



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND SUIT NO. 23 OF 2016**

**KAINGU KALUME MWANONGO.....PLAINTIFF**

**VERSUS**

**BONIFACE WANJE KENGA.....DEFENDANT**

**RULING**

1. By a Chamber Summons application dated 24<sup>th</sup> February 2017, the Defendant Bonface Wanje Kenga is seeking the following:-

a. ....

**b. THAT the court be pleased to stay the hearing of the Plaintiff's motion dated 14/12/2016 pending the hearing and determination of these summons.**

**c. THAT this Honourable Court be pleased to strike out the Applicant as a defendant in the suit herein and in his place substitute the name of ANDREW KITSAO KATANA as a defendant in this suit.**

**d. THAT in the alternative and without prejudice to this prayer (b) above, ANDREW KITSAO KATANA be added as a defendant in this suit.**

2. The application is supported by the Applicant's affidavit sworn on 24<sup>th</sup> February 2017. The gist thereof is captured in the grounds to the application summarized as follows:-

*i. That the Plaintiff instituted this suit against the defendant seeking inter alia orders of ejectment and vacant possession of the suit premises.*

*ii. The Plaintiff is well aware that the Defendant is an employee of ANDREW KITSAO KATANA, a purchaser for value of the suit premises.*

*iii. The Plaintiff by this action is seeking to circumvent his obligations arising from the said sale and he is abusing the process of the court by accusing the Defendant of inducing a breach of contract for the sale of the suit premises to a 3<sup>rd</sup> party. This will cause the Applicant tremendous loss and damage especially at this time when the economy in Watamu is shrinking and opportunities for employment for a person of the Applicant's station in life.*

*iv. That the defendant's presence in the land is based on his contract of service as an employee of the said ANDREW KITSAO KATANA. Acceding to the Plaintiff's claim will in turn result in the Defendant breaching a fundamental term of his contract of service which is to ensure that the property is secured and kept free of encroachment by 3<sup>rd</sup> parties.*

*v. That as the principal, the intended defendant is a necessary party in terms of Order 1 Rule 10 and the Court has the power to introduce him as a defendant suo motu.*

*vi. It is in the interest of justice that the application is allowed.*

3. The Plaintiff Kaingu Kalume Mwanongo is opposed to the application. By an Affidavit in Reply sworn on 27<sup>th</sup> February 2017, he depones that the cause of action arose as a result of the defendant's acts of obstruction, visited upon him and his invitees on the suitland and not by any other party. It is his case that he does not have a cause of action against Andrew Kitsao Katana whom the defendant wants to be enjoined in these proceedings. He denies knowledge of the fact that one Kaniki Karisa Kaniki has attempted to bribe the Defendant to vacate the land as stated in the application.

4. The Plaintiff/Respondent further contends that the Defendant/Applicant is not an agent or attorney of/for anybody. He states that the Defendant is a trespasser on his land who is minded to capitalize on such trespass and extort money from the Plaintiff. It is his case that the agreement for sale of land relied upon by the defendant to seek an order to join Andrew Kitsao Katana was and is still is inchoate, after it was rescinded and the full amount then paid to the vendor having been refunded to the said Andrew Kitsao Katana by bank cheque. He avers that since he rescinded the agreement in 2007, the said Andrew Katsao Katana has never gone to court, and his proposed joinder in this suit is intended to give him a lifeline, thereby defeating through the backdoor the defence of limitation that has accrued to him.

5. In a further affidavit in reply sworn on 27/2/2012 by one Kaniki Karisa Kaniki (who is said to have tried to induce the Applicant's departure from the suitland) the deponent denies vehemently that he offered the Applicant a sum of Kshs 1,000,000/= to vacate the suit premises. He accuses the Applicant instead of threatening his son with death and causing a breach of the peace in 2016 when the Plaintiff tried to have the suitland surveyed. He denies that he has sold the land to 3<sup>rd</sup> parties as alleged by the Applicant or at all.

6. I have considered the Chamber Summons and the Affidavits in reply. I have also considered both oral and written submissions as well as the Authorities placed before me by the Learned Advocates for the parties herein.

7. In the Plaint filed herein on 15<sup>th</sup> February 2016, the Plaintiff states that he was at all material times the allottee seized of all those plot Numbers 607 and 618, Watamu, in Kilifi County, measuring approximately 0.18 hectares each. He further states that he has alienated the suitland to a third party, who in furtherance of the agreement for sale has paid the full purchase price and is now minded to take physical possession of the purchased land to undertake survey and demarcate the same for purposes of processing title for the land sold. It is his case that with the full knowledge of the circumstances, the Defendant herein has wrongfully, maliciously and without any right or sufficient cause whatsoever obstructed ingress upon the suit land for the said purpose with the intent that the sale agreement between the plaintiff and the third party should collapse. The Plaintiff therefore prays for damages, ejectment of the defendant as well as a permanent injunction to prevent any such further conduct.

