



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 35 OF 2019

MWANAFELA ALI SHARIFF.....PLAINTIFF

VERSUS

- 1. DICKSON KITSAO KADENGE**
- 2. SHIDA KAINGU**
- 3. HAMISI TUYE KAINGU**
- 4. CHENGO KADENGE KAINGU**
- 5. JOHNSON KAINGU CHARO**
- 6. RUEBEN KADHENGI KAINGU**
- 7. WILSON CHARO MTOI**
- 8. MOSES KAINGU CHEA**
- 9. RAJAB TUYE KAINGU**
- 10. SHIDA KAINGU CHEA**
- 11. JOSEPH TUYE KAINGU.....DEFENDANTS**

RULING

This ruling is in respect of an Application dated 20th May 2021 by the Defendant/Applicant seeking the following orders: -

a) Spent

b) Spent

c) That the Plaintiff/respondent their servants, agents, employees and/or any other person claiming under them be restrained by way of temporary injunction from dealing, leasing, constructing, selling, cultivating, wasting and/or interfering with the Defendants/Applicants quiet occupation and possession of parcel Subdivision Numbers 1587 and 1588 {Original No. 265 Section III MN} pending the hearing and determination of this suit.

d) That the County Police Commandant Kilifi, Officer Commanding Station- Kijipwa Police Station do ensure compliance with the said orders of the court to the latter.

e) That the Defendants/Applicants be granted leave to amend their defence to enjoin Co- defendants and include a counterclaim attached hereto.

f) That the amended defence and counterclaim annexed hereto be treated as the Defendants/Applicants amended defence and

counterclaim and the same be deemed as having been duly filed and served.

g) That the Plaintiff/Respondent be at liberty to file a reply to amended defence and counterclaim if they so please.

h) That leave be granted to the Defendants/Applicants to serve the amended defence and counterclaim to the Plaintiff/Respondent.

i) That CHRISTOPHER KENGA MUTOI and 97 others as per the annexed list marked annexure 1 be enjoined as Co-defendants.

j) That the Honourable Court do carry out a site visit to the locus in quo and/or in the alternative, order for a ground survey be conducted and ground status report be filed in court to enable the court verify that the persons marked annexure 1 are in actual physical possession of the land.

k) That costs of this Application be provided for.

Counsel agreed to canvas the Application vide written submissions which were duly filed.

DEFENDANT /APPLICANT'S SUBMISSIONS

The Applicant relied on the grounds on the face of the Application and the Supporting Affidavit where he deponed that the Defendants have been in continuous quiet occupation of the land Subdivision No. 1587 and 1588 (Original No. 265 Section III MN) having acquired the same from their ancestral parents who lived on the suit property since the year 1900. He further stated that the suit property was illegally allotted to third parties and in favour of the then Sultan and Mazrui families.

Counsel submitted on whether the Defendants are entitled to an order of injunction and cited the cases of **Giella v Cassman Brown & Company Limited [1973] EA 358** and **Nguruman Limited v Jan Bonde Nielsen & 2 others CA No. 77 of 2012 [2014] eKLR** on principles for grant of injunctions. Counsel also submitted that the other issue for determination is whether the Defendants should be granted leave to amend their defence and join the Co-defendants listed in annexure 1 and include a counter-claim.

Counsel submitted that the Defendants have established a prima facie case as they have been in occupation of the suit land without interference by the Plaintiff for many years and have established their homes therein.

On the issue whether the Applicants will harm, counsel cited the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR**, on the definition of irreparable harm and stated that the Defendants stand to lose their source of livelihood if the Plaintiff is not restrained from destroying their trees and crops on the suit property.

Counsel further cited the cases of **Peter Kairu Gitu v KCB Kenya Limited & another [2021] eKLR** and **Paul Gitonga Wanjau v Gathuthis Tea Factory Company Limited & 2 others [2016] eKLR**, and submitted that the inconvenience the Defendants would suffer was greater than what the Plaintiff would suffer if the injunction is issued. That there is no prejudice that the Plaintiff would suffer if the orders as granted.

On the second issue as to whether the Defendants should be granted leave to amend their defence joining the Co-defendants to include a counter claim, counsel submitted that the intended Defendants to be joined to this suit were in physical occupation of the suit property and that the same could only be verified through a site visit by this court.

