



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 34 OF 2014

(formerly CMCC No. 364 of 2010)

1. FRANCIS K. BAYA
2. JOSEPH KIRINGI
3. CLEMENTINA MAPENZI *(suing on their behalf as chairman, secretary and treasurer respectively as officials and on behalf of Rainbow community care Kibokoni.....PLAINTIFFS*

=VERSUS=

1. SAMMY MTILE
2. DENISE KNOTE MTILE.....DEFENDANTS

RULING

1. This suit was filed in the year 2010 in the lower court. In the suit, the Plaintiffs, suing on behalf of Rainbow Community Care, Kibokoni, are seeking for an order compelling the Defendants to transfer properties known as Kilifi/Kibokoni/Block M 13D/113 and Kilifi/Kibokoni/Block M 13D/114 to them.
2. The firm of Wesley John & Associates advocates entered appearance for the two Defendants on 26th November 2010 and filed a joint Defence on 3rd January, 2011.
3. The record shows that the evidence of PW1, the 1st Plaintiff, was taken by the Chief Magistrate on 28th March, 2012. On the same day, the evidence of the 2nd Defendant, PW2, (the Applicant herein) was taken. The 2nd Defendant/Applicant testified on behalf of the Plaintiff as PW2. In her opening remarks; PW2 who is the Applicant herein, informed the Magistrate as follows:

“I was the 2nd Defendant before the court discontinued the suit against me. This was pursuant to my application filed on 9th July 2011. I swore an affidavit in the application asking the court to remove me therefrom. The facts in the affidavit are correct and true.”

4. The Applicant then proceeded to give her evidence on oath as PW2 on what she knew concerning the suit property and was cross examined by the 1st Defendant's counsel at length.
5. On 4th March 2014, the advocate for the Plaintiff and the 1st Defendant recorded a consent to transfer the suit from the lower court to this court in the following term:

“By consent, this matter is hereby transferred to this court for hearing and disposal of the main suit. The matter to begin denovo. The parties to file any further witness statements and documents within 30 days.”

6. On 16th September 2014, the advocates for the Plaintiff and the 1st Defendant recorded a further consent which was adopted by the court. In the consent, the parties agreed that the evidence of PW1 and PW2 (the applicant) which was recorded in the lower court be admitted as evidence in this case and all the exhibits which were produced in the lower court be admitted as exhibits in this court.
7. With the above consent, this court proceeded to receive the evidence of PW3, PW4 and PW5 and the evidence of the 1st Defendant, DW1. The court then directed the Plaintiff's and the 1st Defendant's advocate to file their respective submissions.
8. The Applicant, who was initially the 2nd Defendant, has now filed an Application dated 19th March 2015 in which she is seeking for the following orders:

(a) That this Honorable Court be pleased to review, discharge, set aside, vary and or vacate the consent orders of this court issued on 16th September 2014.

(b) That this Honourable Court be pleased to allow the 2nd Defendant/Applicant to give her defence.

9. The Application is premised on the ground that the consent order was given contrary to the law and policy of the court; that the said consent order was entered in ignorance of the law and material facts; that the consent order was made in existence of an order for the matter to start denovo and that the court had ordered for the matter to start denovo as the previous court did not have jurisdiction.
10. It is the Applicant's case that the proceedings from the lower court were void ab initio for lack of jurisdiction and that the consent orders filed herein prejudiced the 2nd Defendant who was locked out of the proceedings and could be condemned unheard.
11. In his response, the Plaintiff's advocate averred in the Grounds of Opposition that the Applicant's Motion is a delaying tactic; that the Application has been filed by a party long removed from the proceedings as a party and who was heard as a witness and that there is no error apparent on the face of the record or error of law regarding the consent orders of 16th September 2014.
12. The Respondents' advocate finally averred that the proceedings in the lower court were not void for lack of jurisdiction as the said court was properly seized of jurisdiction.
13. According to the Plaintiffs' counsel, the proceedings in the lower court were moved to this court pursuant to the provisions of the Environment and Land Court Act and the Practice Directions that were issued by the Chief Justice.
14. The advocates made their oral submissions which I have considered.
15. I have already enumerated the history of this matter above.
16. It is not in dispute that the Applicant/2nd Defendant entered appearance and filed a Defence in this matter after being served with Summons to Enter Appearance.
17. It is also not in dispute that on 9th June, 2011, the Applicant, through her then advocate filed a Chamber Summons dated 9th June, 2011 in which she applied to be removed from the suit as a Defendant, which application was allowed by the court.
18. In the affidavit in support of her Application dated 9th June, 2011, the Applicant deposed that it has never been her intention to own land in Kenya.
19. It is on the basis of her own Application and affidavit that she was allowed by the court to testify as PW2. Indeed, the Applicant informed the court that she had done so on her own volition.
20. It therefore follows that having been struck out as a Defendant pursuant to the provisions of Order 10 Rule 2 of the Civil Procedure Rules, the Applicant lacks the locus standi to review or set aside the consent order that was entered into between the Plaintiff and the 1st Defendant on 16th September 2014.
21. The Plaintiff and the 1st Defendant having consented to adopt the evidence of PW1 and PW2, and considering that none of the parties objected to the jurisdiction of the lower court in which the matter was initially filed, the Applicant's Application is unmeritorious.
22. I say so because the initial order to start the matter de novo was by consent of the parties before they changed that consent and agreed to adopt the evidence of PW1 and PW2 together with all the

- exhibits. The issue of whether the lower court had jurisdiction or not to deal with the dispute was never ventilated. The matter was moved to this court due to the requirements of Article 162(2)(b) of the Constitution which provides that all disputes relating to the environment and the use and occupation of, and title to land shall be heard and determined by this court.
23. In fact, Section 30 of the Environment and Land Court Act allows the transfer of proceedings from the lower court to this court.
24. In view of the fact that the Applicant was struck off the suit as a Defendant, and considering that the Applicant was heard on oath as PW2, it will be untrue to state that she will be condemned unheard.
25. The Applicant cannot at one point request the court to excuse her from being a party to the suit and then thereafter ask the court to set aside or vary a consent in which she was not a party. That, in my view, is an abuse of the court process and an affront to the overriding objectives of the Civil Procedure Act and the Rules which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.
26. For those reasons, I dismiss the Applicant's Application dated 19th March 2015 with costs. The costs of the Application shall be borne by the Applicant notwithstanding the fact that she is not a party to the suit.

Dated and delivered in Malindi this 17th day of April, 2015.

O. A. Angote

Judge