



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION

ELC NO. 92 OF 2013

DIXON ODABA APPLICANT/DEFENDANT

VERSUS

EVALINE AUMA OCHUNGA RESPONDENT/PLAINTIFF

RULING

1. The application before me is dated 29/3/2017 and was filed on 30/3/2017. The Applicant – **DIXON ODABA** – is the Defendant in the suit herein filed by the Respondent – **EVALINE AUMA OCHUNGA** – on 1/11/2013. Evaline is the Plaintiff in the suit. In the suit, the Plaintiff is contesting an alleged illegal entry and occupation of her land by the Defendant. The Defendant filed a defence on 21/7/2016 denying the Plaintiff's claim. It is that defence that he wants to amend. He wants to add a new party – ADAMS KHAMIS JARDEN – and also include a counterclaim. That is clear from the filed amended defence.

2. The prayers sought in the application are as follows:

Prayer 1: That the Defendant/Applicant be granted leave to amend his defence.

Prayer 2: That one ADAMS KHAMIS JARDEN be enjoined in this suit as an Interested Party.

Prayer 3: That costs be in the cause.

3. According to the Applicant, he has come across new facts and the Respondent stands to suffer no prejudice. The party intended to be enjoined is said to have demolished the Applicant's house, fence and destroyed other developments and due to the damage suffered, the Applicant wants to file a counterclaim.

4. The Respondent filed a replying affidavit on 24/4/2017. She gave a background to this case. To her, the application is brought in bad faith and is a waste of Court's time. The Applicant was said to have no real interest in defending the suit. But the Respondent added that should the Court be minded to allow the application, she is not opposed to enjoining the intended party. And this is because the intended party is the one who has purchaser's interest in the land.

5. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 22/5/2017. The Respondent's submissions were also filed on the same date. I have considered the rival submissions. I do not want to delve much into what each side said. I need to observe that rigidity of procedure cannot be allowed to stand in the way of substantive justice. The Applicant has explained why he wants to bring a new party on board. The new party is supposed to be enjoined as Interested Party. And the proposed joinder comes about because the new party has allegedly gone to the Applicant's land

and occupied it. He is said to have destroyed a structure, a fence, and some other developments. This allegation is the crucial consideration that the Court should have in mind in deciding the application. The Respondent's submissions do not seem to focus on this consideration.

6. To the Court, the Applicant has shown he has a strong interest in enjoining the new party. It seems clear that without the new party the Applicant's alleged interest in the case cannot be effectively adjudicated. He has shown too that he has a possible right to pursue against the new party.

7. It is also in the interest of the new party to be enjoined in the suit. As things stand now, the suit is between the Applicant and the Respondent. But it is clear from the Respondent herself that the proposed party has a purchaser's interest in what the Applicant is claiming to be his own. The proposed Interested Party then has an obvious right to be allowed to defend his interest. And this can only happen if he is brought on board. All this points to the need to allow the application.

8. Whatever shortcomings the application may have, and whatever shortcomings of procedure, substantive justice should be the overriding objective. The Respondent can be compensated by way of costs and that would be enough.

9. I therefore allow the application herein but I award costs to the Respondent.

Dated, signed and delivered at Busia this 26th day of July, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant/Defendant:

Respondent/Applicant.....

Counsel: