



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC CASE NUMBER 33 OF 2020(OS)

MALAKWEN ARAP CHOBE (Suing as the administrator ad litem of
the estate of **KIPCHOBE ARAP MURGOR** deceased).....**PLAINTIFF**

VERSUS

DAVID MIBEI.....**DEFENDANT**

RULING

1. This ruling is in respect of the Plaintiff/ Applicant's Notice of Motion application dated 15th of November 2021. The said application is expresses to be brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 8 Rules 3 and 5, Order 51 Rule 1 of the Civil Procedure Rules 2010.

2. The application is filed under certificate of urgency and seeks the following Orders:

a. Spent

b. THAT this Honorable court be pleased to grant leave to the Applicant to amend the Originating Summons dated 20th May 2020 as per the draft Amended Originating Summons.

c. THAT upon grant of prayer (b) the Draft Amended Originating Summons be deemed duly filed subject to payment of relevant court fees.

d. THAT the costs of this application be in the main cause.

3. The application is based on the grounds on its face and supported by the supporting affidavit sworn by Malakwen Arap Chobe sworn on the 15th of November 2021.

FACTUAL BACKGROUND

4. This suit was commenced by way of Originating Summons and filed on 21st May 2020. The plaintiff seeks various declarations and orders. The declarations and orders are hinged on a determination of several questions as set out below:

1) Whether the Plaintiff is entitled under Section 38 of the Limitation of Actions Act CAP 22 Laws of Kenya to be registered as the proprietor of L.R NAKURU/OLENGURONE/AMALO 310

2) Whether the Defendant holds LR NAKURU/OLENGURUONE/AMALO/310 in trust for the Plaintiff.

3)Whether the Deputy Registrar of the High Court of Kenya at Nakuru may be authorized to execute the transfer documents in respect of NAKURU/OLENGURUONE/AMALO/310 in favor of the Plaintiff.

4) Who pays the costs of the suit?

THE PLAINTIFF/APPLICANT'S CONTENTION.

6. The Plaintiff/Applicant contends that this suit was filed against the Defendant on 21st May, 2020 seeking orders for adverse possession in respect of land parcel Number **NAKURU/OLENGURUONE/310**.

7. It is his contention that that adverse possession runs against a title of a registered owner and that the Defendant/Respondent in this matter claims to have bought the suit property from the late Zakeo Gichaga Moigo.

8. It is the Plaintiff/Respondent's further contention that it was not until the Defendant/Respondent filed his response to this suit that he discovered that the title deed to the suit property was registered in the name of Zakeo Gichaga Moigo(deceased).

9. He also contends that the failure to include the estate of the late Zakeo Gichaga Moigo was inadvertent and he therefore seeks to amend his Originating Summons to include them as they are a necessary party to the proceedings and will assist the court in determining all the issues in controversy.

10. He ends his deposition by stating that this application has been brought in good faith and without undue delay and that the intended amendments do not introduce any new cause of action and the Defendant/Respondent will not be prejudiced in any way if the orders sought are granted.

THE DEFENDANT/RESPONDENT'S CONTENTION

11. The Defendant/Respondent contends that the present application seeking leave to amend the originating summons has been filed two years after the Plaintiff/Applicant has benefited from various rulings of the court which have exposed some procedural shortfalls on his part which rulings were delivered on 27th July, 2020 and 8th December 2020.

12. It is also his contention that the Plaintiff/Applicant's application is not urgent as the proposed amendments only seek to add to new facts in the Originating Summons that were within his knowledge before he instituted this suit.

13. The Defendant/Respondent also contends that the Plaintiff/Applicant in his Originating Summons indicated that they have been on the suit property between the year 1958 -2019 which is a period of over 62 years but the court in its ruling on 8th December 2020 indicated that the said occupation was interrupted by unresolved disputes and so the procedure of Originating Summons failed *ipso facto*.

14. He contends that the Plaintiff/Applicant now seeks to amend his Originating Summons to narrow down the duration from 1978 to an unspecified period of twelve years.

15. He contends further that the Originating Summons dated 20th May, 2020 was dismissed and the parties left to pursue their claims through an ordinary suit and therefore the amending the Originating Summons is not necessary. He also contends that the Plaintiff/Applicant's intention to posthumously sue the late Zakeo Gichaga Moigo as the 2nd Defendant will embarrass the just and fair trial of the suit.

16. The Defendant/Respondent contends that Zakeo Gichaga Moigo (deceased) sold the land to him through the sale agreement dated 11th March, 1996 which was over twenty five years ago and would not assist this court in determining the real issues in controversy as he was from a different ethnic community and due to tribal clashes, could not continue being in possession of the suit property so sold it to the Defendant.

