



**James v Njeru (Environment & Land Case 33 of 2014)  
[2023] KEELC 20186 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20186 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 33 OF 2014  
A KANIARU, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**JOHN MBAKA JAMES ..... PLAINTIFF**

**AND**

**JAMES MUCHIRI NJERU ..... DEFENDANT**

**RULING**

1. The application before me for determination is a Notice of Motion application dated 12/10/2021 and filed on 13/10/2021. It is expressed to be brought under order 40 rules 1,2,3 and 4 of Civil Procedures Rules and Sections 68 and 69 of the *Land Registration Act*. The applicant – John Mbaka James – is the plaintiff in the suit while the respondent – James Muchiri Njeru – is the defendant. It is essentially an application for amendment of Originating Summons to join a 2<sup>nd</sup> Defendant, to get an order for Inhibition, and also a restraining order. The prayers sought are specifically as follows:
  - a. That this court be pleased to grant leave to the plaintiff to amend his Originating Summons dated 16<sup>th</sup> December, 2009 to enjoin Lydia Mugechi Ndegwa as a 2<sup>nd</sup> Defendant in the suit.
  - b. That the court do issue orders of inhibition, inhibiting the registration of any further dealings in Land parcel no. Kyeni/Mufu/4761 pending hearing and determination of this matter.
  - c. That the defendants by themselves, their agents, servants or anybody acting on their instructions or at their behest be restrained from selling, transferring, leasing, evicting the plaintiff from land parcel no. Kyeni/Mufu/4761 or in any other manner interfering with the Plaintiff's use and occupation of the said land pending the hearing and determination of this suit.



- d. That costs of this application be provided for.
2. The motion is premised on the grounds, inter alia, that the plaintiff has been in exclusive occupation and open use of the suit land for over 40 years; that he has extensively developed the said land; that the 1<sup>st</sup> defendant transferred the said land to the intended 2<sup>nd</sup> defendant during the pendency of the plaintiff's case for adverse possession with the intention of defeating the plaintiff's claim; and that the intended 2<sup>nd</sup> defendant is therefore a critical party to the proceedings.
  3. The application came with a supporting affidavit in which it is deposed, inter alia, that the plaintiff filed a suit on 16/12/2009 claiming for adverse possession of land parcel no. Kyeni/Mufu/4761 previously registered under the defendant's name; that the plaintiff later learnt through the defendant's filed list of documents filed on 10/12/2014 that the defendant had sold the said parcel of land to the intended 2<sup>nd</sup> Defendant who has since acquired a Certificate of Title over the suit land; that an order for inhibition is necessary to prevent a further transfer and/or dealings in the said land pending the hearing and determination of this suit; and that no prejudice will be occasioned to any party by the joinder of the intended 2<sup>nd</sup> defendant.
  4. The application was responded to vide a replying affidavit dated 10/2/2022 and filed on 24/2/2022. The replying affidavit was sworn by one James Muchiri Njeru, who introduced himself as the original registered land owner of the suit land. Muchiri deposed, inter alia, that he was granted the suit land vide a succession cause no. 39 of 1990 which was confirmed and he obtained a title deed over the said parcel of land. He said that he sold the land in 2012 to the intended 2<sup>nd</sup> defendant with vacant possession, which land the intended 2<sup>nd</sup> defendant has since been utilizing. Further, he said that the plaintiff is guilty of delay in filing this application and therefore the prayer for inhibition or restraint in any dealings with the suit land is an afterthought and is intended to delay the rightful owner from fully enjoying the use of her land.
  5. The application was canvassed through written submissions. The applicant's submissions were filed on 9/5/2023. According to the applicant, it is necessary and in the interest of justice for the plaintiff to amend his Originating Summons to join the 2<sup>nd</sup> Defendant so that the real questions in controversy between the parties may be heard and determined and to avoid multiplicity of suits. The court is being urged to appreciate that the law on amendments allows amendments to be freely granted provided that no prejudice is occasioned to the other side. It was further pointed out that there is no prejudice if the other side can be compensated with costs. The appellants further submitted that the court, under section 68 of the *Land Registration Act* 2012, had powers to issue inhibition orders so as to maintain status quo to avoid further convolution of the dispute. The applicant seeks to rely on the case of *Central Kenya Ltd v Trust Bank Ltd* as quoted in the case of *John Nyagaka Osoro vs Reynold Karisa Charo & 5 others* [2021] Eklr, *Dorcas Muthoni & 20 others v Michael Ireri Ngari* [2006] eklr, *Giella v Cassman Brown* [1973] EA 358, and *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKlr as quoted in the *Florence Khayanga Musanga vs Transnational Bank Ltd & Anor* [2020] Eklr.
  6. The respondent's submissions were filed on 21/9/2022 and again on 24/11/2022. It is not clear why the submissions were filed twice. The respondent submitted that the plaintiff has been indolent and has caused inordinate delay in bringing his application for amendment, hence his application ought not to be allowed. That further, the applicant's case has no chance of success as he has never proved his interest in the suit land and is therefore a stranger and cannot restrain the disputed land anyhow. The Respondent cited the case of *Giella v Cassman Brown* (supra), relevant provisions of *Civil Procedure Act* - specifically sections 1A, 1B and 3 of the Act and section 26(1) of the *Land Registration Act* no. 3 of 2012, to support his submission.