8. In his defence filed on 1<sup>st</sup> April 2016, the Defendant states that he lives on the suitland as an employee of Andrew Kitsao Katana whom he states purchased the land from the Plaintiff in 2002. It is the Defendant's case that the second sale alluded to by the Plaintiff herein is illegal in light of the earlier contract made with his employer who now resides outside the country, in 2002. Accordingly, he denies that he is a trespasser on the suit land as stated by the Plaintiff and avers that he is instead, a caretaker of the land for the said Andrew Kitsao Katana on whose permission he entered into the suitland.

9. Contemporaneous with the Plaintiff, the Plaintiff filed an application under certificate of urgency dated 15<sup>th</sup> February 2016 seeking an interlocutory injunction to restrain the Defendant from interfering with the survey of the plots. Shortly thereafter, an application dated 31<sup>st</sup> March 2016, was filed herein seeking to have the said Andrew Kitsao Katana enjoined herein as an Interested Party. The Application was filed by the said Andrew Kitsao Katana through the Defendant who was then said to be acting for him on the basis of a power of attorney donated to the Defendant on 1<sup>st</sup> January 2011. In the said application for joinder of Andrew Kitsao Katana, the Applicant also sought orders to stay the proceedings herein and in particular the plaintiff's application for injunction against the Defendant dated 15<sup>th</sup> February 2016.

10. After hearing the arguments for and against the application for joinder dated 31<sup>st</sup> March 2016, the Honourable Justice Angote then seized of the matter proceeded to strike it out with costs on 1st July 2016. It was the Learned Judge's finding that although the opening paragraph of the Affidavit in support of the application showed that it is the said Andrew Kitsao Katana who swore the Affidavit, it is actually the Defendant who did so on the basis of an unregistered special power of attorney dated 1<sup>st</sup> January 2011. The Court further found that by virtue of Order 9 Rule 2(a) of the Civil Procedure Rules, one can only make appearance and applications and do such acts on behalf of a party subject to approval of the Court. Given that the defendant had not sought the leave of the Court before appearing on behalf of the intended Interested Party, his action had no basis in law.

11. By filing the present application to have his name struck out as a defendant in this suit and in his place substitute the name of Andrew Kitsao Katana, it would appear that the Defendant is still determined to achieve the very same results he sought out to achieve when he swore the affidavit for the application dated 31<sup>st</sup> March 2016. In regard to substitution and addition of parties to a suit, order 1 Rule 10 of the Civil Procedure Rules under which this application has been brought provides as follows:-

*10(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.*

*(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.*

12. I note that the orders being sought herein are for an injunction against the defendant to restrain him from stopping the plaintiff to gain ingress into the suitland and for his ejection therefrom. The defendant resists the granting of the orders on the basis that he is a caretaker on the land for and on behalf of the said Andrew Kitsao Katana.

13. In striking out the Defendant's application dated 31<sup>st</sup> March 2016 which sought orders to have Andrew Kitsao Katana joined into these proceedings, the Honourable Angote J declared that the purported power of attorney dated 1<sup>st</sup> January 2011 on which the Defendant sought to rely was incompetent. The Defendant has now exhibited a new Power of Attorney executed on 28<sup>th</sup> June 2016. That would suggest that Andrew Kitsao Katana was in the country at least some 3 days before Justice Angote delivered the Ruling on the application dated 31<sup>st</sup> March 2016. There is surprisingly no explanation about this new power of attorney and why Kitsao did not seek leave of Court in person, to be joined either as defendant or as an interested party when he was in the country.

14. I think I am in agreement with the plaintiff that the said Kitsao is abusing this Court's process in using the defendant to secure an order to join him in this matter yet he was in the country around the time when

the ruling disallowing his application was made. He was certainly in a better position to vindicate his rights in and over the suitland, if any and prove to the court how he stands to be affected if orders are granted to remove the Defendant from the suitland as sought by the Plaintiff.

15. It is clear to me that if the Defendant has any claim against Kitsao or any other person, he may apply to issue and serve a third party notice against such party.

16. His present application however has no merit. The same is dismissed with costs.

**Dated, signed and delivered at Malindi this 27<sup>th</sup> day of July, 2017.**

**J.O. OLOLA**

**JUDGE**