



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 158 OF 2008

MWAI LIMITED 1ST PLAINTIFF

JAMES MATHENGE MWAI, GRACE WACHEKE MWAI AND

CATHERINE WANGUI MUIGAI (as Administrators of the estate of

ISAIAH MWAI MATHENGE 2ND PLAINTIFF

- V E R S U S -

MOUNT HOLDINGS LIMITED 1ST DEFENDANT

G.K. MEENYE & M.A. KIRIMA T/A

MEENYE KIRIMA ADVOCATES 2ND DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA 3RD DEFENDANT

RULING

[1] This case was filed on 26th June, 2008. The parties were Mwai Limited, 1st plaintiff, James Mathenge Mwai, Grace Wacheke Mwai and Catherine Wangui Muigai as administrators of the Estate Isaiah Mwai Mathenge. Mount Holdings Ltd is the 1st defendant, G.K. Meenye and M.N. Kirima t/a Meenye Kirima Advocates as 2nd defendant, Municipal Council of Mombasa as 3rd defendant.

This suit was amended on 13th October, 2009. The names of *Mwai Limited* was removed and the name of Simon Nyaga Mathenge was added as the 2nd plaintiff. The amendment of the said two plaintiffs was not properly indicated by writing those names down and cancelling out the name of *Mwai Limited* and underlining the name of Simon Nyaga Mathenge as is required by the Civil Procedure Rules.

[2] On 15th September 2009 the Amended Chamber Summons was filed showing amendments on para 12,13 and 14. More particularly, the amendment included *High Court Civil Suit No. 147 of 2009* between the administrators of the Estate of Isaiah Mwai Mathenge and Simon Nyaga Mathenge suing Municipal Council of Mombasa and Apollo Muinde t/a. Apollo Muinde & Co. advocates and the consent entered in that suit. It is worth of note that the defendants in this current suit *HCCC 158 of 2008* were not parties to the said suit.

The Amended Chamber Summons of 15th September, 2009 aforesaid prayed for five orders. The salient orders prayed for are orders 2 and 3. They stated

"2. That interest and/or penalty thereon be and is hereby waived in toto.

3. That the plaintiffs do pay the firm of Apollo Muinde & Associates a sum of Kshs. 2,400,000.000 on account of legal fees, Auctioneers charges and any other attendant disbursements emanating from this suit and in Chief Magistrate Court Civil Suit No. 27 of 2009 between the same parties within 30 days from today."

The application was supported by the affidavit of Catherine Wangui Muigai. The primary ground for Mrs. Muigai was that prior to 20th March 2008, the plaintiffs were fraudulently registered as proprietors of Land Reference Number Mombasa/VI Mainland/911 and 2960. She further stated that the 1st respondent herein was registered pursuant to a vesting order issued by the Mombasa Chief Magistrates Court on 19th March, 2008 in civil case no. 362 of 2007. She stated that the plaintiffs instituted Mombasa HCCC. No. 147 of 2009 to stay proceedings in CMCC No. 27 of 2009 and a consent was reached on 19th June 2009 before Njagi J. The consent is set out in para. 13 of the amended Chamber Summons aforesaid. The respondents in this Chamber Summons were not parties to that suit and the consent entered therein.

[3] The applicants also rely on a Judicial Review they filed in *High Court Miscellaneous Application No. 11 of 2008* to quash the subordinate court orders issued in *CMCC No. 362 OF 2007* and in which the High Court granted leave for institution of certiorari orders to quash the orders of 12th February, 2008, 19th March 2008 and 28th March 2008. The applicants therefore argue that in view of the leave granted in the Judicial Review proceedings they have a *prima facie* case for granting an injunction against the 1st defendant

[4] The 3rd defendants adopted *Mutatis Mutandis* the submission of the applicant. The 3rd defendant relied on the fact that the filing of suit for rates in the magistrate's court by the 2nd defendant and the sale of the suit properties pursuant to a vesting order by the magistrates court was illegal and fraudulent and not sanctioned by themselves and they supported the injunction applied herein by the applicants.

[5] The first respondent raised the issue of *locus standi*. It challenged the locus of Mrs. Catherine Wangui Muigai to swear an affidavit without the express authority from *Mwai Limited* a limited liability company to swear the affidavit as a director.

The first respondent also averred that the applicants had not met the threshold of *Geilla vs Kasaman Brown*. The first respondent argued that the property is in the name of the first respondent and the applicants cannot say that they are going to suffer irreparable damage when the first respondent was in possession and was the registered proprietor.

