



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

LAND CASE NO. 304 OF 2014 (MULTI-TRACK)

MOHAMED ABDALLA DAGO.....1ST PLAINTIFF
OMARI HASSAN DAGO.....2ND PLAINTIF
KIBWANA MOHAMED DAGO.....3RD PLAINTIFF
MWANASHA MWALIMU DAGO.....4TH PLAINTIFF

VERSUS

ABDUL HUSSEIN OMARI KILALO
alias KADIR HUSSEIN OMARI.....DEFENDANT

AND

HASSAN ALI NGENYA.....1ST APPLICANT
OMAR A. ZANI.....2ND APPLICANT
MOHAMED MWACHIMBUGWA.....3RD APPLICANT
SULEIMAN KOI.....4TH APPLICANT
JUMA MWAMBORI.....5TH APPICANT
SADIQ MWACHARO..... 6TH APPLICANT'
BAKARI NASSORO NYUNI.....7TH APPLICANT
BASHIR M. KILALO.....8TH APPLICANT

RULING

1. The applicants numbering 8 have come to court under Section 1A, 2A and 3A of the Civil

Procedure Act and Order 1 rule 1 of the Civil Procedure Rules seeking to be joined in this suit as defendants. Their reasons for seeking to join the suit is three-fold; first that there is a mosque standing at the far end of this land where they worship and secondly the suit land falls squarely within the 60 meters off the high sea hence it is a public utility and thirdly that the "**true**" title to the suit plot is in the hands of a 3rd party therefore the plaintiffs' claim is without any basis.

2. The motion is supported further by an affidavit sworn by one Hassan Ali Ngenya on behalf of the other applicants. He deposes that the mosque was built in 1914 by their forefathers and it is attended by over 130 villagers in the neighbourhood for daily prayers. Mr. Ali deposes that the suit plot was transferred to Beach Cot Limited in 1988 and that the documents of title exhibited by the plaintiffs are a 'fraud'. It is the applicant's contention that any decision made in this suit will affect their rights as worshipers. They urged the court to allow their prayers as contained in the notice of motion dated 15th Dec 2014.

3. The defendants do not oppose the motion the applicants' motion seeking to be joined as parties. The application is opposed by plaintiffs vide their replying affidavit filed. The plaintiffs submit the applicants are trespassers as they have admitted their presence in the suit property. The plaintiffs aver the applicants have not disclosed whether they have any legal or equitable interest in the property. The right of worship should not be protected on a private property as the law cannot allow an accosted trespasser to justify their presence in the land. He cited the case of **Samuel Mwangi vs Jeremiah Gitobu (2012) e KLR.**

4. The 3rd plaintiff deposed that it is not true the applicants have been on the suit property since 1914 since such a claim had been presented by the defendant before the Special District Commissioner which claim was dismissed. Further that the applicants have no locus stand to claim for and thro Beach Cot Limited which company is also not existing as per annexure D - 2. Lastly that the applicants are not necessary parties since there are no valid orders that can be given to trespassers.

5. I have read through the pleadings filed together with the annexures in support thereto. I have also considered the submissions offered and case and statute law cited. Section 1A refers to the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. Section 3A refers to the inherent powers of the court to make orders as may be necessary for the ends of justice. There is no section 2A as quoted in the motion. Order 1 rule 1 refers to who may be joined as plaintiffs. I will presume the applicants intended to refer to order 1 rule 3 not rule 1. Rule 3 provides that "**all persons may be joined as defendants against whom any relief in respect of or arising out of the same transaction is alleged to exist whether jointly or severally or where if separate suits were brought against such persons any common question of law or fact would arise.**"

6. In the plaint filed, the plaintiff seeks an order of permanent injunction to issue against the defendant, his agents or any persons claiming through him from.....trespassing or in any other way interfering with the plaintiffs' quite possessions and enjoyment of the suit property Kwale/Msambweni/2189. The plaintiffs' annexure K. 6 in the supporting affidavit to the application for injunction are pictures taken of a building partly constructed. The building is referred to by plaintiff in paragraph 16 of his affidavit sworn on 17th December 2014 as '*intended to be a mosque*' while deposing the fact that there was no mosque in existence since 1914 as alleged by the applicants.

7. The existence of this mosque was mentioned in the proceedings before the Special District Commissioner which proceedings were annexed by the plaintiff. In effect, this court finds that the pleadings filed show part of the defendant's wrongful act is building the 'intended mosque'. Whether there was a mosque in existence before the one under construction is a matter requiring proof by way of adduction of evidence. Therefore if the applicants are worshiping on a portion of this land whether as trespassers or otherwise then if this suit succeeds, the order stopping them from continuing with such worship will indeed affect them.

8. The basis for which they are seeking to be joined may be without merit but since the order will affect them, it is in the interests of justice that they be afforded a hearing by allowing them to participate in the proceedings. Consequently I allow the motion dated 15/12/2014 but with a condition because the applicants have imposed themselves in the plaintiffs' suit. I direct that they deposit in court a sum of Kenya Shillings One Hundred Thousand (KShs. 100,000/=) within 60 days to be held as security for costs in favour of the plaintiffs. In default, they shall not be allowed to participate in these proceedings.

Dated and delivered in open court at Mombasa this 11th day of March 2015.

A. OMOLLO

JUDGE