



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 414 OF 1996

MOHAMED BWANA BWANAADI & ANOTHERPLAINTIFFS

VERSUS

RISHAD ABDULREHMAN KHATOR & 9 OTHERSDEFENDANTS

AND

FUAD MBARAK ALI AHMAD

SALMA MBARAK ALIINTENDED INTERESTED PARTIES/APPLICANTS

RULING

(Application by two persons seeking to be enjoined as interested parties; suit seeking cancellation of some titles said to have been acquired fraudulently after the shares of the other joint owners were extinguished; applicants being grandchildren of one of the original joint owners; court not persuaded that it is necessary to enjoin them as they do not hold any grant of letters of administration; if the court were to be too liberal, then all persons in consanguinity to any of the parties will apply to be enjoined yet they are not necessary for the litigation to be determined; application dismissed)

1. The application before me is that dated 10 February 2020 filed by Fuad Mbarak Ali Ahmad and Salma Mbarak Ali who wish to be enjoined in this suit as interested parties. The application is opposed by the 8th defendant.

2. To put matters into context, this is now an old suit which was commenced through a plaint filed on 22 July 1996. The plaintiffs are administrators de bonis non (alongside the 1st defendant) of the estate of the late Khator Bin Salim (the deceased) who died on 9 June 1943. It is pleaded that in the year 1923, the deceased, and six others, namely Saleh Bin Abdulla, Ahmed Bin Salim, Halima Binti Salim, Mwana Amina Binti Salim, Mwana Ana Binti Salim, and Mwe Memwenyi Binti Ahmed, were registered as owners of three properties identified as Plots No. 193, 194 and 196/Section III/Mainland North (the suit properties). It is pleaded that through the suit Mombasa HCCC No. 264 of 1961, the High Court decreed that Mohamed Khator Salim (as administrator of the estate of Khator Bin Salim) had acquired title to the suit properties, and that save for the interest of Ahmed Bin Salim, the interests of the other persons (who appear to have been deceased and were represented in that suit by the Public Trustee) was extinguished. It is pleaded that on 11 July 1962, Ahmed Bin Salim, sold and transferred his 28/128 share in the suit properties to one Virchand Karamshi Shah (2nd defendant).

3. It is contended that in September 1989, in disregard of the decree in Mombasa HCCC No. 264 of 1961, the 7th defendant (The Public Trustee) issued certificates certifying that the shares of Halima, Mwana Amina, Memwenyi and Ahmed Bin Salim, were below KShs. 100,000/= in value, and consequently, the said certificates were registered against the titles, and on the force of those certificates, the 7th defendant conveyed their purported shares to the 1st, 3rd, 4th and 5th defendants. It is further alleged that the 7th defendant also illegally conveyed the purported share of Saleh Bin Abdulla to the 6th defendant who is his heir. These transfers are claimed to be fraudulent for reason inter alia that the issue of ownership was settled by the High Court in Mombasa HCCC No. 264 of 1961. It is contended that the Public Trustee issued false and misleading certificates and it was wrong for the Registrar of Titles (9th defendant) to register them in disregard to the decree in Mombasa HCCC No. 264 of 1961.

4. It is pleaded that upon the acquisition, the 2nd, 3rd, 4th, 5th and 6th defendants, consolidated the Plots No. 193 and 194 to create a Plot No. 2712 of 4 Ha, with the certificate of title being issued on 24 October 1995 showing that it is owned by the 1st – 6th defendants. On the same day, a partition was presented, for subdivision of this land with one of the portions created being a Plot No. 2715 in name of the 2nd, 3rd and 4th defendants. They then transferred this Plot No. 2715 to the 8th defendant on 23 February 1996. In this suit, the plaintiffs seek a declaration that the Plots No. 193, 194 and 196 are, pursuant to the decree in Mombasa HCCC No. 264 of 1961, vested in the administrators

of the estate of Khator Bin Salim, and further, that the Public Trustee could not transfer any interest to third parties. They also seek to nullify the consolidation and subsequent subdivision of the Plots No. 193 and 194, and cancellation of the titles issued as a result thereof.

5. The applicants state that they are the grandchildren of Mwana Ana Binti Salim Hero (who it said died in the year 1922) but are not parties, yet they are entitled as heirs to her estate, in respect of the suit properties. They want to be enjoined so as to shed light as to their interests as lawful heirs of the Plots No. 193 and 194. They contend that unless they are admitted, they are likely to lose their inheritance. The supporting affidavit is sworn by Fuad Mbarak Ali Ahmad who basically claims that Mwana Ana's interest in the suit properties is intact.

6. In the grounds of opposition filed by the 8th defendant, it is submitted inter alia, that the applicants have no locus as they have not exhibited any grant of letters of administration for the estate of the deceased.

7. I have considered the matter. The court has wide discretion to enjoin parties to suits. The general power is under Order 1 Rule 10 (2) which provides as follows :-

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

8. My interpretation of the above is that the court, before enjoining a person to proceedings as an interested party, needs to be persuaded that it is necessary for that person to be enjoined, so as to enable the court effectually and completely adjudicate on the matter and settle all questions involved.

9. In this application, the only reason why the applicants want to be enjoined is because they are grandchildren of Mwana Ana (deceased). I do not see how, in the circumstances of this case, the applicants can be deemed to be necessary parties, by reason only, that they are grandchildren of Mwana Ana (deceased). It is my opinion, as rightfully pointed out by the 8th defendant, that they need to demonstrate that they have the locus to represent and bind her estate. If this was not to be insisted, then anybody who has some sort of consanguinity to Mwana Ana, or indeed a child, grandchild or great grandchild, or person having any sort of affinity to any of the parties in this case, will apply to be enjoined to this suit as interested parties. The result is that this litigation will balloon out of manageable proportions, yet those parties will not be able to bind the estates that they claim to be heirs to. Whichever way you look at it, such persons do not need to be enjoined so that the issues in this case are determined. It should be recalled that this is not a succession matter, but is a suit seeking cancellation of titles. It is those who hold the titles, or have held the titles in the past, or those who represent their estates, that can be considered as necessary to this suit.

10. Apart from the above, this is a 1996 matter. It is partly heard. I wonder how it has suddenly dawned upon the applicants, that they now have an interest; where have they been for the last 25 years ? The application, to me, is clearly an afterthought, and if it is to be allowed, it will only encourage other relatives of the other parties, to file numerous applications for joinder, yet their presence is not necessary in order to determine the issues herein. This will only lead to additional delay in determining this old case.

11. I am thus not persuaded to allow this application and it is hereby dismissed.

12. I however make no orders as to costs.

13. Orders accordingly.

DATED AND DELIVERED THIS 3RD DAY OF FEBRUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA