



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 314 OF 2016

ANAS HASSAN MUSA KHAMISA.....PLAINTIFF

=VERSUS=

AMANDA MARY SEEL T/A ZINJI WORKSHOP..... DEFENDANT

R U L I N G

1. The Plaintiff's Notice of Motion Application dated 21st November 2016 came up for hearing before me on 6th February 2017. While Mr. Wafula for the Plaintiff was ready to proceed with the Application, Mr. Chamwada for the Defendant indicated he was not ready to argue and/or respond to the Application but would instead raise a preliminary objection to the entire suit as filed against his Client.
2. Subsequently, the Defendant made an Oral Application for the striking out of the defendant's name for misjoinder.
3. In his Complaint dated and filed herein on 21st November 2016, the Plaintiff avers that the Defendant has leased two Parcels of land namely L.R No 1513/126 and Group 1/57 which Parcels are separated from the Plaintiff's Parcel Number LR. 1513/127 by an access road.
4. It is further the Plaintiff's contention that the Defendant has erected a fence cutting across Group 1/57 through a part of the Plaintiff's Parcel of land as well as a metallic gate on the public access road and thus hindering the Plaintiff's access to his Parcel of land.
5. In her Written Statement of Defence dated and filed in court in person on 13th December 2016, the Defendant contends at Paragraph 3 thereof that the suit as filed does not disclose any cause of action against her as she is merely a tenant in the Suit Property with no mandate to carry out any development on the suit property "without the consent of the landlord".
6. At Paragraph 4 of the Written Statement of Defence, the Defendant goes ahead to name her said landlord as one Suleiman Rashid Abdalla and invites the Plaintiff to go ahead and sue him.
7. The Preliminary Objection on misjoinder largely relied on these averments made on Paragraphs 3 and 4 of the Defendant's Written Statement of Defence. It was their contention that the Defendant has no proprietary interest whatsoever in the suit land save for a tenancy agreement with the landlord.
8. In response to the objection, the Plaintiff insisted that the Defendant is properly sued. It was their contention that the defendant is in physical possession of the land and that she was the one who had

blocked access to the Plaintiff. In the alternative, Counsel for the Plaintiff urged the Court to consider allowing them to amend their pleadings to substitute and /or enjoin the right party if it is found that the wrong party had been sued herein.

9. It is now settled law that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained (*per Sir Charles Newbold P in Mukisa Biscuit Co-vs-West End Distributors (1969) EA 606 of page 701*).

10. In the proceedings before me, the Plaintiff contends that the Defendant is the leasee of two parcels of land adjacent to his own in which Parcels the Defendant has erected a metallic wall blocking the Plaintiff's access to his own parcel of land. In rebuttal, the Defendant states that she is a mere tenant in the suit property with no mandate to carry out any development on the suit property "without the consent of the landlord."

11. At the hearing of the objection both parties made reference to an alleged tenancy agreement between the Defendant and the alleged landlord. The alleged tenancy agreement was however not filed and the Parties could not even agree that it referred to the Parcel of land which is the subject matter of the suit.

12. For this court to be able to efficiently and effectively determine the disputes between the Parties herein, it would be appropriate to ascertain not only the existence of the alleged tenancy agreement as well as the terms thereof but also to ascertain the parcel of land to which it relates.

13. In light of the foregoing, I am unable at this stage to strike out the Defendant's name from the suit as prayed by the Defendant.

14. The above notwithstanding, *Order 1 Rule 10(a) of the Civil Procedure Rules* provides that:

"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, 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.

15. Having perused the pleadings and listened to the submissions of both the Plaintiff and the Defendant, I am persuaded that the presence of one Suleiman Rashid Abdalla cited herein as the Defendant's landlord is necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the suit.

16. Accordingly, the Plaintiff is hereby ordered to proceed within 14 days to amend the Plaint in such a manner as may be necessary and to serve the amended copies of the summons and the Plaint upon the new defendant as well as the original defendant.

This matter shall thereafter be mentioned on **16th March 2017** for further directions.

Dated, signed and delivered in Malindi on 17TH day FEBRUARY 2017

J. OLOLA

Judge