17. He contends that the joinder of the intended 2nd Defendant who is deceased offends the principles of Natural Justice to the personal representatives of his estate who did not participate in these proceedings at the initial stage and that they cannot be traced timeously without undue delay.

18. He contends further that the overriding objective of the court is to place the parties who appear before it on equal footing and that will only be possible if the Plaintiff/Applicant's application dated 15th November, 2021 is dismissed and that the amendments sought touch on substantive issues of facts and law which will cause a complete overhaul of the pleadings already filed.

19. He also contends that Order 8 Rule 3(1) of the Civil Procedure Rules allows parties to amend their pleadings at any stage of the proceedings but this is not available to a party who is on a shopping forum as the Plaintiff/Applicant does in the present application.

20. He states that he is in agreement with the Plaintiff/Applicant that a claim based on adverse possession runs against the title deed of the registered owner which fact the Plaintiff/Applicant was aware but he chose to sue him instead of the intended 2nd Defendant and since he is not the registered owner, he has been sued wrongly.

21. The Defendant/Respondent also contends that the court in its ruling on 20th May, 2020 ordered that the Originating Summons be converted to a Plaint and the matter to proceed by way of viva voce evidence. On 8th December, 2020, the court ordered that the parties prepare for trial within sixty days and therefore the intended amendment negates those directions of the court.

22. He also contends that the Plaintiff/Applicant has complied with Order 11 of the Civil Procedure Rules by filing all the requisite documents and therefore no basis has been laid for the intended amendment and that he filed his Replying Affidavit on 26th June, 2020 which had disclosed that he bought the suit property from Zakeo Gichaga Moigo (deceased) and that was the right time for the Plaintiff/Applicant to seek to amend his pleadings to include the intended 2nd Defendant and since he waited for too long, the present

application is an abuse of the court process.

24. He deposes finally and reiterates that there is an inordinate delay on the Plaintiff/Applicant's part in seeking to amend his pleadings and therefore his application should not be allowed as it will result in devastating consequences on the Defendant who will be forced to alter his pleadings already filed.

PLAINTIFF/APPLICANT'S RESPONSE TO THE REPLYING AFFIDAVIT.

25. After the Defendant/Respondent filed his Replying Affidavit, the Plaintiff/Applicant filed a Further Affidavit where he contends that the Defendant/Respondent has misconstrued the ruling delivered on 27th July, 2020 and so his application has merit.

26. The Plaintiff/Applicant also contends that he is not reframing his originating summons and that he has a right to amend pleadings under Order 8 of the Civil Procedure Rules and that he has complied with Order 11 and only seeks to enjoin Zacheo Gichaga Moigo as the 2nd Defendant.

27. He reiterates that he only became aware of the existence of the intended 2nd Defendant from the response to the Originating Summons filed by the Defendant/Respondent and that he has tried to confirm the registration status of the suit property from the Land Registrar Nakuru who has declined to furnish him with the certified copy of the green card.

28. He contends further that the failure to obtain a certified copy of the green card has delayed the amendment of the Originating Summons and that when it seemed apparent that the Land Registrar was not willing to issue the same, he decided to file the present application.

29. He also reiterated that the Defendant/Respondent misconstrued the ruling of the court delivered on 8th November, 2020 adding that at no point in the ruling did the court hold that his occupation of the suit property had been interrupted by unresolved disputes and neither did the court hold that his originating summons had failed ipso facto.

30. He contends further that they have been in occupation of the suit property from the year 1958 to date which is a period of over sixty-two years but since the title deed was issued in the year 1978, the period between then and when this suit was filed is forty-two years and so this is when adverse possession is said to have run against the registered owner's title.

31. The Plaintiff/Applicant also contended that it is clear from his pleadings that he has been in open, peaceful and continuous occupation of the suit property for a period exceeding twelve years. It is his contention that the Originating Summons dated 20th May, 2020 was not dismissed.

32. In further response to the Defendant/Respondent's replying affidavit, he contends that there is no evidence that Zakeo Gichaga Moigo is deceased as there is no death certificate attached and so he intends to serve the amended pleadings on him personally once he is granted leave to do so. He contends that his application to enjoin Zakeo Gichaga Moigo has merit as the suit property is registered in his name even though the Defendant/Respondent alleges that the suit property was sold to him.

33. The Plaintiff/Applicant contends that save for the need to serve the intended 2nd Defendant, his application to amend the suit does not jeopardize the pleadings already filed and does not touch on any substantive issues of facts and law.

34. He also contends that under Order 8 Rule 3(1), the court has the power to allow parties to amend their pleadings. He contends further that his application has merit and should be allowed as the proposed amendments do not vary the orders of the court issued on 20th May, 2020 that converted the Originating Summons to a Plaint.

35. He deposes finally that annexure DM-1 attached to the Defendant/Respondent's Replying Affidavit misconstrues the orders granted by the court on 17th July, 2020 and therefore the said Replying Affidavit is vexatious and ought to be dismissed.

