



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 1535 OF 1989(O.S)**

**JOHN GITHEHU KIARIE**

**JEREMIAH KIOI**

**JAMES F.NJENGA.....PLAINTIFFS**

**VERSUS**

**KAHIHU KINYANJUI.....DEFENDANT**

**RULING**

The Defendant in an application dated 20<sup>th</sup> July 2009 is seeking orders that the Originating Summons dated 22<sup>nd</sup> day of March 1989 be dismissed. The grounds are that the Originating Summons is scandalous, frivolous and vexatious, is causing prejudice and embarrassment to the Defendant and is an abuse of the process of the court. After perusal of the said Originating Summons, it is revealed that the Plaintiffs herein are seeking relief in terms of orders for adverse possession with regard to the land parcel L.R. No. Dagoretti/Riruta/2062

The Defendant in a Supporting Affidavit sworn on 20<sup>th</sup> July 2009 avers that this suit was instituted in the year 1989, and the matter has been pending before court for a period of 20 years. Further, that the Plaintiffs have in their own admission admitted that they are not in occupation of land parcel L.R. No. Dagoretti/Riruta/2062, but another parcel of land that is not the subject of the present suit, and there is therefore an undisputed misjoinder of issues and facts which is incapable of being cured. The Defendant also states that the Plaintiffs have been unable to comply with the orders of the court, and the court has disallowed any attempt at amendment of pleadings.

The Defendant's Advocate in his submissions made during the hearing of the application on 31<sup>st</sup> January 2012 referred the court to the various orders annexed to the application in which the Plaintiffs' applications for amendments have been dismissed, after the Plaintiffs failed to comply with orders by Angawa J. given on 2<sup>nd</sup> October 2007 granting them leave to amend and serve the Originating Summons within 14 days. The Advocate argued that the door for amendment is now shut, and any such application for amendment by the Plaintiff would be *res judicata*. The Advocate sought to rely on the authority of **Jyotsna Dhanani v Nitin K. Pandya and another HCCC No 227 of 1998** on the issues of delay and of the Plaintiffs having been indolent.

The Plaintiffs' response is in a Replying Affidavit sworn by the 2<sup>nd</sup> Plaintiff on 24<sup>th</sup> September 2009, wherein he states that the only reason the Defendant seeks the dismissal of the Plaintiffs' case, is on account of the failure by the Plaintiffs to comply with court orders to amend the Originating Summons herein. Further, that the failure to comply with the court orders was a failure by the Plaintiffs' previous Advocates, and the Plaintiffs have since appointed new Advocates who intend to apply for amendment of the Originating Summons. The Plaintiffs also state that the Defendant is seeking in his application to take advantage of an error in the pleadings which can be corrected by amendment, yet the Defendant does not stand to suffer any prejudice as there is still another suit, namely HCCC No. 1268 of 2000 between the parties, which suit was stayed pending the outcome of the present case. The Plaintiffs have annexed a copy of the Plaintiff in HCCC NO. 1268 of 2000.

**The Plaintiffs' Advocate made oral submissions during the hearing of the application, and in addition stated that the court has power to order the amendment of pleadings at any stage in the interests of justice under Order VIA Rule 3 of the revoked Civil Procedure Rules, and that the Constitution also now urges Courts to dispense of justice without due regard to procedural technicalities. He further submitted that the Plaintiffs do not know the correct land reference number of the suit property, and the court can order substitution once the correct number is identified. The Advocate also submitted that they intend to challenge the jurisdiction of the Deputy Registrar who heard and decided on their applications for amendment of the Originating Summons, and also distinguished the authority cited by the Defendant's Advocate on the ground that it was dealing with the issue of dismissal for want of prosecution.**

After consideration of the pleadings filed in this case and the submissions by the parties, the main issue for consideration is whether the Originating Summons filed herein by the Plaintiffs is scandalous, frivolous and vexatious, and is an abuse of the process of the court in light of the reasons given by the Defendant, so as to justify its striking out. It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In **D.T.Dobie & Company (Kenya) Ltd. v. Muchina**[1982] KLR 1 at p. 9 by Madan, J.A.as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

The said Originating Summons in my opinion is neither scandalous nor frivolous as the Plaintiffs are alleging adverse possession and have stated that they have been in possession of the disputed land for over 50 years. The Plaintiff's suit therefore raises substantive legal issues that need to be considered and determined. In addition, the request for amendments by the Plaintiffs are not disputed by the Defendant, and it is settled law that if a defect in a pleading can be remedied by an amendment then that opportunity should be given to a party to amend and state his or her case, instead of striking out the pleading.

I do not agree that an application to amend the Originating Summons will be *res judicata*, as in my opinion section 7 of the Civil Procedure Act applies to substantive issues arising from the cause of action or relief sought by the parties which have been previously decided on by a competent court, and does not apply to purely procedural issues such as amendment of pleadings. In addition Order 8 Rule 3 of the Civil Procedure Rules (previously Order VIA Rule 3 of the Revoked Civil Procedure Rules) gives a wide discretion to Courts to grant leave for the amendment of pleadings at any stage of the proceedings.

For the foregoing reasons the Defendant's application dated 20<sup>th</sup> July 2009 is denied. It is also hereby ordered pursuant to the provisions of Order 8 Rule 5 of the Civil Procedure Rules (previously Order VIA Rule 5 of the Revoked Civil Procedure Rules), and sections 1A, 1B and 3A of the Civil Procedure Act, that the Plaintiffs file and serve an amended Originating Summons within 30 days of the date of this ruling, failure of which the Defendant is at liberty to apply for judgment or other orders on the basis of the Plaintiffs' admission.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_29<sup>th</sup>\_\_\_\_ day of \_\_\_\_March\_\_\_\_, 2012.

**P. NYAMWEYA**  
JUDGE