



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 23 OF 2016**

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

**VERSUS**

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

**AND**

**ANDREW KITSAO KATANA (*through his attorney*)**

**BONIFACE WANJE KENGA.....INTERESTED PARTY/APPLICANT**

**RULING**

1. In his Application dated 31<sup>st</sup> March, 2016, the Interested Party is seeking to be enjoined in this suit.
2. In his Affidavit, the Interested Party has deponed that he has appointed one Boniface Wanje Kenga as his Attorney to act on his behalf in any matter relating to the suit property; that he is the legal owner of plot numbers 607 and 618 having purchased it from Kaingu Kalume Mwanongo, the Plaintiff and that he paid to the Plaintiff Kshs.1,052,000 for the suit property leaving a balance of Kshs.148,000.
3. It is the Interested Party's case, through his Attorney, that the Plaintiff refused to accept the monthly payments that had been agreed upon until 12<sup>th</sup> September, 2007 when he sent him a letter purporting to terminate the sale agreement.
4. The Interested Party's Attorney has deponed that the purported rescission of the sale agreement was illegal for lack of notice and that the Defendant is his employee.
5. The Plaintiff has opposed the Application by filing Grounds of Opposition.
6. In his Grounds of Opposition, the Plaintiff averred that the Defendant has not obtained the permission of the court to act as an Attorney for any party; that the Power of Attorney relied upon by the Defendant is incompetent for want of stamping and that it *ius tertii* is properly pleaded by the Defendant, there would be no need to join the Defendant's alleged principal under Order 1 Rule 10.
7. In his submissions, the Applicant's advocate submitted that the failure by the Defendant to seek the leave of the court before filing the suit on behalf of the Applicant is a curable defect; that the power of attorney can be registered before the hearing of the suit and that Article 159 of the Constitution provides that justice should not be unduly hampered by technicalities.
8. The Plaintiff's advocate submitted that there is no law permitting the joinder in a suit commenced by a Plaintiff; that the Defendant has sworn an affidavit pretending to be the Interested Party and

- that the plea by the Defendant that he is the attorney of the said Andrew Kitsao Katana does not atone for his wrong.
9. The Plaintiff's counsel submitted that the Special Power of Attorney annexed on the Applicant's affidavit is incompetent and contra-statute. Counsel relied on the case of **Nazim Din Vs Devonshire Stores (1958) 729** which I have considered.
  10. In his Plea, the Plaintiff has averred that he has alienated the suit property to a third party; that the Defendant has wrongfully entered upon the suit land and that the Defendant is aware that the agreement between the Plaintiff and Andrew Kitsao Katana fell through.
  11. The Plaintiff is seeking for the ejection of the Defendant from the suit property.
  12. The Interested Party, through the Defendant as his Attorney is seeking to be enjoined in the suit.
  13. The Affidavit in support of the Application for joinder was purportedly "sworn" by Andrew Kitsao Katanathrough his Attorney, Boniface Wanje Kenga."
  14. Although the opening paragraph of the Affidavit shows that it is Andrew Kitsao Katana who swore the Supporting Affidavit, it would appear that it is the Defendant who swore the Affidavit on 31<sup>st</sup> March, 2016 on the basis of an unregistered special power of attorney dated 1<sup>st</sup> January, 2011.
  15. Having signed it, it follows that it is the Defendant who swore the Supporting Affidavit on the basis of the Power of Attorney dated 1<sup>st</sup> January, 2011. It is irregular for the Intended Interested Party to state in the opening paragraph that he is the one who was swearing the Affidavit when the same was signed by the Defendant.
  16. Indeed, as correctly submitted by the Plaintiff's counsel, an affidavit must be sworn by persons who may lawfully be examined, or give, or be required to give evidence. It was therefore incumbent that the Interested Party swears the affidavit.
  17. The Defendant has not informed the court why the Special Power of Attorney dated 1<sup>st</sup> January, 2011 has never been stamped and registered with the Registrar of Documents or against the title.
  18. It is trite that one can only rely on a Power of Attorney once the same has complied with the provisions of Stamp Duty Act. Having failed to stamp the Special Power of Attorney and register it, the Defendant cannot rely on it to support the assertion that he is defending the suit on behalf of the Interested Party.
  19. Order 9 Rule 2 (a) of the Civil Procedure Rules provides that one can make appearance and applications and do such acts on behalf of a party subject to approval by the court. The Defendant in this matter did not seek the leave of the court to appear on behalf of the Interested Party.
  20. Consequently, the Application dated 31<sup>st</sup> March, 2016 is struck out with costs.

Dated, signed and delivered in Malindi this 1<sup>st</sup> day of **July**, 2016.

**O. A. Angote**

**Judge**