



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 31 OF 2018

BETWEEN

MBARUK ABDALLA SULEIMAN.....1<sup>ST</sup> APPELLANT

MOHAMED KHAMIS OMAR.....2<sup>ND</sup> APPELLANT

MOHAMED SULEIMAN ALI.....3<sup>RD</sup> APPELLANT

SWABIR MASOUD ABDALLA.....4<sup>TH</sup> APPELLANT

SULEIMAN RASHID ABDALLA.....5<sup>TH</sup> APPELLANT

NASSIR MASOUD MOHAMED.....6<sup>TH</sup> APPELLANT

AND

MOMBASA CEMENT LIMITED.....1<sup>ST</sup> RESPONDENT

SALIM MASOUD ABDALLA.....2<sup>ND</sup> RESPONDENT

KHALFAN ABDALLA.....3<sup>RD</sup> RESPONDENT

RASHID MOHAMED SALIM.....4<sup>TH</sup> RESPONDENT

AHMED MOHAMED SALIM.....5<sup>TH</sup> RESPONDENT

SALIM AL-AMIN SULEIMAN.....6<sup>TH</sup> RESPONDENT

*(An appeal from the ruling of the Environment and Land Court of Kenya at Mombasa (Yano, J.) dated 16<sup>th</sup> January, 2018 in*

*E.L.C No. 157 of 2017)*

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**JUDGMENT OF THE COURT**

1. The appeal herein calls into question the exercise of the learned Judge's (Yano, J.) discretion in declining to allow the joinder of the appellants herein as interested parties in E.L.C No. 157 of 2017. As such, we can only interfere with the said discretion within the settled parameters as enunciated in the *locus classicus* case of *Mbogo & Another vs. Shah* [1968] EA 93. Simply put, we ought not to interfere with the exercise of such discretion unless we are satisfied that the learned Judge misdirected himself in some matter and as a result, arrived at a wrong decision, or that it is manifest from the case as a whole that the learned Judge was clearly wrong in the exercise of his discretion and occasioned injustice.

2. The suit in the Environment and Land Court (ELC) was instituted against the 2<sup>nd</sup> to the 6<sup>th</sup> respondents as the elected trustees of the

Mazuri Community (Development and welfare) Wakf Trust (the Trust). Under the Trust Deed dated 7<sup>th</sup> February, 2006 the said trustees held the parcel of land described as L.R No. 409/1 Kilifi (suit land) in trust and managed the same on behalf of the members of the Trust who were the legal and beneficial owners.

3. Pursuant to a lease agreement executed by the 1<sup>st</sup> respondent on one part and the 3<sup>rd</sup> to the 5<sup>th</sup> respondents on the other part, a portion of 1000 acres of the suit land was leased out to the 1<sup>st</sup> respondent for an annual rent of Kshs.40,000 per acre. The said portion was to be utilized exclusively for mining purposes. Further, following the 3<sup>rd</sup> to 5<sup>th</sup> respondents request, the 1<sup>st</sup> respondent paid annual rent in advance to the tune of Kshs.10,000,000.

4. Thereafter, it seems that internal wrangles arose between the trustees which escalated in the 1<sup>st</sup> respondent being served with numerous notices to vacate the suit land. In as much as the 3<sup>rd</sup> to the 5<sup>th</sup> respondents disowned the said notices, the 1<sup>st</sup> respondent was apprehensive that it could be evicted at any moment from the suit land which it had heavily invested in to its detriment. It is for this reason that the 1<sup>st</sup> respondent filed the suit in question seeking *inter alia*, a declaration that it was entitled to exclusive and unimpeded quiet possession of the suit land; an injunction restraining the 2<sup>nd</sup> to the 5<sup>th</sup> respondents from evicting or otherwise interfering with its quiet possession of the suit land as well as damages for the interference occasioned by the notices to vacate.

5. It was clear that the 2<sup>nd</sup> to the 5<sup>th</sup> respondents were not reading from the same script as evident in statements of defence filed therein. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents challenged the validity of the lease agreement on the grounds that the same was not executed collectively by all the trustees; and that the 1<sup>st</sup> respondent had not obtained the requisite consents for carrying out mining activities on the suit land. Towards that end, the said respondents filed a counter claim against the 1<sup>st</sup> respondent seeking damages for the pollution, destruction and diminution of the value of the suit land amongst other orders. As for the 3<sup>rd</sup> to the 5<sup>th</sup> respondents, they averred that they had executed the lease in question as trustees of the Trust and acknowledged that the 1<sup>st</sup> respondent had paid annual rent in advance up to the year 2021. They also intimated their support for the 1<sup>st</sup> respondent's suit.

6. Before the hearing of the suit could proceed, the appellants herein filed an application dated 5<sup>th</sup> July, 2017 in the ELC seeking to be enjoined as interested parties. The basis of seeking those orders was that they had been duly elected as trustees of the Trust in the elections which were held on 7<sup>th</sup> May, 2017. They intended to oppose the 1<sup>st</sup> respondent's suit on the same grounds as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. In the alternative, they sought to be enjoined as beneficiaries of the Trust as opposed to the trustees thereof.

