



Kamau & another (Suing as the Legal Representatives of the Estate of Johnson Kamau Macharia - Deceased) v Bomett & 7 others; Lagat (Interested Party) (Environment & Land Case 201 of 2013 & E24 of 2021 (Consolidated)) [2023] KEELC 18709 (KLR) (17 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18709 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 201 OF 2013 & E24 OF 2021 (CONSOLIDATED)
FM NJOROGE, J
JULY 17, 2023

BETWEEN

PETER NJOROGE KAMAU 1ST PLAINTIFF
ANNE WANJIKU KAMAU 2ND PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOHNSON
KAMAU MACHARIA - DECEASED

AND

ALICE BOMETT 1ST DEFENDANT
MAGDALENE CHELIMO 2ND DEFENDANT
RUTH CHEPTARUS (SUED AS THE TRUSTEES OF KANU MAENDELEO YA
WANAWAKE ORGANIZATION NAKURU DISTRICT) 3RD DEFENDANT
LAND REGISTRAR NAKURU 4TH DEFENDANT
COMMISSIONER OF LANDS 5TH DEFENDANT
ATTORNEY GENERAL 6TH DEFENDANT

AND

STEPHEN KIPLIMO LAGAT INTERESTED PARTY

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE E24 OF 2021

BETWEEN

PETER NJOROGE KAMAU 1ST PLAINTIFF



**ANNE WANJIKU KAMAU 2ND PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOHNSON
KAMAU MACHARIA -DECEASED**

AND

**BOARD OF TRUSTEES OF MAENDELEO YA WANAWAKE
ORGANIZATION 1ST DEFENDANT
MAENDELEO YA WANAWAKE CORPORATE 2ND DEFENDANT
LAND REGISTRAR NAKURU 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT**

RULING

1. This is a ruling on an application dated 14/3/2023 filed by the plaintiffs under Order 8 rule 3, and 5 of the Civil Procedure Rules. It seeks leave to amend the plaint. The grounds relied on appear on its face as well as in the sworn supporting affidavit of Peter Njoroge Kamau, the 1st plaintiff. They are that the documentation in the custody of lands offices show that the 3rd defendant is the 2nd defendant and it has been claimed that no documentation exists with regard to the plaintiff; that the plaintiffs are wary of fraud illegality and falsification of documents and forgery as well as corruption and destruction of records yet the deceased took possession of the suit land in 1966; that the plaintiffs in the circumstances wish to amend the plaint to seek an alternative relief of entitlement to the suit land by way of adverse possession.
2. The 1st and 2nd defendants filed their grounds of opposition to the motion on 12/4/2023. The main grounds are that the application seeks to introduce a new cause of action that is adverse possession; that the proposed amendment will radically alter the case pleaded by the parties when the trial began and that there is no sufficient reason or any sufficient cause upon which this court can exercise its discretion in favour of the plaintiffs.
3. There was no response to the motion from the 3rd and 4th defendants.
4. The plaintiffs on 24/5/2023 and the 1st and 2nd defendant's defendant on 18/4/2023 respectively complied with the order on the filing of submissions for the disposal of the motion and which submissions I have considered in making this ruling.
5. The background to the making of the present application is that on 22/2/2017 the Hon Justice Ohungo struck out the plaintiff's suit in ELC 201 Of 2013 (formerly HCCC NO 168 of 2012) for noncompliance with court orders. An application seeking to reinstate the struck out suit was declined on 31/3/2017. That left the 1st and 2nd defendants with a counterclaim dated 146/2012 to prosecute in that suit. However, on 4/3/2021 the present plaintiffs filed ELC 24 Of 2021 seeking orders that the deceased is the rightful owner and/or allottee of that land parcel known as Nakuru Municipality Block 21 /469 and that the registration of the 2nd defendant as the proprietor of the suit land is null and void, an order to revoke the certificate of leased issued to the 2nd defendant and direction the 3rd defendant to rectify the land register to read the name of the deceased as the owner of the suit land, and a permanent injunction against the defendants, costs and interest. The foregoing notwithstanding the plaintiffs in ELC 201 of 2013 were granted leave to amend the plaint to substitute the deceased original plaintiff on



8/12/2020 and the hearing of the counterclaim was scheduled for 11/3/2021. On 11/3/2021 however Mr Gatonye informed the court that he had filed a motions seeking the consolidation of ELC 201 of 2013 with ELC 24 of 2021 which motion was finally allowed on 27/5/2021 with the rider that ELC No 201 of 2013 be the lead file. On 19/10/2021 the interested party was joined to the suit upon the grant of an application dated 12/7/2021.

6. As stated earlier, ELC 24 Of 2021 sought orders that the deceased is the rightful owner and/or allottee of that land parcel known as Nakuru Municipality Block 21 /469 and that the registration of the 2nd defendant as the proprietor of the suit land is null and void, an order to revoke the certificate of leased issued to the 2nd defendant and direction the 3rd defendant to rectify the land register to read the name of the deceased as the owner of the suit land, and a permanent injunction against the defendants, costs and interest. The claim of the plaintiffs in that suit is that the deceased made an application in 1966 to the then commissioner of lands and was granted a temporary occupation licence over what is now the suit land and he and his family took up possession and in 1992 he made an application to the commissioner of lands for allocation of the suit land to him given his prolonged occupation thereof and the commissioner initiated the relevant processes to that end including physical planning; in 1999 he was issued with a letter of allotment and he complied with all the conditions set out therein. However, the deceased later discovered that the suit land had been registered in the name of the 2nd defendant in ELC 24 of 2021 and a certificate of lease issued on 20/5/2005. The plaintiffs however note that the 1st defendant had been allocated other land that is distinct from the suit land. it is stated that the registration of the 2nd defendant as proprietor of the suit land is illegal, irregular fraudulent band null and void hence the prayers sought.
7. The present application seeks orders of amendment of the plaint to seek an alternative order of declaration that the deceased acquired the suit land by way of adverse possession and that he be registered as the sole proprietor thereof.
8. I have anxiously considered the application and I must reject it on the ground that a claim of adverse possession can not lie side by side in the same suit with an application seeking that the acquisition of title to the land by the defendant against whom the adverse possession is claimed was irregular, illegal and null and void since adverse possession presupposes that title held by the registered land owner is valid. The plaintiff has to elect what cause of action to pursue between the two. On that ground alone I find that the motion dated 14/3/2023 lacks merit and it is hereby dismissed with costs. The parties shall appear before the Deputy Registrar on 27/7/2023 for the fixing of a hearing date.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 17TH DAY OF JULY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

