



Theuri (Suing as the Legal Representative of the Estate of the Late Veronica Wangeci Theuri) v Gikonyo (Sued as the Administrator of the Estate of John N. Gikonyo Deceased) (Environment & Land Case 261 of 2015) [2023] KEELC 21029 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21029 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 261 OF 2015
FM NJOROGE, J
OCTOBER 26, 2023**

BETWEEN

JOHN THEURI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE VERONICA WANGECI THEURI) PLAINTIFF

AND

ANASTASIA NYANJAU GIKONYO (SUED AS THE ADMINISTRATOR OF THE ESTATE OF JOHN N. GIKONYO DECEASED) DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's notice of motion application dated 12/06/2023 which is expressed to be brought under article 159 2(d) of the *Constitution of Kenya*, sections 1A, 3A of the *Civil Procedure Act*, order 8 rule 3(1) and (2) of the *Civil Procedure Rules* which sought the following order:
 1. Spent
 2. That this honorable court be pleased to grant leave to the plaintiff to amend his further amended originating summons to correct the description of the property from Nakuru/Rare Block 1/138 to Rare/Teret Block 1/138.
 3. That costs of this application be in the cause.
2. The application is supported by the affidavit of the plaintiff John Theuri. The grounds on the face of the application and the supporting affidavit are that on 26/10/2022, the plaintiff's advocates filed a further amended originating summons; that the said further amended originating summons misspelt the suit property as Nakuru/Rare Block 1/138 instead of Rare/Teret Block 1/138; that all the documents that he relies on indicate that the suit property is known as Rare/Teret Block 1/138; that it



was a typing error and so he seeks that he be allowed to amend his summons; that the said amendment will assist the court in adjudicating the dispute between the parties and that the proposed amendments would not prejudice any party.

3. The defendant filed a replying affidavit on 11/07/2023 sworn on 06/07/2023. She deposed that she is advised by her advocates on record that in a claim of adverse possession, a claimant has to specifically identify the land as was held in the Court of Appeal decision in *John Kiplangat Barbaret & 8 Others v Isaiah Kiplangat Arap Cheluget* [2017] eKLR; that the plaintiff's application is meant to circumvent the threshold he must meet; that the plaintiff has established a pattern where whenever her counsel raises an issue that contradicts the plaintiff's pleadings, the plaintiff rushes to amend his pleadings to circumvent the same; that the plaintiff's intended amendment will introduce a new cause of action from land parcel No. Nakuru/Rare Block 1/138 to Nakuru/Rare/ Teret Block 1/138; that the amendment sought is a substantive one that is meant to defeat the cause of justice as her advocates have already cross -examined the plaintiff's key witness; that the plaintiff intends to fill the gaps and/or remedy the loopholes that arose in cross-examination in the proposed amendment and that she will be prejudiced as she had already formulated her defence based on the applicant's suit and allowing the said amendment would alter the character of the said case.

Submissions

4. I have perused through the court file at the time of preparing the present ruling and found no submissions filed on behalf of the applicant. The defendant filed her submissions on 23/08/2023. The defendant submitted on whether the plaintiff should be granted leave to amend the further amended originating summons. The defendant reiterated the contents of her replying affidavit and submits that the plaintiff's claim of adverse possession is over land parcel No. Nakuru/Rare Block 1/138 and yet she owns land parcel No. Nakuru/Rare/Teret Block 1/138. The defendant submits that in a claim for adverse possession, the plaintiff has to clearly identify the parcel of land he is claiming. The defendant relies on the cases of *John Kiplangat Barbaret & 8 others v Isaiah Kiplangat Arap Cheluger* [2017], *Julius Njiraini Nyamu v Henry Mburu Marungo & 3 others* [2021], *Joshua Kimani v Kiso Enterprises Ltd & 3 others* [2020] eKLR among other cases in support of her arguments.
5. The defendant concluded her submissions by stating that the application is an afterthought and that the amendment sought is a substantive and significant one that is meant to defeat the cause of justice since her counsel has already examined the plaintiff's key witness. The defendant therefore seeks that the plaintiff's application be dismissed with costs.

Analysis and determination

6. After considering the application and the response thereto, the only issue that arises for determination is whether the plaintiff should be granted leave to amend his further amended originating summons.
7. Order 8 Rule 3(1) of the *Civil Procedure Rules* provides as follows:
 - “(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”
8. Order 8 rule 5(1) of the *Civil Procedure Rules* also provides as follows:
 - “(1) 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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

9. The Court of Appeal in the case of *Central Kenya Limited v Trust Bank Limited* (2000)2 EA 365 held as follows:

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

10. The plaintiff is seeking to amend his further amended originating summons to correct the description of the suit property from Nakuru/Rare Block 1/138 to Rare/ Teret Block 1/138. The defendant opposes the said amendment on the grounds that the plaintiff is seeking to close the loopholes that were raised during cross-examination and that she will be prejudiced since she formulated her defence based on the plaintiff’s suit.
11. The plaintiff has annexed to his supporting affidavit a draft further amended originating summons that indicates that the proposed amendments are limited to rectifying Nakuru/Rare Block 1/138 to Rare/Teret Block 1/138. The documents that were annexed to the plaintiff’s further amended originating summons indicate that the suit property is Rare/Teret Block 1/138. It is my view that the said amendment will not prejudice the defendant in any way and since the court has the unfettered jurisdiction to allow an amendment for the purposes of determining the real issues in controversy between the parties, the plaintiff’s application is hereby allowed as prayed. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26TH DAY OF OCTOBER 2023.

MWANGI NJOROGE

JUDGE

