



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 74 OF 2019

ABDULLAHI FARAH HAJI

FAMAU AHMED FAMAU.....PLAINTIFFS

VERSUS

GEORGE MOORHEAD.....DEFENDANT

KENYA WILDLIFE SERVICES.....INTERESTED PARTY/APPLICANT

RULING

1. By the Notice of Motion dated and filed herein on 19th August 2020, Kenya Wildlife Services [the Interested Party/Applicant] prays for an order to be enjoined in these proceedings as an Interested Party and to be granted leave to file its Defence and List of Documents.

2. The Application which is supported by an affidavit sworn by the Applicant's Legal Officer – Doreen Mutunga is premised on the grounds:

i. That the Applicant is the proprietor in trust on behalf of the people of Kenya of all that piece of land known as Kiunga Marine National Reserve;

ii. That the Reserve was established as per Legal Notice No. 291 of 26th October 1979 and Boundary Plan No. 216/39 with an area of 250km² and includes all the Islands within the Boundary Plan including Kiwayu Island;

iii. That through this suit, the Plaintiffs are illegally laying a claim on a 60 acre piece of land on Kiwayu Island which land currently serves as a National Marine Reserve managed by the Applicant;

iv. That at all times material, the Defendant has been operating a tourist recreational facility within Kiwayu Island Christened Kiwayu Safari Lodge under the authority and license of the Applicant;

v. That the interim orders granted to the Plaintiffs against the Defendant and any further consequential orders that may emanate from these proceedings, are prejudicial to the Applicant's rights of ownership and management of Kiwayu Island and the same is an affront to conservation of Marine wildlife and promotion of tourism; and

v. Having not been a party to the proceedings ab initio, the Applicant stands to be affected by the decision of the court and it will be exterminating for the Applicant's interests to be articulated unless the Applicant appears and participates in the proceedings.

3. The application is opposed. By an Affidavit in Reply sworn and filed herein on 16th September 2020, Abdillahi Farah Haji [the 1st Plaintiff] avers that together with the 2nd Plaintiff on whose authority he swears the affidavit, they are the registered proprietors of the parcel of land known as LR No. 27898 Lamu.

4. The Plaintiff further avers that Legal Notice no. 291 of 26th October 1979 referred to by the applicants refers to the waters of the ocean in the area and not the land in the Islands. The plaintiffs contend that if the application is allowed the same will infringe on their right to own property as protected under Article 40 of the constitution.

5. I have carefully considered both the application and the response thereto. I have similarly considered the submissions and authorities as filed herein by the Learned Advocates for the parties.

6. Rule 10 [2] of Order 1 of the Civil Procedure Rules provides as follows:

“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”

7. On the other hand, Black's Law Dictionary, 9th Edition defines a “necessary party” as being:

“A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings.”

8. Explaining when an interested party ought to be enjoined in proceedings in ***Kenya Medical Laboratory Technicians and Technologists Board & 6 others – vs- The Attorney General & 4 others [2017]eKLR***, Mativo J. observed as follows:

“A person is legally interested in the proceedings only if he can say that it may lead to result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter or an action sufficient to entitle him to be joined as an interested party, the true test lies not so much in analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject matter or the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must not only have an interest in the pending litigation but the interest must be legal, identifiable or demonstrate a duty”

9. In ***Communications Commission of Kenya & 4 others – vs- Royal Media Services Ltd & 7 others [2014] eKLR***, the Supreme Court of Kenya stated as follows:

“[22] In determining whether the Applicant should be admitted into these proceedings as an interested party, we are guided by this Court's Ruling in the Mumo Matemo case where the court [at paragraph 14 and 18] held:

“ [An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself of herself appears in the proceedings, and champions his or her cause...”

10. In the matter before me, the Plaintiffs have instituted this claim against one George Moorhead [the Defendant] accusing him of trespassing onto the Plaintiff's parcel of land known as LR No. 27898 Lamu by entering thereon on 2nd May, 2019 and erecting certain structures thereon without the Plaintiff's authority. The Plaintiffs accordingly urge this court to issue a permanent order of injunction restraining the Defendant from entering, remaining in, constructing, selling or dealing in any manner whatsoever with the

suit property. In addition, the Plaintiffs have urged the court to direct the Defendant to demolish the structures constructed on the said property.

11. By their application herein however, it is apparent that the Defendant entered the suit property on the authority and license of the Interested Party herein who equally lays claim to the very suit property. In this respect, the Interested Party has annexed documents which they say indicate that the suit property is part of the National Marine Reserve Park in Kiwayu Island which by dint of Legal Notice No. 291 of 26th October 1979 is part and parcel of the greater Kiunga Marine National Reserve.

12. While the Plaintiffs have dismissed the interested party's claim asserting that the Interested Party is only entitled to the water surrounding the Island, I am of the considered view that the application before me has met the threshold and requirement to necessitate participation in these proceedings by the Interested Party.

13. I say so because in my view, it is only through participation of both the Plaintiff and the Interested Party herein that the court can interrogate the tenor and purport of the said Legal Notice No. 291 of 26th October 1979 and the validity of the title held by the Plaintiffs.

14. In the premises I am satisfied that there is merit in the Motion dated 19th August 2020. I allow the same in terms of prayer 2 and 3 thereof to the effect that the applicant be enjoined as the 2nd Defendant herein

15. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 31ST DAY OF AUGUST, 2021

J.O. OLOLA

JUDGE



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