



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC HCCC NO. 331 OF 2010**

**HAMISI BEJA & 18 OTHERS.....PLAINTIFFS/APPLICANTS**

**-VERSUS-**

**KARIM MOHAMED HASSANALI**

**& 3 OTHERS.....DEFENDANTS/RESPONDENTS**

**RULING**

1. The applicants have moved this Court vide their notice of motion dated 27<sup>th</sup> August 2014 brought under the provisions of section 1A, 1B, 3A & 100 of the Civil Procedure Act and Order 1 rule 10 & 25 and Order 8 rule 3 & 8 of the Civil Procedure Rules seeking:

**1. Spent**

**2. That the honourable Court grant leave to the applicants to include additional names of 427 plaintiffs who are resident within plot No 486 MN Section V.**

**3. Costs of the application be in the cause.**

2. The application is premised on the grounds first that at the time of filing the claim, the 19 applicants were acting in a representative capacity on behalf of the 427 individuals. Secondly, to determine the real questions in issue, the 427 individuals should be added as parties. The application is also supported by an affidavit deposed to by Hamisi Beja. He deposed that the 19 plaintiffs/applicants represent family units and homesteads belonging to approximated 442 individuals as per the list annexed. That the names of the 442 individuals need to be included to determine the real matter in dispute instead of being represented under the 19 plaintiffs. That the said amendments should be allowed since no prejudice shall be occasioned to the defendants.

3. This claim was withdrawn as against the 3<sup>rd</sup> & 4<sup>th</sup> defendants. The application is opposed by the 1<sup>st</sup> & 2<sup>nd</sup> defendants vide a replying affidavit sworn by the 2<sup>nd</sup> defendant. He deposed that the application was made to delay this suit. He also deposed that the additional parties are non-existent on the ground hence why no copies of IDs or photographs are attached and that no case has been made for the additional parties. The 2<sup>nd</sup> defendant deposes further that a joint survey commissioned by the Court established the families and parties on the ground and he annexed the surveyor's report as "A 1". He urged the Court to dismiss the application.

4. The advocates for the parties filed written submissions on 9.5.2016. The submissions were highlighted on 19.1.17. Mr Tindi advocate for the applicants submit that failure to include all the names of the individual residents may prejudice their interest in and rights over the suit property since the Respondents are claiming they are not residing on the land. He also submitted that as is evident in the Respondents' annexure 'A 1', the surveyor only picked the main house within each homestead – but did not capture the areas occupied by the applicants who do not necessarily live on the land but uses it for cultivation. That the true reflection of how the land is occupied is captured in annexure HB-3 to the supplementary affidavit of Hamisi Beja.

5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents through Mulwa Nduywa & Co advocates submits that parties are bound by their pleadings. That the applicants filed the Originating Summons in 2012 in a representative capacity on behalf of all individuals resident on the suit property. Therefore the alleged interest of the 427 additional plaintiffs is already represented in this suit. He quoted the provisions of Order 1 rule 8 (1) of the Civil Procedure Rules to support this.

6. The Respondents submit further that this application contradicts the original representation made to the Court and is made to alter substantially the progress of the suit to the detriment of the defendants constitutional rights to have the trial concluded without unreasonable delay. In support of their submissions, they have cited the cases of:

- **Esso Petroleum Co Ltd vs South Port Corporation (7) (1956) AC 218**
- **Pupsa vs Fleet Transport company (1960) E A 10-25**
- **James Oduol vs Richard Kuloba (2008) eKLR**

7. The Respondents further submit that the application was brought after inordinate delay. While quoting **Eastern Bakery vs Costelino (1958) E. A 461** where the Court stated that the Court should exercise discretion in allowing amendment after hearing has progressed as in this case. The Respondents also quoted **Lalchand Fulchand Shah & Another vs I 7 M Bank Ltd (2015) eKLR** where an application to add additional parties was dismissed because it was brought after inordinate delay. They urged the Court to follow the decision in **Kyalo vs Bayusuf Brothers Ltd (19812) eKLR** where the Court held that *“application for amendment of pleadings should only be allowed if they are brought within reasonable time as a late amendment amount to an abuse of the Court process.”*

8. The record does show that this Originating Summons was filed on 15.9.2010 and the pleadings closed on 18.10.2011 when the matter was given a hearing date being 21.11.2011. The 1<sup>st</sup> plaintiff testified on 21.11.2011 and concluded his evidence at which point the Court made an order for Court visit. The Court then made a site visit on 16.2.2012. This application has thus been made after the hearing had progressed. Because of this, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit the application was brought after inordinate delay. The applicants did not attempt to explain why they took so long to bring this application inspite of filing a supplementary affidavit dated 6<sup>th</sup> May 2016.

9. The applicants have annexed a list of persons they want to be joined as co-plaintiffs in this suit. I have read the originating summons dated 7<sup>th</sup> January 2010 together with the affidavit in its support. The 1<sup>st</sup> applicant swore the affidavit on behalf of his co- applicants name. I have not seen any paragraph where it is pleaded that the suit was brought on their behalf and on behalf of the individual residents on the suit plot No 486. It is therefore misleading to plead this application that the individuals who were represented now wishes that their names be joined in this suit.

10. Further the applicants have merely annexed a list of names with no statements and authority issued by the named individuals stating their interest to be joined in this case. Order 1 rule 8 (3) provides that **“any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule 1 may apply to the Court to be made a party to such suit.”** The interference of this rule is that it is incumbent upon parties named in the list to be the ones to move the Court.

11. Similarly Order 1 rule 2 of the Civil Procedure Rules provides that **“where it appears to be the Court**

***that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may either on the application of any party or of its own motion put the plaintiff to their election or order separate trials or make such other order as may be expedient.***” The hearing of this case already commenced with the Court having made appropriate notes/observations. The Respondents submit that joining the new plaintiffs would delay the trial and conclusion of this matter thus prejudicing their right to property.

12. The applicants on their part claim no prejudice will be suffered by the Respondents. Having analysed the status of this case and given the delay in bringing this application together with absence of expression by the persons sought to be enjoined, I am convinced the joining of this plaintiffs now will cause delay of the trial of this case. The intended new plaintiffs can commence their own suits as against the defendants if at all.

13. In conclusion, I refuse to exercise discretion in favour of the applicants and instead dismiss the notice of motion dated 27<sup>th</sup> August 2014 for the reasons that it was brought after undue delay and secondly that granting it will cause delay of the trial of this case. The costs of the application is awarded to the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.

**Dated and signed this 23<sup>rd</sup> day of March 2017**

**A. OMOLLO**

**JUDGE**

**Delivered at Mombasa this this 24<sup>th</sup> day of March 2017 by**

**C. YANO**

**JUDGE**