



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO.39 OF 2015

JANE M. KIANO.....PLAINTIFF/RESPONDENT

=VERSUS=

CHEMA NGOLENYA MUDZI.....DEFENDANT/APPLICANT

RULING

1. The Application before me is the one dated 28th July, 2015 and filed by the Defendant. The Defendant is seeking for the following orders:-
 - (a) **THAT the order issued on 9th June, 2015, be set aside and the defendant be allowed to file grounds of opposition and a replying affidavit and thereafter the application dated 10th March 2015 be heard afresh.**
 - (b) **THAT the ex parte interlocutory judgment, if any, be set aside and the defendant be allowed and serve a defence.**
 - (c) **THAT the costs of this application be provided for.**
2. The Application is premised on the grounds that although the Defendant was served with the Complaint, the Summons and the Application dated 10th February 2015, he approached M/S MUHURI, a non-governmental organisation dealing with matters of access to justice who assured him that all steps will be taken to protect his interests; that the Defendant went to the offices of MUHURI On several occasions and found the offices closed and that by the time the said offices opened, the matter had already proceeded for hearing ex-parte.
3. It is the Defendant's case that the suit property deals with his residential house and that the execution of the order will lead to his eviction.
4. The Defendant also filed a second Application of the same date in which he is seeking to enjoin five people in the suit as 2nd- 6th Defendants.
5. The Defendant's/Applicant's counsel submitted that the employees of the original owner of the suit property obtained an order in Misc. Civil Application Number 208 of 2001 (os) apportioning themselves the suit land; that among the Applicants in that suit were the proposed Defendants and that the Defendant's late father was also beneficiary of the said court order.
6. Counsel submitted that the prejudice that will be suffered by the Defendant is immense; that the eviction of the Defendant from the suit property before full hearing will be in equitable and that the Defendant and his relatives have been in occupation of the suit property from pre-independence.

7. On the issue of joinder of the proposed Defendants, counsel submitted that the Estate of the late Ngolenya Mudzi is a necessary party and that the orders that the Plaintiff is seeking involves the eviction of the 2nd -6th proposed Defendants.
8. The Plaintiff's advocate on the other hand submitted that there is no firm of Advocates known as MUHURI; that the Applicant's intention is to delay the hearing of this suit and that the four intended parties were not parties to HCCC No. 192 of 2008.
9. On the issue of whether the Defendant's father owned the suit property, counsel submitted that that issue was ventilated in HCCC No. 192 of 2008 (OS) and that this matter should proceed for formal proof.
10. This suit was commenced by way of a Plaintiff.
11. In the Plaintiff, the Plaintiff has averred that the Defendant's father was the original allottee of subdivision number 1649; that the Defendant has been interfering with the Plaintiff's possession of plot number 1650 and that the orders for injunction and eviction should issue.
12. In the Plaintiff, the Plaintiff has stated that the Defendant filed Mombasa High Court Civil Suit Number 192 of 2008 (os) against the Plaintiff for adverse possession which suit was dismissed with costs.
13. Contemporaneously with the Plaintiff, the Plaintiff filed an Application seeking for temporary injunctive orders.
14. When the Application came up for interpartes hearing on 19th May 2015, the Applicant was in court in person and sought for time to file a Replying Affidavit.
15. The court allowed the Applicant to file a Replying Affidavit within 14 days and fixed the Application for hearing on 9th June, 2015.
16. The Applicant did not appear in Court on 9th June 2015 and the Plaintiff's Application proceeded as an opposed .
17. The Respondent now claims that he had instructed MUHURI, a non governmental organisation to represent him in this matter but the offices of the said organisation were subsequently closed down.
18. I have gone through the proceedings and there is no indication showing that the Defendant informed the court that the documents that he had been served with were with MUHURI.
19. Indeed, the record shows that when the Defendant appeared in person on the 19th May 2015, he informed the court that his advocate "was on the way."
20. Even after the court adjourned the matter to 9th June, 2015, the Applicant did not turn up on the said dates to inform the court about his predicament.
21. In the circumstances, the prayer to set aside the order of this court of 9th June, 2015 cannot be granted because no good reason has been given by the Defendant/Applicant.
22. The issue as to whether the Defendant's father is the one entitled to the suit property was heard and determined in Mombasa HCCC No. 192 of 2008 (os).
23. In that suit, the Defendant herein sued the Defendant, not as a legal representative of the Estate of his father, but in his own personal capacity. His suit was dismissed.
24. With the decision in Mombasa HCCC NO. 192 of 2008 (os), I do not see how the Defendant would have resisted the Plaintiff's Application even if he was given an opportunity to oppose.
25. It is for the reasons I have given above that I decline to allow the Application dated 27th July, 2015 seeking to set aside the orders of 9th June, 2015.
26. On the issue of whether the five Interested Parties should be joined in the suit as Defendants, I shall allow the same for the purpose of ascertaining whether they are entitled to the suit property.
27. I say so because Mombasa HCCC No. 192 of 2008 (os) was between the Plaintiff and the Defendant.
28. To enable this court to conclusively deal with the issue of ownership of the suit property and to avoid the filing of numerous suits by parties, the proposed Defendants should be allowed to file a Defence and to participate in these proceedings.
29. For those reasons, I allow the Application dated 27th July, 2015 for joinder in the following terms;-

(a) That the court be and is hereby pleased to add Stephen Wamai Ngolanya Mudzi, John Muthami Ngolenya Mudzi, Wilson Ngolenya Chome and Kitavi John Muthama in this suit

as the 2nd, 3rd, 4th, 5th, and 6th Defendants.

(b) Each party to bear his own costs.

Dated and delivered in Malindi this 1st day of **April**, 2016.

O. A. Angote

Judge