



Nyangacha v Nyagwoka; Nyagitari & another (Interested Parties) (Environment & Land Case 354 of 2016) [2023] KEELC 16654 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16654 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 354 OF 2016**

**M SILA, J
MARCH 28, 2023**

BETWEEN

SABINA KEMUNTO NYANGACHA PLAINTIFF

AND

RAYMOND NYAGWOKA DEFENDANT

AND

WYCLIFFE NYAANGA NYAGITARI INTERESTED PARTY

INNOCENT NYAGITARI BARASA INTERESTED PARTY

RULING

(Application for amendment of plaint; application dismissed as it introduces a new cause of action not related to the original action)

1. The application before me is that dated January 30, 2023 filed by the plaintiff. She wishes to have leave to amend the plaint and she has annexed a draft amended plaint. The application is not opposed.
2. By way of background, the plaintiff commenced this suit through a plaint filed on November 1, 2016, where she sued one Raymond Nyagwoka as the sole defendant. Her case was that she was the registered proprietor of the land parcel Kitaru Settlement Scheme/13 measuring 7.2 Ha. She pleaded that in the month of October 2016, the defendant entered the land and started constructing a house therein. In the plaint, she asked for orders of a declaration that she is the owner of the said land and eviction against the defendant. The defendant appointed counsel and filed defence wherein he refuted that the plaintiff was the registered owner of the said land parcel Kitaru Settlement Scheme/13. He also denied invading the land in October 2016 as he said that he has been in the United States of America (USA).
3. He pleaded that his mother is named Sabina Kemunto and that the plaintiff passed herself off as his mother, due to their similarity of names, and proceeded to fraudulently purport to effect a change



of name of proprietor from Sabina Kemunto to Sabina Kemunto Nyangacha. The appointed counsel of the defendant subsequently applied to withdraw from the suit and the defendant was left to act in person. He did not attend the hearing of the suit on November 26, 2020, and the matter proceeded *ex parte* before Onyango J. The judge delivered judgment on March 24, 2022 in favour of the plaintiff as her case was not opposed.

4. What followed was an application dated June 13, 2022 filed by two persons, namely, Innocent Nyagitari Barasa, and Wycliffe Nyaanga Nyagitari to be joined as interested parties and for the judgment to be reviewed and set aside. They presented that on January 8, 2029, the Land Registrar had already cancelled the title of the plaintiff and registered it in name of the 1st interested party, Innocent Nyagitari Barasa. He then subdivided the land into the land parcels Kitaru Settlement Scheme/134, 135, 136, 137, and 138. He thus contended that the land parcel Kitaru Settlement Scheme/13 no longer exists. I delivered ruling on that application on 26 January 2023. I observed that the land parcel No 13 ceased to exist on 26 August 2021 when it was subdivided. I noted that when the court delivered judgment on March 24, 2022, the land parcel No 13 was not there to be declared as being owned by the plaintiff. I therefore reviewed the judgment and set it aside. I also allowed the joinder of the applicants as interested parties.
5. This application was then filed. I have already mentioned that it is an application seeking leave to amend the plaint. I have gone through the draft amended plaint. The plaintiff proposes to add the Land Registrar, Nyamira County, and the Hon. Attorney General as the 2nd and 3rd defendants respectively, while Raymond Nyagwoka remains as 1st defendant. Innocent Nyagitari Barasa and Wycliffe Nyaanga Nyagitari, are proposed to be left as interested parties. I see in the body of the plaint, that the plaintiff complains that on August 26, 2021, while this suit was pending, the proposed 2nd defendant, unlawfully caused the land parcel Kitaru Settlement Scheme/13 to be subdivided into the land parcels Kitaru Settlement Scheme/134, 135, 136, 137 and 138 with intention to defeat the outcome of this case. In her prayers, she has added a prayer for a declaration that the said subdivision was illegal, null and void, and she wants the land to revert back to the parcel No 13 as it was originally.
6. I have considered the application. Though not opposed, I am unable to allow it as what is being introduced is a completely new cause of action, not related to the cause of action in the original suit, and not capable of being tried alongside it.
7. I am aware that courts are generally liberal in allowing applications to amend. I am also alive to the provisions of Order 8 Rule 3 (5) of the [*Civil Procedure Rules, 2010*](#), which provides as follows :-
 - (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.
8. From the above, a new cause of action can be introduced into an amendment, but such cause of action must arise out of the same facts as the original cause of action. My view, of the new cause of action being introduced, is that it arises from very different facts and circumstances, completely unrelated to the facts relating to the original cause of action. Thus, no amendment can be allowed and the avenue is to file a separate suit. I will elaborate.
9. What the plaintiff is now saying is that her land parcel Kitaru Settlement Scheme/13 was unlawfully subdivided. This is a new cause of action since the original pleadings did not mention subdivision of this land parcel. The original cause of action is trespass, said to have occurred in the year 2016. This



new cause of action sought to be introduced is subdivision of the land, which occurred in the year 2021. The original cause of action was against one defendant. This new cause of action can only be against the beneficiaries of the subdivisions. It is not now a case of trespass but a case related to title to land. The issue whether the original defendant was trespasser in the year 2016 and whether the new subdivisions are legal are too remote to be combined. This cause of action in the proposed amended plaint cannot in fact be against the original defendant in the original plaint.

10. As I have pointed out, it can only be against the proprietors of the land parcels Kitaru Settlement Scheme/134, 135, 136, 137 and 138, who have never been defendants in this suit and are not even proposed to be defendants in the amended plaint. The original defendant has nothing to do with the subdivision of the land and cannot have anything to do with what is pleaded in the amended plaint regarding division of the land and creation of new titles in names of other people. I am not even sure whether he is beneficiary of any of the subdivision. Assuming that he is, the cause of action cannot now be that he is trespasser in the parcel No. 13 but is a beneficiary of an illegal subdivision and his title should be cancelled.
11. What we have is a new cause of action arising from subdivision of the land parcel Kitaru Settlement Scheme/13 that can only be commenced and determined through the filing of a fresh suit, not an amendment to the existing suit. I even doubt, whether, with the subdivision of the land parcel Kitaru Settlement Scheme/13, the original cause of action for trespass is still alive. It looks to me that whatever the plaintiff was complaining of has already been overtaken by events, in that there are new titles owned by other people. I think, strongly, that the plaintiff needs to consider withdrawing the present suit and file a new suit if her intention is to challenge the subdivision of the land parcel Kitaru Settlement Scheme/13.
12. For the above reasons, I find no merit in this application and it is hereby dismissed.
13. I make no orders as to costs since nothing was filed to oppose it.
14. Orders accordingly.

DATED AND DELIVERED THIS 28 DAY OF MARCH 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