Counsel relied on Order 1 rule 10 (2) of the Civil Procedure Rules, and submitted that the court has powers to grant leave to join new parties to a suit and leave to amend pleadings at any time before judgment.

Counsel cited the cases of **Departed Asians Property Custodian Board v Jaffer Brothers Limited [1991] 1 EA 55** cited in **Kennedy Mwita & another v Board of Trustees NSSF & 2 others [2012] eKLR** and the case of **Crescent Distribution Services Limited v Egnite Technologies Limited & another [2013] eKLR** on amendment of pleadings and joinder of parties and urged the court to allow the application as prayed.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

The Plaintiff /Respondent relied on the Replying Affidavit whereby he deponed that the present application was an afterthought since this suit had long been fixed for hearing and further that the intended new Defendants were strangers to the Plaintiffs.

Counsel submitted that the current application is an omnibus application with a raft of prayers as was held in the case of **Pyaralal Mhand Bheru Rajput versus Barclays Bank And Others Civil Case No. 38 of 2004** by Ringera J (as he then was) who stated that: -

“There is no doubt the application is an all cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out.”

Counsel submitted that before the Plaintiff/Respondent filed this suit, they did a ground visit with the area Assistant Chief to establish the alleged squatters and only the Defendants herein and those in **ELC 36 of 2019** were on the suit property.

It was counsel's submission that an interlocutory injunction could not be granted in this case since the Defendant neither had a counterclaim nor did the relief sought arise out of the Plaintiffs' cause of action.

Counsel submitted that the Defendants anchor their claim to Plot No. 1588 on two grounds; namely ancestral claim alleging that the land is their ancestral land because their parents came to live there around the year 1900 and a claim of adverse possession.

Mr. Odongo further submitted that the land which the Defendants are claiming, that is No 1588 section III Mainland North or 265 section III MN, no longer exists. Counsel referred the court to paragraph 35 of the Replying Affidavit, where the Plaintiff stated that in 2018, she subdivided it to yield nine (9) subdivisions which she distributed amongst her children exhibited the 9 certificates of title.

Counsel cited the case of **Stephen Mwadoro & 56 others v Alhad Mohamed Hatimy [2020] eKLR** where the court held as follows:

“On the first issue, it is clear to me that the land that the plaintiffs claim does not exist as described. I have seen the Certificate of Title annexed by the defendant and it is very clear that the land described as LR No. 8826 (Original 143/2), which is what the plaintiffs seek title to by way of adverse possession, has been subdivided into several plots, and therefore that title no longer exists. These subdivisions are now owned by various people who are not parties to this suit. One cannot seek adverse possession against a title that does not exist. It is upon any claimant seeking land by adverse possession to be very precise on what title he seeks to be registered as proprietor. That is why you have the provision of Rule 7 (2) in Order 37 which requires an applicant in a case of adverse possession to annex an extract of the title that is the subject of the suit. It is pointless having this suit proceed on a title that does not exist. There is no need of wasting the court's time on a case where the order sought is incapable of being granted for the non-existence of the subject matter. I cannot order the plaintiffs to be registered as owners of the title LR No. 8826 (Original 143/2) because that title is non-existent.”

Counsel also submitted on whether a party can claim to have acquired land by way of adverse possession if he claims that the land he is occupying is ancestral land and relied on the case of **Haro Yonda Juaje v Sadaka Dzenge Mbauro & another [2014] eKLR** where the court held in the negative.

Mr. Odongo submitted that the Defendants are not being truthful as per part G of the Replying Affidavit (paragraph 41) where the Plaintiff has exhibited court documents from one of the many cases between the parties wherein the Defendants pleaded that their late father came to the land in 1944 and not in the year 1900. This shows that the suit land had been delineated as far back as 1923.

Counsel further relied on the case of **Omar Hassan Haji & another v Safari Kazungu & 49 others [2021] eKLR** where the court did not have kind words for parties who, like the Defendants, enter someone's land and lay claim to it. The court stated: -

“I am unfortunately for them, unprepared to accept the submission that a group of people can just move into a piece of land registered in the name of another person and by virtue of that entry and building of unauthorized structures claim the land to be their own”.

It was counsel's further submission that issuance of an injunction against a registered owner would be tantamount to arbitrary deprivation of right to property guaranteed under Article 40 (2) (a) and (b) guaranteed under the Constitution of Kenya, 2010.

