



Tsuma & another v Said (Sued on his Own Behalf and on Behalf of the Estate of Zeyana Binti Azzan) & another (Environmental and Land Originating Summons 23 of 2021) [2023] KEELC 22193 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22193 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 23 OF 2021
FM NJOROGE, J
DECEMBER 14, 2023**

BETWEEN

EMMANUEL CHAI KALAMA 1ST PLAINTIFF

PAUL CHAI Tsuma 2ND PLAINTIFF

AND

**THE BOARD OF DIRECTORS TAWFIQ MUSLIM ACADEMY 1ST
DEFENDANT**

**SEIF MOHAMED SAID (SUED ON HIS OWN BEHALF AND ON BEHALF OF
THE ESTATE OF ZEYANA BINTI AZZAN) 2ND DEFENDANT**

RULING

1. The application before this court is that dated November 22, 2022 filed by the applicants. The application is brought pursuant to the provisions of order 19 of the [Civil Procedure Rules, 2010](#) (the Rules). The application substantially seeks an order that the replying affidavit of Seif Mohamed Said dated 4 November 2022 and filed on 15 November 2022 be struck out and/or in the alternative be expunged from the record. The application is supported by the grounds adduced thereto and the affidavit of Paul Chai Tsuma. In summary, the Applicants averred that the Replying Affidavit as filed offends the provisions of order 19 rule 3 of the [Rules](#) for containing a counter-claim and a new party joined without leave of the court.
2. In opposing the application, the respondents filed a replying affidavit sworn by Seif Mohamed Said on 10 January 2023.
3. To put matters into context, the applicants instituted this suit on December 3, 2021 by way of an originating summons seeking orders *inter alia* that they be declared the legal beneficial owners of Plot No LR 159A Malindi (the suit property) by virtue of adverse possession. In response thereto,



the respondents filed a replying affidavit dated 4 November 2022 (the impugned affidavit). A perusal of the impugned affidavit reveals that the 1st Respondent narrated how the applicants came to be in possession of the suit property. It is also clear that there is included a counter-claim therein in which the 1st respondent seeks an eviction order against the applicants.

4. The application was canvassed by way of written submissions.

Applicants' submissions

5. Counsel submitted that the objection has nothing to do with the form of the impugned affidavit but the substance. That as framed, the impugned affidavit offends the best evidence rule set out in order 19 Rule 3 of the Rules which provides that affidavits shall be confined to such facts as the deponent is able to prove. To counsel the same is therefore argumentative and ought to be struck out under order 19 rule 6 of the Rules. To buttress this issue, counsel relied on the case of *Cammille v Meralli* [1966] EA 411, *Mayers & another v Akira Ranch Ltd* [1974] EA 169 as cited in *Mbugua & Mbugua Advocates v Kenindia Assurance Co Ltd* [2014] eKLR.
6. Counsel further submitted that the impugned affidavit tends to join a third party to an existing suit without leave of the court contrary to order 1 rule 10. For the above reason, counsel argued that the impugned affidavit is incompetent unable to be cured by the provisions of article 159 (2)(d) of the Constitution of Kenya and sections 1A and 1B of the Civil Procedure Act. Counsel relied on the cases of *Maimai Hamisi v Persi Pesi Tobiko & 2 others* CA 154/2014; *Mumo Matemu v Trusted Society of Human Rights Alliance and others* CA 290/2013; *Shabbir Ali Jusab v Annar Osman Gamrai and another* [2013] eKLR as cited in *Raila Amollo Odinga v IEBC and 4 others* Supreme Court Petition No. 5 of 2013.

Respondents' Submissions

7. Counsel identified three issues for determination. Firstly, whether the impugned affidavit offends the provisions of order 19 rule 3. Regarding this issue, counsel submitted that the Applicants' allegations that the impugned affidavit contains no factual averments but only arguments and opinions was misleading and that the correct position is that the said affidavit raises concise facts backed by evidence.
8. Secondly, counsel discussed whether the respondent is allowed to file a counter-claim as he did, in a situation where the suit is commenced by way of originating summons. According to him, an originating summons is a pleading as defined under section 2 of the Civil Procedure Act and as such the counter-claim is properly included in the replying affidavit. Counsel added that in any case directions were yet to be issued as to the hearing of the suit, as such the court could order that the Originating Summons be converted into a plaint as envisaged under order 37 rule 19. To buttress this point Counsel relied on the case of *Emily Chepkor Chepkwony v Paul Arap Chandock* [2021] eKLR.
9. The respondent's last issue was whether leave of the court is required when adding a new defendant to a suit. Counsel argued that by virtue of order 7 rule 8 of the Rules, there is no requirement for a defendant to seek leave of the court prior to introducing another defendant by way of counterclaim.
10. I have carefully considered the arguments made by the parties herein. The issue for determination is whether the replying affidavit dated 4 November 2022 should be struck out for the reasons that it contains a counter-claim and is argumentative.
11. The provisions of order 19 rule 3 of the Rules are as follows;
 1. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:



Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

2. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.
12. Order 19 rule 6 further provides that the court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.
13. I have perused the impugned replying affidavit sworn by the 1st Respondent. He states therein that the matters he has deposed to are within his knowledge and best belief and sources to which he disclosed. It is also evident that the said affidavit contains a whole counter-claim and an additional party, which to me is quite unusual as the whole purpose of an affidavit as provided in Order 19 rule 1 of the *Rules* is to provide evidence. Rule 3 sub-rule 1 above is also clear that an affidavit shall be confined to facts as the deponent is able of his own knowledge to prove. The only limitation that applies as stated by order 19 rule 6 of the Rules is that the matters in an affidavit should not be scandalous, oppressive or irrelevant.
14. For the above reasons and by dint of order 19 rule 6 above, this court is of the view that the counter-claim as framed is misplaced. The 1st Respondent ought to have simply stated the contents therein without having to include the counter-claim. In any event, the contents of the counter-claim mirror those he outlined in the first phase of the impugned replying affidavit.
15. The upshot is that the purported counter-claim, contained in paragraphs 29-48 of the replying affidavit, is hereby struck out and expunged from the court record. Having said so, there is therefore no need to determine whether the new party, 3rd defendant in the said counterclaim, was rightfully joined.
16. The application dated 22/11/2022 therefore partially succeeds and the costs thereof are hereby awarded to the applicant. The matter shall be mentioned on 28/2/24.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 14TH DAY OF DECEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