[6] In her affidavit sworn on 25th June 2008 Catherine Wangui Muigai swore in para 4 that "4 That the plaintiffs were until the 20th March, 2008 the registered proprietors of Land Reference Number Mombasa/VI Mainland/2960 and Mombasa/VI Mainland 911 all situated within the 3rd defendants Municipality. Annexed hereto and marked exhibit A is a copy of the certificate of title."

The registered owners of the suit property pursuant to the attached title were,

1. **Ismail Abdulla 3/28 shares**
2. **Adam Bin Mohmood Bin Mohamed Mirak 3/28 shares**
3. **Mwai Ltd 15/28 undivided shares**

The property comprised of 5.71 acres. None of the properties is in the name of Isaiah Mwai Mathenge or in the names of the administrators of his estate. *Mwai Limited* is a limited liability company. This is a

legal entity. It obviously has directors. Mrs. Catherine Wangui Muigai swore in her affidavit under reference that she is a director of *Mwai Limited* and has authority of the board of directors to swear that affidavit on their behalf. That resolution of the board of directors was not annexed to the affidavit at all.

In the amended suit the name of *Mwai Limited* was removed from this suit. That company therefore ceased to be a party in these proceedings on 13th October, 2009.

[7] The first three plaintiffs are the administrators of the estate of Isaiah Mwai Mathenge. The fourth one is Simon Nyaga Mathenge. Isaiah Mwai Mathenge was not the registered owner of the suit premises on his death. The fourth defendant is not a registered owner of any of the suit properties.

The application herein and the suit pray for exactly the same thing that is;

"That a permanent injunction restraining the first defendant by itself, its agents, employees or servants from trespassing into land Reference No. Mombasa/VI Mainland 9/11 and Mombasa Mainland/2960 and/or demolishing any of the existing structures and or from exercising any proprietary rights thereon."

In determining this notice of motion I will inevitably be determining the suit. I am conscious of the fact that a suit should not be determined at a preliminary stage. However and in rare cases when the plaintiff/applicant chooses to pray for the same thing in the suit and in his subsequent application like in this case, a determination that affects the entire suit is inevitable. The respondent herein have raised the issue of the applicants locus standi in this suit and application.

[8] *Does the applicants /plaintiffs have locus standi in bringing this case and this application?*

The first to third applicants bring the suit as administrators of the Estate of Isaiah Mwai Mathenge. At the death of the late Mathenge, the suit properties were not in his name. There is therefore no nexus between the 1st to 3rd respondents and the suit properties. The fact that one Catherine Wangui Muigai is director in *Mwai Limited* does not establish any legal connection with the suit property. She needed to have the necessary boards' resolution from *Mwai Limited* to file the suit and application. She cannot in law do so without such resolution¹. In any case, the amendment of 13th October, 2009 removed *Mwai Limited* from the suit. The fourth defendant Simon Nyaga Mathenge equally has no connection with the suit property. He has never been a registered owner of the suit properties contrary to what is averred in the plaint and this application. There is equally no nexus between him and the suit property. The plaintiffs under the circumstances become busybodies interfering with the suit property and persons without any legal interest in the said properties. They have no locus standi to bring the suit and the application filed herein. The other persons who could have a sustainable legal claim herein were *Mwai Limited, Ismail Abdulla and Adam Bin Mohmood Bin Mohamed Mirak*. Even then, any suit filed should have been accompanied by the resolution of the board of directors of *Mwai Limited* to file the suit. No such resolution was filed with the original plaint. If that plaint had not been amended, it would equally have flopped for that reason. Anyway, the said *Mwai Limited* was removed from the suit by the amendment of 13th October, 2009 and the other two co-owners are not parties to this suit.

The first respondent has title to the suit properties. Title granted by orders of a court of competent jurisdiction. The owner of those interests must not be disturbed in the enjoyment of his properties by people who have no locus to bring this suit and application.

[8] I am aware that there is a pending *Judicial Review No. 11 of 2008* by the applicants herein for review of the Chief Magistrates orders that vested the suit properties on the first defendant. I do not want to speculate on the orders the Judicial Review court will make. But I am certain that, that court might want to investigate and inquire on the issue of the locus standi of the applicants therein. I need not say more on that issue.

Having found that the plaintiffs have no capacity to bring this application and the suit I hereby dismiss this suit and application with costs to the first respondent.

Dated and delivered in open court at Mombasa this 10th day of September, 2014.

S. MUKUNYA

JUDGE

10.9.2014

In the presence of:

Simiyu advocate for the plaintiff

Misaru advocate for Oloo advocate for 3rd defendant

see - Nairobi HCCC 524 of 2004

Affordable Homes Africa Ltd v Henderson and 2 others

Malindi HCC. 29 of 2011 Royal Tulia Estate Ltd v Davidson Matano & 4 others