



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO.88 OF 2018

MONICA MUSILI PHILLIP.....1ST PLAINTIFF

NDAVI NZIOKA2ND PLAINTIFF

-VERSUS-

TANGAI MUNALI1ST DEFENDANT

JOHN KYENGO2ND DEFENDANT

RULING

1) What is before this court for ruling is the Defendants’/Applicants’ Notice of Motion application expressed to be brought under Order 1 Rule 3, Order 7 Rule 17, Sections 1A and 3A of the Civil Procedure Act for orders: -

- 1. THAT Tamu Kenya Investments Limited be enjoined in this suit as a defendant.**
- 2. THAT leave be granted to the defendant’s to file their defence out of time.**
- 3. THAT the defendants be allowed to comply with Order 11 of the Civil Procedure Rules Cap 21 Laws of Kenya.**
- 4. THAT cost be provided for.**

The application is predicated on the grounds on its face and is supported by the affidavit of Tangai Munali, the 1st Defendant/Applicant herein, sworn at Nairobi on the 19th March, 2019 and filed in court on 20th March, 2019 together with the application which is similarly dated.

2) The Plaintiffs/Respondents have opposed the application vide their grounds of opposition dated 15th May, 2019 and filed in court on 16th May, 2019. The Plaintiffs have raised the following grounds: -

- 1. THAT the application is misconceived, without any merits and an abuse of court process.**
- 2. THAT the application as drawn is bad in law and fatally defective and *ex facie* incompetent and ought to be dismissed with costs.**
- 3. The applicants have totally failed to provide any grounds as to why they failed to file their defence on time.**

4. **The applicants are seeking to introduce a subject matter which is strange to the matter in dispute.**

5. **The application herein is brought after an inordinate delay.**

6. **The applicant's application is a mere strategy to delay the conclusion of the matter herein.**

3) Parties herein have filed their submissions pursuant to the Court's direction issued on 16th May, 2019 to dispose off the application by way of written submissions.

4) Tangai Munali, the 1st Defendant/Applicant herein, has deposed in paragraphs 4, 5, 6, 7, 8, 11, 12, 13 and 14 of his affidavit that the Plaintiffs/Respondents are known to him, that the particular parcel of land in dispute being claimed by the Plaintiffs/Respondents as plot No. Sultan Hamud Town/412 is owned and registered in the name of Tamu Kenya Investments Limited (the company), that he is a director of the company and of his own knowledge he knows the history of the acquisition of the parcel of land by the company, that the Plaintiff/Respondent and his family had been allowed to use the plot by the previous owner who was his father, Jackson Mutiati Kioko, before the same was acquired by the same company, that it is evident that a parcel of land cannot have two titles and therefore one must be fake and that it is the Plaintiff/Respondent who holds such document, that he seeks to have the company enjoined as a defendant to enable the court arrive at a just determination of the case, that the Plaintiff/Respondent is aware that the company is the owner of the suit property but conveniently avoided making it a party to hoodwink the court and obtain orders, that by enjoining the company to the suit, it will not in any way derail, prejudice or delay the disposal of the suit.

5) By the time of writing this ruling, it is only the Defendants'/Applicants' Counsel who had filed their submissions. The Counsel framed two issues for determination namely: -

1. *Whether Tamu Investments Kenya Limited be enjoined in this suit as a defendant.*

2. *Whether leave be granted to file defence out of time and comply with Order 11 of the Civil Procedure Rules Cap 21 Laws of Kenya.*

6) Regarding the first issue, the Counsel submitted that plot No. Sultan Hamud/412 is owned and registered in the name of Tamu Kenya Investment Limited of which the 1st Defendant/Applicant is its director and hence its inclusion in this suit would help the court in making its decision. In support of his submissions the Counsel cited the case of **Housing Finance Company of Kenya Ltd vs. Faith Kimelia & Another [1998] eKLR** where the Court held that: -

“Order 1 Rule 10 of the Civil Procedure Rules provides for the addition of a party to a suit so that his presence before the court may enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit to enable the court determine the real matters in dispute.”

The Counsel added that the Plaintiff/Respondent will not suffer any prejudice if the company were to be enjoined as the 3rd Defendant.

7) On whether or not leave be granted to file defence out of time and to comply with Order 11 Civil Procedure Rules, the Counsel submitted the court will have to decide on who is the true owner of the contested suit property and this can only be done after hearing both parties. The Counsel cited the case of **Joshua Mulungu Mutie and Another vs. County Government of Machakos [2018] eKLR** where the Court held that: -

“Considering that there is no Judgment in this matter, the issue of whether the Defendant's draft Defence raises triable issues or not does not arise. It is the Defendant's constitutional and statutory right to defend the suit. The

Plaintiffs can only raise the issue of whether the Defence raises triable issues or not after the Defence has been filed and served.”

8) I have read the application, the grounds of opposition as well as the submissions that were filed by the Defendants’/Applicants’ Counsel. The averment in paragraph 4 of the plaint that the Plaintiffs are the registered and legal owners of land parcel plot No.Sultan Hamud Town/412 measuring 0.54 hectares have been denied in paragraph 3 of the draft defence annexed to the supporting affidavit of the 1st Defendant’s/Applicant’s application. Further paragraph 8 of the draft defence raises the issue that the Defendants/Applicants are in the suit property with the authority of Tamu Kenya Investments Company Limited. As such, it is clear that there is contention on the issue of ownership of the suit property.

9) Arising from the above, my finding is that the interests of justice demand that the said Tamu Kenya Investment Limited. be enjoined to this suit to enable the court effectually and to completely adjudicate upon on the issues raised therein. Consequently, it cannot be said that the application is misconceived, without merit and an abuse of the court process, nor can it be said that it is bad in law and fatally defective.

10) The upshot of the foregoing is that the application has merits and I hereby proceed to issue the following orders: -

- 1. Tamu Kenya Investment Limited be enjoined in this suit as a Defendant.**
- 2. The Defendants/Applicants are granted leave of 21 days from today to file and serve their defence.**
- 3. Costs of the application are provided for.**

Signed, Dated and Delivered at Makueni this 18th day of **December, 2019.**

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Ndolo holding brief for Mr. J. Nzioka for the Applicant

P. M. Mutinda & Co. Advocates for the Respondent – absent

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

18/12/2019.



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