



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
CIVIL CASE NO. 18 OF 2013

BREK SULUM HEMED PLAINTIFF

VERSUS

CONSTITUENCY DEVELOPMENT FUND BOARD 1ST DEFENDANT

KENYA RURAL ROADS AUTHORITY 2ND DEFENDANT

RULING

0. The plaintiff, who claims to be the registered proprietor of parcel of land MSA/BLOCKXVI/564 situated within Mwembe Tanganyika, Majengo estate, Mombasa Island, has filed a suit against the 1st defendant Constituency Development Fund Board and the Kenya Rural Roads Authority for awarding a contract for the construction of a road to a named contractor who is not a party to the suit and who had, with the assistance of the police, forcefully entered upon the plaintiff's property and commenced construction on the road which encroached on the plaintiff's said land. The plaintiff, therefore, seeks a declaration that the defendants' action in encroaching the plaintiff's land by the use of force and constructing a road thereon, is unlawful, illegal and affront to sanctity of ownership and related injunctive reliefs, damages and costs. There is another suit, **Constitutional Petition no. 1 of 2013** in which landowners in similar situation as the plaintiff herein have sued the contractor and the Constituency Development Fund Committee as respondents over the encroachment by the same road over their properties.
0. By an application dated 11th December 2013, under section 1A, 1B and 3A of the Civil Procedure Rules, some 18 applicants who are interested parties in the said other suit, **Constitutional Petition no. 18 of 2013**, seek an order that they be enjoined as necessary parties in this and the plaint be amended to include their names as necessary parties. The application was supported by an affidavit of Abdalla Said Jumaan on behalf of the applicants who are said to be residents of Mwembe Tanganyika area where the suit property is situate and some owners of plots along an access road on which it is alleged the suit property and others are created by subdivision. The application was based on the grounds set out in the motion challenging the existence of the suit property among other alleged subdivisions along an access road, which if *'allowed to exist the intended parties will suffer great prejudice as the access into their respective houses shall be permanently blocked.'*
0. By a replying affidavit of 10th January 2014, the plaintiff opposed the application principally on the ground that the application only aimed to burden and delay the finalisation of his otherwise straightforward suit against the defendants who had, without regard to the sanctity of his title to

- the suit property, encroached on thereon and started constructing a road thereon, which case was, he contended, ‘*destined for success, since the 1st defendant by its defence filed herein, is running away from it, while the 2nd defendant, who actually participated in the tendering process, has not filed its defence.*’ In fact, the 2nd respondent filed its defence (in which it denies any involvement other than in advisory/supervisory capacity as a project manager due to its expertise and puts the plaintiff to strict proof) on the 20th January 2014, two days before the hearing of the application.
0. In making submissions for their respective clients, Counsel for the parties – Mr Odongo for the plaintiff, Mr. Hamza for the intended interested parties and Miss Kiti for the 2nd defendant, in the absence of the 1st respondent although duly notified, argued as follows:

“Mr. Hamza for the intended interested parties

Notice of Motion of 11th December 2013 seeks joinder of 18 applicants as necessary parties. It is supported by the affidavit of Abdalla said Jumaan. Jumaan is a resident of Mwembe Tanganyika area. He is a plot owner with the 17 other applicants. The bone of contention is the road that was demarcated at the time when the subdivision of the entire area was done. We have annexed a Plan for the entire area as Exh C.

The plaintiff has a plot on the access road. The applicants claim as users of the road and residents of the area. They contended that they are affected by the plaintiff’s title. The application is made under the sections 1A and 1B of the Civil Procedure Act. The section allows the court to ensure that justice is done. Under the Constitution of Kenya on the exercise of judicial authority without undue regard to technicality under art. 159.

The interested Parties seek to show that they have rights to property and to the use of the road. If the plaintiff application is determined without their involvement, it will be a breach of the rules of Natural justice. There is another suit Petition No. 1 of 2013 over the use of the same road. If they are not joined in this case, the plaintiff may be granted an order to construct on the plot when the applicants have sought to demonstrate their property rights to the use of the road by the public. I urge the court to allow the application to join the applicants as necessary parties. I however submit that whether we came in as necessary parties or interested parties it has no effect on their case.

Miss Kiti for the 2nd respondent

I have instructions not to oppose the application

Mr. Odongo for the plaintiff

I oppose the application. The applicants have not demonstrated what the applicants seek to put in defence and counter-claim. The intended applicants should have attached a draft defence and counterclaim so that the argument on the application is done with the knowledge of issues before the court.

Section 1 A and 1B do not arise. The provisions cannot allow the grant of the application. There is provision under Order 1 rule 10 (2) of the Civil Procedure Rules under which the court may join a party. Order 1 rule 10 (2) requires that the court be moved or of its own motion to consider that the presence of a party to be necessary. The application may be made by the plaintiff for the addition of the defendant. The court may also direct that a necessary party be made party. The purpose of joinder is to effectively adjudicate the dispute. The plaintiff has only cited two people as defendants. The plaintiff has not claimed that any person has refused the plaintiff to construct on the plot.

The issue of title to the property is not in question before the court. If it were sought to challenge the title it ought to have been done before the construction of the road. The

defendants should have acquired title by compulsory acquisition.

The presence of the interested parties is supposed to aid the determination of the dispute as to whether the action by the defendant was wrong or right, which is the dispute before the court.

If they believe that the titles were forgery or fraudulent, they should file a separate suit to have the titles revoked. Alternatively, they could buy the title holders out. Their claim cannot be canvassed in this suit. Their case will divert our case to become a question of validity of title. There is no evidence that the titles are fake. The titles are recognized by Municipal Council. As late as October 2013, the council was demanding rates and we have attached payment of rates. See Exh. No. A on the affidavit of Brek Sulum.

