



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 142 OF 2014

SALIM BAKARI MWINYI & OTHERS PLAINTIFFS

VERSUS

MOHAMED ALI MOSES ALIAS GANDI & 5 OTHERS DEFENDANTS

RULING

1. The plaintiff's/applicants have moved this court vide their application dated 16th June 2014 seeking prayers that;

a) *That the Honourable Court may be pleased to consolidate this suit with the Civil Suit No. 13 of 2013 in the High Court of Mombasa, Land and Environment Division and Civil Suit No. 102 of 2012 (OS) in the High Court of Malindi then select this suit as a test case to determine the other mentioned suit related to it and mentioned herein above on the issue of liability.*

b) *That the Honourable Court may be pleased to do stay and set aside the execution of judgment entered against the plaintiff on the 26th June 2013 on the Civil Suit No 13 of 2013 pending the hearing and determination of this suit and then grant the plaintiff leave to file and serve this application out of time.*

c) *That cost of this application be awarded to the plaintiff.*

2. The application is supported by several grounds listed on its face inter alia;

i) That from the Civil suit No. 13 of 2013, judgment made on the 26th June 2013 be set aside or stayed this may or might give a slight hard time for the defendants in that suit to surface all the facts so that it gives proper direction for an appropriated determination of this suit.

ii) Civil Suit no. 102 of 2012 in High Court Malindi is proceeding even without our information or blessings from our elders since the one acting on our behalf happened to be among the new arrivals.

iii) For the last five (5) decades we have received several people in our community with such intentions but they disappear after receiving our contribution amounts with some beginning business while we were made poor.

3. The application is also supported by an affidavit deposited by Salim Bakari Mwinyi which affidavit reiterated the grounds contained in the face of the application. It also annexed a copy of the ruling and

plaint in MBS HCC No. 13 of 2013 and the originating summons in Malindi HCC. NO. 102 of 2012. The application is supported by the defendants in No. 13 of 2013. The Motion is opposed by the 3rd and 5th defendants herein. Mr. Sichangi for 3rd defendant said the two suits cannot be consolidated as the land in dispute has two separate titles. Secondly, the 3rd defendant is not a party in Malindi ELC 13 of 2013 which suit he is informed from the replying affidavit of the 5th defendant has been struck out.

4. Ms. Adagi for the 5th defendant also opposed the motion and relied on the replying affidavit sworn on 17th February, 2015. In the replying affidavit, they have annexed a copy of the ruling striking out suit no. 102 of 2012. She submitted that in suit no. 13/2013, there is an application to set aside the contempt proceedings hence consolidating with this matter would delay the prosecution of that application. I have considered these issues raised in the submissions together with the pleadings filed. It is noteworthy that in prayer 2 of the motion, the applicants are seeking for an order setting aside the judgment in No. 13 of 2013. Ms. Adagi has confirmed that no judgment has been entered in no. 13 of 2013 as

the case is still pending.

5. It is also procedural that application for setting aside an order or judgment can only be made in the relevant file. The orders contained in prayer (2) in this motion can only be determined in the file no. HCC. 13/2013 if there is judgment where the court would then be able to access the facts forming the background for such a prayer in determining its merits or otherwise. It is my finding that this prayer is misplaced in the current motion and I hereby strike it out with costs to the 3rd and 5th defendants.

6. In regard to prayer no (1) seeking for consolidation, the applicant seeks to have HCC. no. 13 of 2013 and Malindi HCC no. 102 of 2012 heard together with this suit. The 5th respondent annexed a copy of the ruling in Malindi ELC no. 102 of 2012 (O.S) which ruling struck out the suit on 26th April 2013 delivered by the learned Judge O.A. Angote Esq. There is no document annexed to show that the plaintiff's in that suit have appealed that ruling. In the absence of such document, this court cannot consolidate a matter which is determined with a matter that is pending. Consequently the prayer to consolidate Malindi ELC no.102 of 2012 with this suit is refused.

7. In regard to consolidation with suit no. Mombasa HCC no. 13 of 2013, I have taken note that the 1st and 4th defendants in that suit (no 13) have no objection to the consolidation sought. I have noted from the pleadings that the subject property in dispute is plot no. LR 5692. Plot No. 1589/13/111/MN situate in Mtwapa. This same property is listed in this originating summons as part of the parcels of land the plaintiffs seek to be declared as owners by way of adverse possession. Although the plaintiffs have listed several other parcels, I am convinced that the subject matter in suit no. 13 of 2013 forms part of the subject matter in the dispute in this suit and the same should be heard together. I have taken note of the 3rd respondent's submissions that they are not a party to suit no. 13 of 2013 and their titles are different. However the plaintiffs sole claim is for adverse possession in respect of the titles listed. The purpose of consolidation is to limit duplicity of suits in a situation where they can be heard together.

8. In conclusion, I allow the plaintiffs prayer no. (1) to the extent that this suit shall be heard together with MBS High Court Civil Case no. 13 of 2013 subject to the pending application for contempt in no. 13 being dispensed with first. Costs of the entire application awarded to the 3rd and 5th respondents. The defendants can put in their responses to the originating summons since there are more pieces of land listed herein, This file will form the lead file.

Dated and delivered in open court at Mombasa this 22nd day of April 2015.

A. OMOLLO

JUDGE

22.4.2015