

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 72 OF 2008

[FORMERLY KAKAMEGA HCC NO. 82 OF 2006]

EDWARD WAFULA YANDA PLAINTIFF

VERSUS

BOAZ MUSUKHA WAKHWAKU

MARK MUFUMU WAKHWAKU

MOSES MWAMI WAKHWAKU DEFENDANTS

RULING

1. In the instant application dated 12th August 2013, the applicants seek leave of the court to amend their defence. The application is based on the two grounds listed on the face of the application and the supporting affidavit sworn by Moses Mwami Wakhwaku – the 3rd defendant/applicant. It is deposed that the proposed amendments will enable the court to reach a just conclusion of this matter.

2. The application is opposed by the plaintiff/respondent. The respondent deposes that the application is incompetent and is an abuse of the court process. In paragraph 5 of the replying affidavit, the respondent states that the applicants are trying to introduce a counter-claim through the back door and has annexed a copy of a judgment which determined the matter in his favour. He deposes further that if the amendment is allowed, it will be against the law and is res-judicata. He urged the court to disallow the application.

3. The parties made oral submissions before court which this court has taken into consideration in reaching its decision. I have perused the draft defence. Unfortunately the applicants did not underline in red ink as is required by law what the proposed amendments are. However, I will take it from the defence on record and deposition of the respondent that what is intended to be amended is the introduction of the counter-claim. If this be the position, the question is whether the proposed amendment is against the law and is res judicata as submitted by the respondent.

4. The respondent is claiming vacant possession of L.R. Bokoli/Kituni/1796 which he pleads the defendants are currently in occupation of. The said parcel of land was curved out of Bokoli/Kituni/121 which was the subject matter in dispute in Kakamega HCCC no. 330 of 1988. In the supplementary affidavit filed in court on 27th November 2013, the applicant admits L.R. Bokoli/Kituni/1796 was curved out of L.R. No. 121. The plaintiff in the Kakamega case was the brother to the present defendants. In that suit (Kakamega HCCC no. 330 of 1988) Tanui J (as he then was) held that, ***“In the circumstances I find that when the plaintiff filed this suit, he had not acquired title to the suit land by adverse possession as claimed. The plaintiff's case is therefore dismissed for being premature.”***

5. This court is alive to the fact that the matter for determination is an application for leave to amend the defence and not the substantive suit. Under order 8 rule 3 (5) provides that an amendment may be allowed **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 amend. The provisions of this order gives parties room to amend to introduce even a new cause of action as is submitted by the respondent that the applicant is intent on doing the counter-claim.

6. The defendants in their defence earlier filed denied that they had filed a suit through their brother Dickson Marango in Kakamega HCCC no. 330 of 1988. Once a matter is denied, it follows that the party alleging the fact must prove. Although from the copy of the judgment annexed to the replying affidavit it would appear the claim for res judicata may be valid in regard to the contents of the counter-claim sought to be introduced. However the respondent would have to establish by way of evidence that indeed the plaintiff in Kakamega HCCC no. 330 of 1988 brought the claim on his behalf and on behalf of the present defendants. This can only be done during a full trial and not at the interim stage in an application for leave to amend. In regard to the issue of the supporting affidavit being defective, I find this as a matter curable by the provisions of article 159 of Constitution which requires this court not to give regard to technicalities.

7. In light of the foregoing, I find no reason to refuse the the applicant leave to introduce the amendments. The respondent will have an opportunity during the trial of this case to adduce evidence in opposition to the defendant's claim if any. I do allow the application and direct that the defendants to file and serve their amended defence within 14 days of the date of this ruling. The cost of this application is awarded to the plaintiff/respondent.

DATED and DELIVERED this 29th day of Sept. 2014

A. OMOLLO

JUDGE.