an admission that the Applicants are in possession and/or occupation of the Suit Land.

10. For the reasons set out above, I allow the Application with no order as to costs.

Ruling dated, signed and delivered at Mombasa this 17th day of September 2018.

C. YANO

JUDGE