7. Ultimately, the application was said to lack merits and the court was urged- to dismiss it and award costs to the respondent.
8. I have considered the application, the response made to it, rival submissions, and the entire court record in general. There are three issues for determination;
  - a. Whether the court should allow the application for amendment of the originating summons.
  - b. Whether the plaintiff is entitled to an order of inhibition.
  - c. Whether the court should grant a restraining order.
9. Section 100 of the [Civil Procedure Act](#) sets out the general power to make amendments. Parties to a suit have a right to amend their pleadings at any stage of the proceedings. That right is however dependent upon the discretion of the court. As a general requirement this discretion should be exercised judiciously and in line with criteria set out under order 8 rule 5 of the [Civil Procedure Rules](#).

Order 8 rule 5 of the Civil Procedure Rules provides as follows:-

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings the court may either of its own motion or on the application of any party order any documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

In *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] Eklr, the Court held as follows concerning amendment of pleadings;

“The law on amendment of pleading in a suit was summarized by this Court, quoting from *Bullen and Leake & Jacob’s Precedents of Pleading – 12th Edition*, in the case of *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal No. 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”

The court therefore has the power to amend pleadings and that power can be exercised at any stage of the proceedings before judgment.

10. Similarly, in [Halsbury’s Laws of England](#), 4<sup>th</sup> Ed. (re-issue), Vol. 36(1) at paragraph 76, it is stated as follows about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the



proceedings or of its own motion. .... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”(Emphasis mine).

11. The applicant sought for leave to amend his Originating Summons so as to join the intended a 2<sup>nd</sup> defendant who is said to have acquired the land in dispute during the pendency of this suit. The respondent has objected to the amendment solely on the ground that there was inordinate delay in bringing the application. It is clear from the above authorities that a party may make an application for amendment at any stage during proceedings and if late, the same ought to be done in good faith. The plaintiff has explained that he only discovered that the suit land had been disposed of to the intended 2<sup>nd</sup> defendant only after the defendant had filed his list of documents and witness statements. I do not find that the plaintiff was acting in bad faith in bringing this application. In addition the respondent has not shown any prejudice that the amendment will cause to him should the application be allowed.
12. The Applicant submitted that section 68(1) of the [Land Registration Act](#) gives the court powers to issue inhibition orders so as to preserve the land. He submitted further that during the pendency of the suit the suit land was transferred from the defendant to another party, hence the necessity to have the orders of inhibition issued to prevent any further alienation of the suit land. He urges the court to take the course that carries the lower risk of injustice.
13. The respondent on the other hand seeks to rely on the case of *Giella v Cassman Brown & Co. Ltd* (Supra) where it was held that a party seeking an injunctive order has to demonstrate a prima facie case with the probability of success and that the Applicant will suffer irreparable loss should the orders sought not be granted. He submits further that the applicant has failed to prove to the satisfaction of the court any prejudice that might be occasioned to them if the orders sought are not granted and therefore he does not deserve the orders sought in the application.
14. In this application the orders of inhibition are sought against Land Parcel No. Kyeni/Mufu/4761 which the plaintiff is claiming as an adverse possessor.

While considering an application for orders of inhibition Makau J, In the case of [Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria](#) [2012] eKLR cited in Nrb ELC No. 383 of 2012 [Rosemary Wanjiku Njigi v Nancy Munjiru Ngigi](#) outlined the conditions that an applicant must satisfy in an application for orders of inhibition. He stated as follows:

“In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions:-

- a) That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservative orders of inhibition are issued.
  - b) That the refusal to grant orders of inhibition would render the applicant's suit nugatory.
  - c) That the applicant has arguable case.”
15. In this particular case, the suit land was already transferred to the 2<sup>nd</sup> intended defendant in the year 2012, facts which are not denied. The same was done while the applicant's case for adverse possession



was still pending in court, having been filed on 16<sup>th</sup> December 2009. I find the applicants claim to be true that nothing prevents the 2<sup>nd</sup> Defendant from further transferring the suit land to another party. If the court does not inhibit, the possibility of pre-judicial dealings is very real.

16. Further, the Applicant prays for an order restraining the Respondent's from further dealings in the land or in any manner interfering with the applicants use and occupation of it pending determination of this suit. From my perusal of this file, it appears that a similar application had been made on 24<sup>th</sup> July, 2012 under Certificate of urgency. That application to this date has not been prosecuted. There has been no explanation given by the applicant why the same has not been prosecuted, neither has the application been withdrawn. It is also not clear whether the applicant has abandoned the said application. Nevertheless, it is noteworthy that a period of 9 years has lapsed since the Applicant made the said application. There has been no explanation given for the 9 year delay nor has there been evidence given of any loss that the applicant has incurred over the said period that can't be compensated by way of damages. It has been said time again that delay defeats equity and that equity aids the vigilant not the indolent. It is on this basis that I find that there is no justification for the restraining orders to be granted.
17. I am persuaded that the merits of the application before me have been well demonstrated in part. I allow the applicant to amend the originating summons to join the 2<sup>nd</sup> defendant (prayer I). Orders of inhibition are hereby issued to prevent any further dealings in the land (prayer 2). However the application for a restraining order (prayer 3) is hereby dismissed. Costs in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 21ST DAY OF SEPTEMBER, 2023.**

**A.K. KANIARU**

**JUDGE**

**21.09.2023**