ISSUES FOR DETERMINATION

36. Both the Plaintiff/Applicant and the Defendant/Respondent filed their submissions on 24th January, 2022.

37. The Plaintiff/Applicant has identified the following issues for determination:

a) Whether the Applicant should be granted leave to amend the originating summons dated 20th May, 2020 as per the draft Amended Originating Summons.

b) Who bears costs of this application?

38. The Defendant/Respondent has identified the following issues for determination:

1. Whether the Applicant has disclosed sufficient grounds to warrant leave to amend the Originating Summons.

2. Whether the application is regular in view of the court's orders and directions on record.

39. In my view, the issues for determination at this stage are:

a. **Whether the Applicant's Notice of Motion seeking orders for amendment has merit and ought to be entertained.**

b. **Who shall bear the costs of the application?**

ANALYSIS AND DETERMINATION.

40. I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedent and the law of the subject of amendments. I have also considered and weighed the rival submissions in this application.

Whether the Applicant's Notice of Motion for amendment has merit and ought to be entertained.

41. The law relating to amendment of pleadings is in Order 8 of the Civil Procedure Rules.

42. This application is expressed to be brought pursuant to the provisions of Order 8 Rule 3 and 5. The general power to grant orders for amendment is in order 8 Rule 1. The wording of the said provisions are as follows:

Order 8, rule 1.

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.

Order 8, rule 3.

An amendment to correct the name of a party may be allowed under sub rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

Order 8, rule 5.

(5) An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action 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 suit by the party applying for leave to make the amendment.

43. The principles for consideration in an application for amendment of pleadings are set out in Court of Appeal decision of *Ochieng and Others Vs First National Bank of Chicago Civil Appeal Number 147 of 1991*. They are as follows:

a. **the power of the court to allow amendments is intended to determine the true substantive merits of the case;**

b. **the amendments should be timeously applied for;**

c. **power to amend can be exercised by the court at any stage of the proceedings;**

d. 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;(emphasis is more)

e. **the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff the Defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.**

44. *Bramwell, LJ in Tildesley v Harper (1878), 10 Ch.D. at p.296* stated as under:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise.”

45. In *Eastern Bakery v. Castelino, (1958) E.A.461 (U.) at p.462* it was stated thus:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.

46. Having set out the law relating to amendment of pleadings, it is now important to apply the said principles to the present suit. The Plaintiff/Applicant has explained that he filed this suit in May, 2020 seeking orders of adverse possession in respect of land parcel Number **NAKURU/OLENGURUONE/310**. He explains further that adverse possession runs against a title of a registered owner and that it was not until the Defendant/Respondent filed his defence that he discovered that the title deed to the suit property was registered in the name of Zakeo Gichaga Moigo(deceased).

47. The Defendant/Respondents in opposition to the application states that the application has been brought rather late in the day. The Plaintiff/Applicant has explained that there has been a delay in making this application but the same was occasioned by the difficulty in obtaining a green card from the Lands Office, which green card was intended to ascertain ownership. I am satisfied that the failure to include the proposed 2nd Defendant was inadvertent and that this application is made in good faith.

48. In order for this court to arrive at a logical and just determination of this matter, and taking into consideration the explanation offered by the plaintiff/Applicant, I am of the view that an amendment to join the proposed 2nd Defendant is necessary and will not prejudice the defendant. In any event, the matter has not proceeded to hearing and the defendant will have opportunity to amend his pleadings if he deems it necessary.

49. The Defendant/Respondent has raised a host of other issues such as the Plaintiff wrongfully suing him and that he should not be a party to this suit. I have consciously failed to address these issues for the reason that they have no bearing on this application which is for amendment of pleadings. Those issues, is he feels strongly about them, can be raised for determination at the appropriate time or form part of his final submissions.

Who shall bear the costs of the application?

50. On the issue on costs; section 27 of the Civil Procedure Act provides that costs shall follow the event. The successful party shall ordinarily have costs.

DISPOSITION.

51. For the above reasons and having regard to the above cited authorities on amendment of pleadings, I make orders as follows:

- a. The Plaintiff is granted leave to amend his originating summons.**
- b. The annexed amended originating summons be deemed duly filed on payment of requisite court fees.**
- c. The Defendant/Respondent is granted corresponding leave to amend, file and serve his amended defence within 14 days from the date hereof.**
- d. The amended originating summons and summons to enter appearance shall be served on the 2nd Defendant within 14 days hereof and an affidavit of service filed.**
- e. The cost of this application to abide the outcome of the main suit.**

52. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 10TH DAY OF MARCH, 2022

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Bore for the Plaintiff/Applicant.

Mr. Terer for the Defendant/Respondent.

Court Assistant; Jeniffer