



No. 304

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND

CIVIL CASE NO. 186 OF 2011

SAMWEL KENANI OMWANDO PLAINTIFF

VERSUS

CHARLES MAGETO DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 19th September 2011 seeking the following reliefs:
 - i. **Declaration that the plaintiff is the registered and/or lawful owner of LR No. Kisii Municipality/Block III/196.**
 - ii. **An order of eviction directed against the defendant, his agents and/or servants, from LR No. Kisii Municipality/Block III/196.**
 - iii. **Permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the defendant from entering upon, re-entering, trespassing onto, laying a claim to, building on, chasing away the plaintiff's workers, interfering with and/or in any other manner dealing with the suit land, that is, LR No. Kisii Municipality/Block III/196 and/or any portion thereof.**
 - iv. **General damages for trespass.**
 - v. **Interest on (iv) hereof at court rates.**
 - vi. **Costs of this suit be borne by the defendant**
 - vii. **Such further and/or other relief as the honourable court may deem fit and expedient so to grant.**

In his plaint dated 16th September 2011, the plaintiff averred that he is the registered proprietor of all that parcel of land known as LR No. Kisii Municipality/Block III/196 (hereinafter referred to as “**the suit property**”) and as such he is entitled to exclusive and/or absolute rights over the same. The plaintiff averred further that on or about 5th September 2011 the defendant started laying a claim to the suit property by encroaching and/or trespassing thereon and on 7th September 2011 the defendant chased away the plaintiff's employees who had been engaged by the plaintiff to fence the suit property on behalf of the plaintiff claiming that the suit property belongs to him. The plaintiff averred that the defendant's said activities are illegal and have denied the plaintiff the right to use and/or develop the suit property. It is on account of the foregoing that the plaintiff sought the reliefs that I have highlighted at the beginning of this ruling. Together with the plaint,

the plaintiff filed an application by way of Notice of Motion dated 16th September, 2011 seeking a temporary injunction to restrain the defendant from interfering with the suit property pending the hearing and determination of this suit.

2. The defendant entered appearance and filed his statement of defence on 21st October 2011. The defendant also filed his affidavit in reply to the plaintiff's application for injunction on the same date. In his defence, the defendant denied the plaintiff's claim that he had trespassed on or encroached on the suit property. The defendant contended that the suit property is owned by a company known as Dakianga Distributors Ltd and that the said company has been in possession of the said property since the year 2000. The defendant contended that he has been wrongly and/or improperly sued as he is only a director of Dakianga Distributors Ltd that owns the suit property. The defendant averred that the plaintiff obtained title to the suit property through acts of fraud and urged the court to dismiss the plaintiff's suit with costs. From the record, the plaintiff seems not to have filed a reply to the defendant's statement of defence.
3. On 16th January, 2012 the defendant brought an application by way of Notice of Motion dated 6th January 2012 under Order 1 rule 10 (2) and (4) of the Civil Procedure Rules, 2010 seeking an order staying the hearing of the plaintiff's application for injunction dated 16th September 2011, the striking out of the name of the defendant from this suit and the substitution of the name of the defendant with the name of the person who ought to have been joined in this suit, an order for directions to be given on amendment of the plaint and service of summons upon the new party and an order that the costs of the application be awarded to the defendant. The application that was supported by the affidavit of the defendant sworn on 6th January 2012 was brought on the grounds that the defendant was improperly joined in this suit as a defendant and that the person who ought to have been joined as a defendant is Dakianga Distributors Ltd which is a limited liability company separate and distinct from the defendant who is just one of its directors.
4. The defendant contended that it is important for the issue of mis-joinder and non-joinder of parties to be resolved before the plaintiff's application for injunction is heard. The defendant reiterated that the suit property is registered in the name of Dakianga Distributors Ltd that has made substantial developments thereon and has also occupied the same since the year 2000. The defendant contended that in light of the material that he has placed before the court through his replying affidavit that was filed in response to the plaintiff's application for injunction, it is clear that he should not have been made a party to this suit. The defendant's application was opposed by the plaintiff. The plaintiff filed grounds of opposition dated 20th February 2012 and a replying affidavit sworn by the plaintiff on 21st February 2012 in opposition to the application.
5. In his grounds of opposition and replying affidavit aforesaid, the plaintiff contended that the defendant's application is mischievous, misconceived, bad in law and devoid of any merit. The plaintiff contended that the issue as to whether or not the defendant was properly sued can only be determined at the trial and not in a summary manner. The plaintiff contended that as far as he is concerned it is the defendant who trespassed on the suit property and as such the defendant was properly sued. The plaintiff contended that the defendant's allegation that the suit property belongs to and has been developed by Dakianga Distributors Ltd is contentious and as such cannot be a basis for ordering the plaintiff to join Dakianga Distributors Ltd in this suit.
6. On 30th May 2012 the advocates for the parties agreed to argue the defendant's application by way of written submissions. The defendant filed his submissions on 25th April 2012 while the plaintiff filed his submissions on 30th April 2012. I have considered the defendant's application and the grounds of opposition and replying affidavit filed by the plaintiff in opposition thereto. I have also considered the respective submissions by the advocates for the parties and the case law cited. Under Order 1 rule 10 (2) of the Civil Procedure Rules, 2010 the court has power upon application or of its own motion at any stage of the proceedings to order that the name of a party who has been improperly joined in the suit be struck out or that the name of a party who ought to have been joined in the suit whether as a plaintiff or as a defendant or whose presence before the court may be necessary in order to enable the court to determine all questions involved in the suit to be added.
7. The plaintiff has brought this suit against the defendant claiming that on 5th September 2011 and