I pray that the court directs that any challenge to the titles be undertaken in a separate suit . The challenge is not necessary in our suit.

Mr. Hamza in Reply

We do not claim that the plaintiff's title is fake. We contend that it is a nullity. It does not exist. The applicants are entitled to disregard it ex debito justitiae

The Civil Procedure Rules Order 1 rule 10 (2) for purposes of effectively and completely adjudicating the issue in dispute. The court may move of its own motion. The provision is silent as who may move the court. That is why the applicants have used section 1A. I urge the application to prevent multiplicity of suits and for purposes of speedy justice.

Mr Odongo, with leave of court

I consider that the relevant rule is Order 1 rule 10. I did not say that section 1A is irrelevant but there is a clear provision in Order 1 rule 10 of the Civil Procedure Rules.”

0. While it may be convenient, as urged by the counsel for the plaintiff, to attach a draft defence to set out the issues sought to be raised by an applicant for joinder as interested or necessary party, default in that regard is not fatal if the issue (s) can be ascertained from the application itself, as in this case, because under rule 25 Order 1, the application may even be made orally in court. From the application before the court, it is clear that the applicants claim invalidity of the plaintiff's title on *'the alleged subdivision along access road'*.
0. The issue before the court, therefore, is whether the applicants may properly be joined as necessary parties under Order 1 rule 10 (2) of the Civil Procedure Rules.
0. To be sure there is no procedure under the Civil Procedure Act and Rules for the joinder of **'interested parties'**, and the practice of application for interested parties must have been developed by necessary implication where the rules give a right to move the court for relief to **any interested party** such as in receivership, Order 41 rule 5 for removal of a receiver, or an obligation on applicant to serve **persons directly affected** as in Judicial Review proceedings, under Order 53 rule (3) (2) of the Civil Procedure Rules.
0. The procedure for joining a necessary party is indicated by the Order 1 rule 10 (2) of the Civil Procedure Rules to be available to **either party** to move the court, so that a person who is not a party but who seeks to join may, as done by the applicants in this case, invoke the inherent jurisdiction of the court and the overriding objective of the civil process.
0. The issue therefore becomes whether it is in the interest of justice for the applicants to be joined, whether as necessary parties or as interested parties - whether it is on own motion of the court or on their application. As necessary parties, the provisions of rule 10 Order 1 will apply to require that their involvement to be **necessary** for the court to *'effectually and completely adjudicate upon and settle all questions involved in the suit'*. As interested parties, the applicants need only demonstrate interest in the subject of the suit or in other relevant matter affecting the suit.
0. I do not think that the phrase **all questions involved in the suit** in Order 1 Rule 10 (2) is to be restrictively construed to mean only such questions as are raised by the present parties. I think an

issue may properly be taken to be a **question involved in the suit** if it is so related to the suit as to affect the question in the suit. In this regard, I consider that the issue raised by the applicants as to the validity of the plaintiff's title is a question inherently involved in the suit between the plaintiff and the present defendants because the plaintiff's right to sue, or cause of action against, the defendants is predicated upon his title as a registered owner of the suit property: if that ownership is challenged, it is an issue that relates to the question involved in the suit. I find therefore that the applicants are 'necessary parties' within the meaning of Order 1 rule 10 of the Civil Procedure Rules.

0. In addition, I think that a direction, as urged by counsel for the plaintiff, that the applicants file a separate suit against the plaintiff is inconsistent with the overriding objective of the Civil Procedure Act to which the rules made there-under including Order 1 rule 10 (2) are subordinate. The Overriding Objective of the Act is to facilitate just, expeditious, proportionate and affordable resolution of disputes. A separate suit against the plaintiff over the same subject matter would escalate costs even for the plaintiff, make an un-proportionate demand on the time and other resources of the court in dealing with disputes on the same property more than once, and cause a delay which cannot be conducive to fair trial of the dispute.
0. In practice, with much respect, the scenario proposed by the counsel for the plaintiff has the prospects of undesirable result in judicial practice should the court or courts that hear(s) the two suits arrive at two directly opposed verdicts in the suits over the same property, one confirming the ownership by the plaintiff of the suit property and the other invalidating the plaintiff's title. Moreover, there is nothing to bar the consolidation of the two suits once the second is filed because, even if the rule of *sub judice* under section 6 of the Civil Procedure Act were to apply, and it does not, the same does not bar the power of the court to consolidate for purposes of hearing an earlier and a later suit. See **Mulla, The Code of Civil Procedure** 18th ed. (2012) at p. 171 citing **Gupta v. East Asiatic Co.**, AIR 1960 All 184. So no practical benefit is to be served by the filing of separate suits.
0. For the reasons set out above, and in giving effect to the Article 159 principle of substantial justice without undue regard to technicalities of procedure, I allow the applicants' application for them to be joined in the suit, as necessary or interested parties. The applicants will, in accordance with Order 7 of the Civil Procedure Rules, file their defence, and counterclaim if any, within Fourteen (14) days from the date of this ruling, and the plaintiff may file a reply to the defence and counterclaim, if any, within fourteen days of service of the defence and counterclaim, after which the matter will proceed for pre-trial directions. The costs of the application will be costs in the cause.

Dated, signed and delivered on the 25th February 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Njoroge for Mr. Odongo for the Plaintiff

No appearance for 1st Defendant

No appearance for 2nd Defendant

Mr. Hamza for Necessary/Interested Party

Miss Linda - Court Assistant