



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
MISC. CIVIL APPLICATION NO. 332 OF 2009

MATHEW M. KITSAO & 43 OTHERS.....APPLICANTS

VERSUS

CHANDAN JETHANAND GIDOOMAL & 10 OTHERS.....RESPONDENTS

RULING

1. The notice of motion for determination is this one dated 11th July 2014 filed by the 4th Respondent Kigo Ng'anya. It is brought under the provisions of Rule 2 (3) and 3 of High Court practice & Procedure Rules ; Section 5 of the Judicature Act, Section 3A of the Civil Procedure Act and Order 52 Rule (2) & (3) of the Supreme Court Practice Rules of England. The applicant asked for orders:

1. Spent

2. That this Honourable Court be pleased to vacate all orders in force and do allow the applicant to proceed with construction thereon.

3. That this Honourable Court be pleased to strike out the suit for being an abuse of the Court process, as the Respondents/plaintiffs do not have *Locus Standi* by virtue of not being squatters in the suit property known as Plot No. 49 and 50/XI/M.I.

4. That this Honourable Court be pleased to order the 3rd Respondent who are custodians of county development plans to pull down all illegal and unplanned structures within the suit property.

5. That the cost of this application be provided for.

2. The application was supported by the grounds listed on its face and a supporting affidavit sworn by the applicant. The parties delayed in arguing the application for one reason or another. On 22nd July 2015, the plaintiffs (Respondents) filed their written submissions while the applicants filed theirs on 27th August 2015.

3. The plaintiffs submitted that the 4th Respondent is not a party to this suit as they only sued three Respondents. They submit the 4th – 11th Respondents are not parties to this suit and therefore the application is an abuse of the Court process. The plaintiffs submit that the orders sought in the application can only be granted upon hearing parties.

4. The applicants on their part submit they are parties to the suit (the originating summons). That by an application dated 9th July 2011, the plaintiffs sought to commit them to Civil jail. On 10th June 2011, the applicant avers he was summoned by an order issued by the deputy registrar of the Court and that he has been a participant in this cause since 2010. Further that on 8th July 2010 an order was issued requiring him to keep away from the suit property and cease any activity on it.

5. On the merit of the application, he submitted that this suit is an abuse of the Court process as the plaintiffs are not squatters in the suit property. It is his case that entertaining this matter to full hearing will be a waste of the Court's time. He urged the Court to grant the orders as prayed.

6. The starting point for me is to answer the question raised by the plaintiffs as to whether the applicant is a party to this suit or not. I have perused the record and indeed the pleadings filed on 5th August 2009 show only; **Chandan J. Gidoomal, Prem J. Gidoomal and Municipal Council of Mombasa** named as Respondents. The Applicant's name appeared only in an order issued on 8th July 2010 pursuant to a contempt application heard by Ibrahim J. (as he then was). The pleadings therefore show that the applicant is not a party to the suit. If he felt his rights are being infringed/violated by the order which required him to stay away from the suit property then he ought to have moved this Court to be joined first. He therefore cannot seek substantive orders as contained in the present application yet he has no *locus*.

7. On the merits of the application, the applicant submitted that the suit is a waste of the Court's time since the Respondents are not living on the suit land. In paragraph 5 of the affidavit in support of the motion, Mr Kigo deposed that he was advised by his advocate on record that when the advocate perused the Court file, he found that the 1st plaintiff stated under oath in cross-examination in the criminal proceedings that he does not reside on the suit property but is a resident of Tudor estate. Secondly that the 5th plaintiff said in the criminal proceedings that the land belongs to an Indian. The applicant annexed the proceedings in Criminal Case No 2194 of 2011 to support this averment.

8. The applicant continued that on his own investigations he realised the 10th, 11th & 30th plaintiffs also live in Tudor estate while the 18th & 25th plaintiffs who is an MCA resides at Jua Kali Zone Phase II as confirmed by the chief's letter. He concluded that the plaintiffs are busy bodies and have been misleading the Court that they are squatters on the suit premises. He urged the Court to strike out this suit.

9. This suit has not proceeded to hearing on merits. The applicant has only stated via his affidavit that plaintiffs Nos 1, 5, 10, 11, 18, 25 & 30 do not live on the land. He relies on information obtained from 3rd parties (his advocate & the chief through his letter). This sort of evidence need to be tested as the criminal Court did not reach a finding that the 1st plaintiff does not live on the suit land in the proceedings annexed. This was not a matter in issue before that Court. Secondly the plaintiffs must be afforded an opportunity to test the veracity of the chief's letter annexed in the supporting affidavit before a finding can be made on it. Lastly the affidavit said nothing about the remainder of the 36 plaintiffs who are also parties to this suit. The application is thus premised on facts which are yet to be proved and can only be proved during the hearing of the suit on its merits and not via an interlocutory application.

10. Consequently I find no merit on prayer No 3 of the motion. No grounds were presented to support prayer No 4. In any event the effect of that order are so drastic that it cannot be issued without sufficient evidence being shown that the structures are illegal and unplanned. My finding is that there is no merit in the application in its entirety and I hereby dismiss it with costs.

11. This is a very old matter, the plaintiff is hereby directed to file his statements and documents in compliance with Order 11 within 60 days of this date and serve the defendants who are also directed to comply within the same time lines. Thereafter the matter be listed for pre-trial directions from the registry on priority.

Dated and delivered at Mombasa this 2nd day of December 2016

A. OMOLLO

JUDGE