7. It did not come as a surprise that the 1<sup>st</sup> respondent opposed the application through its Human Resource Manager, Akram Mohamed. He deposed that the suit was fatally defective because the appellants had not invoked the correct provisions of the law. Besides, the appellants had been barred by an injunction issued by Njoki, J. on 22<sup>nd</sup> May, 2017 in H.C.C.C No. 55 of 2017 from either claiming under themselves, acting or in any way holding themselves out as trustees of the Trust on account that their election was disputed. To allow the said joinder would undermine the said orders.

8. Equally, the appellants could not be joined in their capacity as members of the Trust since pursuant to the Trust Deed thereunder they had donated their power to the trustees to defend or institute any legal suits on their behalf. Moreover, the said appellants were not necessary parties since the subject of the dispute relates to the lease agreement which was executed before their election. Therefore, the proper parties were the trustees who were in office at the said time. What was more, the appellant admitted that they were not adding anything new to the dispute herein. The 3<sup>rd</sup> to the 5<sup>th</sup> respondents also opposed the application on the basis of the injunction issued in H.C.C.C No. 55 of 2017.

9. Upon weighing the rival arguments put forth by the parties against the law, the learned Judge found that the appellants were not necessary parties to the suit and thus dismissed their application vide a ruling dated 16<sup>th</sup> January, 2018. It is this decision that instigated the appeal before us which is predicated on a total of 8 grounds basically challenging the exercise of the learned Judge's discretion.

10. The appeal herein was ventilated through written submissions and oral highlights. According to learned counsel, Mr.Obaga, who held brief for Mr. Kibet for the appellants, the appellants had established their interest in the matter and as such, should not have been turned away from the seat of justice; doing so, could result in unnecessary multiplicity of suits. Counsel added that a court's power to grant joinder is discretionary and that the overriding issue to be considered is whether the party seeking joinder has proven its interest. To bolster that line of argument, reference was made to ***Civicon Limited vs. Kivuwatt Limited & 2 Others [2015] eKLR***.

11. The appeal received support from the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who through their counsel, Mr. Kimani urged this Court to allow the appeal. Counsel contended that the appellants are beneficiaries and not trustees as claimed; since the trustees had been sued in the proceedings, it was only mete and just that the beneficiaries be given a chance to safeguard their interests as well. He argued that since the appellants had raised the issue of illegal mining and occupation of the suit land, their joinder was necessary to enable the court adjudicate on these issues. Likewise, Mr. Gitonga, learned counsel for the 6<sup>th</sup> respondent, adopted the view that the appellants' interest could only be safeguarded by allowing their joinder. More so, in light of the division within the board of trustees.

12. Opposing the appeal, Mr. Onyony, learned counsel for the 1<sup>st</sup> respondent, termed the impugned ruling as legally sound. He submitted that on account of the court order issued in H.C.C.C No. 55 of 2017 the appellants were no longer trustees as their election was nullified by the court. In contrast, that the Trust Deed granted the proper trustees power to sue and be sued on behalf of the trust, as was the case herein. In any event, neither the Court nor the appellants could compel the 1<sup>st</sup> respondent on who to sue.

13. On a different note, counsel submitted that the appellants should not be permitted to blow hot and cold with regard to the capacity in which they were seeking joinder; that they could not claim to be trustees on one hand, and beneficiaries on the other. As to multiplicity of suits, it was contended that the appellants had not demonstrated that the case they seek to present shall be any different from what has already been placed on record by the defence.

14. On her part, Ms. Mango, learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents, also opposed the appeal on more or less similar grounds as the 1<sup>st</sup> respondent.

15. We have considered the application, submissions by counsel and the law. The essence of allowing joinder of a party to any proceedings is for the court to achieve the ultimate goal of rendering conclusive determination of the real issues in controversy. See J M K vs. M W M & another [2015] eKLR.

16. It follows therefore, that whenever a court is faced with such an application it has to bear in mind the settled principles discussed by this Court in Attorney General vs. Kenya Bureau of Standards & Another [2018] eKLR. These principles include:

*1) The applicant must demonstrate that it would be desirable for him/her to be added as a new party and that his/her presence would enable court to resolve all the matters in the dispute.*

*2) The joinder will not prejudice the other parties.*

*3) The joinder will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.*

17. Applying the foregoing to the circumstances of this case, we find that the appellants did not meet the criteria of being enjoined to the suit in question. We say so because firstly, they conceded in their own application that they would be opposing the 1<sup>st</sup> respondent's suit on similar grounds as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. This means as correctly observed by the 1<sup>st</sup> respondent they would be adding nothing new to the matter. Secondly, they could not be enjoined in their capacity as the newly elected trustees for the simple reason that the injunctive orders issued in H.C.C.C No. 55 of 2017 were still in force. Equally, by virtue of the terms of the Trust Deed they could not be enjoined in their capacity as beneficiaries under the Trust because they had donated that power to the trustees in office, that is, to sue and be sued on their behalf.

18. In the end, we concur with the learned Judge that the appellants were not necessary parties to the suit. We find that the appeal lacks merit and is hereby dismissed with costs.

**Dated and delivered at Mombasa this 6<sup>th</sup> day of December, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**