Counsel lastly submitted that the Defendant can be allowed to amend the defence but not to join Defendants whom the Plaintiff has not sued and has no claim against them.

ANALYSIS AND DETERMINATION

I have looked at the Application and I agree with counsel for the Plaintiff/Respondent that it is actually an omnibus application. The Application has a raft of prayers which I do not know whether the Applicant should have sought all of them in this Application. The prayers sought are really a mouthful. This Application would have been struck out pre 2010, but with the advent of overriding objectives, I am inclined to hear and make a determination.

Going to the application, the issues for determination are whether the Defendant/Applicants have met the threshold for grant of an injunction against the Plaintiff and whether the application for amendment of defence to include a counterclaim and joinder of 97 Co- defendants should be granted.

Order 8 Rule 3 (1) provides as follows:

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.

The Court of Appeal in the case of **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR** restated the law applicable to amendment of pleadings as stated in **Bullen and Leake & Jacob's Precedents of Pleadings – 12th Edition** and captured in the Court of Appeal decision in **Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago [1995] eKLR** 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 exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed; 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; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation: that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment.”

On the issue of amendment of the defence to include a counterclaim, the court has the discretion to allow such amendments if it is done timeously, in good faith and not meant to prejudice the opposing party. The amendment must also not introduce a case or cause of action which would be best claimed in afresh suit.

This application has many limbs which are not related so the court has to deal with them individually. The application for amendment of defence is allowed but the court has to determine the limb for joinder of Co- defendants.

On the issue whether the intended Co-defendants should be allowed to join this suit, it was the Plaintiff's submissions that before they filed this suit they did a ground which established the current Defendants are the ones on the suit land hence there would be no need to join other Defendants whom they have not sued.

Order 1 Rule 3 states as follows on who may be joined as a defendant in a suit: -

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

Order 1 rule 10 (2) further provides:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

In the case of **LUCY NUNGARI NGIGI & 128 OTHERS V NATIONAL BANK OF KENYA LIMITED & ANOTHER [2015] eKLR** the Court stated as follows when considering whether to grant leave to join a party:

“Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rules. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.”

This court has discretion to join parties at any time if such parties are necessary parties that will help in the effectual adjudication of the suit. The court is also cognizant of the fact that joinder of parties may be refused where such joinder will lead to practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit.

From the application the Plaintiff has submitted that before this case was filed they did a ground verification and established the Defendants that they sued. It would be absurd to include new parties to the suit to claim land as they were not originally sued. This is a common occurrence in the Coast region where parties invade registered owners parcels of land and lay claim creating a very bad precedent on indefeasibility of title as provided for in the Land Registration Act and the right to property in the Constitution of Kenya.

It is further a common occurrence that while a case is pending before court squatters invite other squatters to overrun the registered owner by many mushrooming mud structures to defeat sanctity of title. It is also not possible to verify the authenticity of the names attached to be

joined as Co-defendants to this suit. In the circumstances, I am not convinced that the intended Co-defendants should be joined to this suit. The same is therefore declined.

The Defendants have also requested the court to do a site visit and to order a ground survey which order the court cannot grant as in 2019, the Kilifi District Surveyor carried out a survey on 23rd January 2019 and prepared a report dated 15th March 2019 which was filed in court. This prayer is also declined.

On whether an interlocutory injunction should be granted, it is not in dispute that the Plaintiffs bought the suit property Subdivision No. 1587 from the estate of one Mohamed Bin Auf and Aisha Binti Salim sometimes in 1987. The same was later subdivided into several Plots, Nos. 5061, 11802, 11803, 5063, 5064 and 5065 all registered in the names of Suheil Bin Abeid and Mahfudh Bin Awadh. In their Plaint, I note that the Plaintiffs averred that the portion which was occupied by the Defendants fell in Subdivision No 11803.

The Defendants have been in occupation of part of the suit land and that is why this matter is in court. The purpose of a temporary injunction is only to preserve the substratum of a suit and to maintain status quo as was held in the case of **Noormohammed Janmohammed –V- Kassam Ali Virji Madham (1953) 20 LRK 8**. It is therefore important to grant an order of status quo of what used to be Subdivision No. 1587 be maintained pending the determination of this suit.

The upshot is that the Application is allowed partially as per the orders above. Each party to bear their own costs. This matter to be fixed for hearing on a priority basis.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF MARCH, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.