7th September 2011 the defendant trespassed and/or encroached on the suit property and not only laid a claim to the same but also chased away the plaintiff's workers who had been deployed to fence the said property. On his part the defendant has contended that the suit property is owned by an entity known as Dakianga Distributors Ltd in which he is a director and that the said Dakianga is the one in possession of the suit property having enjoyed such possession since the year 2000. In his affidavit sworn on 18th October 2011 in reply to the plaintiff's application for injunction, the defendant placed before the court a copy of a title deed for the suit property dated 30th June 2000 in the name of Dakianga Distributors Limited. The defendant also placed material before the court tracing the title of the suit property from 1970's upto the time the same was transferred to Dakianga Distributors Ltd in the year 2000. The defendant also placed evidence before the court to the effect that the suit property is developed and is also charged to a bank. The defendant's has contended that Dakianga Distributors Ltd is the lawful owner of the suit property and that the title held by the plaintiff is fraudulent.

8. On the material placed before this court by the defendant, I am satisfied that the joinder of Dakianga Distributors Ltd in this suit would enable the court to fully and completely determine all questions that have been raised by both parties in this suit. I am in agreement with the submissions by the plaintiff that whether or not the defendant was improperly joined in this suit can only be determined at the trial. The plaintiff has maintained that it is the defendant who trespassed on the suit property. The defendant has denied this fact and maintained that it is not the defendant but Dakianga Distributors Ltd who is in possession of the suit property. I would not be able to determine who trespassed on the suit property without oral evidence. It should also be noted that this issue of trespass is connected to the issue of ownership of the suit property and can only be determined when the plaintiff, the defendant and Dakianga Distributors Ltd who is also said to own the suit property are together as parties in this suit. I see no reason therefore why the defendant should be removed from the suit.
9. Due to the foregoing, I would allow the defendant's application dated 6th January 2012 only in part. I hereby order that Dakianga Distributors Limited be joined in this suit as the 2nd defendant. In this regard, the plaintiff shall amend the plaint within 21 days from the date hereof to effect the said joinder. The costs of the application shall be in the cause.

Delivered, signed and dated at KISII this 7th day of August, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ombachi h/b for Oguttu for the plaintiff

Mr. Bosire for the defendant

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE