Nyaata (Suing as the Legal Representative of the Estate of Abishai Nyamweya Mwebi) v Odongo; Machogu & another (Interested Parties) (Environment & Land Case 88 of 2011) [2024] KEELC 694 (KLR) (13 February 2024) (Ruling)

Neutral citation: [2024] KEELC 694 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 88 OF 2011

M SILA, J

FEBRUARY 13, 2024

BETWEEN

MAKORI NYAATA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ABISHAI NYAMWEYA MWEBI) ..... PLAINTIFF

AND

JOANES ABUTO ODONGO ..... DEFENDANT

AND

FELIX JOSHUA MACHOGU ..... INTERESTED PARTY

JOSEPH MAGAKI ISABOKE ..... INTERESTED PARTY

RULING

(Application to amend an Originating Summons; applicant having filed suit for adverse possession over certain title; in the course of trial two parties approaching court and asserting that the suit title no longer exists as it has been subdivided and applying to join the case; court directing the applicant to amend the Originating Summons to have the two parties joined as respondents and if he fails to do so then they be joined as interested parties; applicant not joining the two parties as respondents and not amending the Originating Summons as directed; applicant proceeding and closing his case as it is and matter pending defence hearing; before commencement of the defence case, applicant now applying to amend the Originaing Summons to effect the very amendment that leave was given but which he refused to comply with; court of opinion that the application to amend is coming too late in the day and will prejudice the defendant, and further that it will be an abuse of the court process for a party to be given leave to amend and refuse to do so, then after six years, seek the very amendment for which leave was earlier given; application dismissed)

1. What is before me is an application dated 12 September 2023 filed by the applicant in this Originating Summons. He seeks leave to amend his Originating Summons. The application is opposed by the respondents.

2. To put matters into perspective, this suit was commenced through an Originating Summons filed on 12 May 2011 by one Abishai Nyamweya Mwebi (hereinafter referred to as the original plaintiff) against Jones Abuto, through the law firm of M/s Nyariki & Company Advocates. He sought orders that it be declared that he has acquired title, by way of adverse possession, to the land parcel West Kitutu/Bogusero/872 (the suit land). His case was that he purchased the whole of the suit land from the said Jones Abuto in 1976, upon which he took possession, but the respondent failed to execute the requisite instruments to transfer title to him. He otherwise asserted to have been in continuous, open, and peaceful uninterrupted possession of the suit land, hence his claim for adverse possession. The respondent was served with summons but he failed to enter appearance and the suit proceeded for hearing ex parte, on 5 March 2013, culminating in a judgment in favour of the original plaintiff delivered on 19 April 2013.

3. Through an application dated 26 July 2013, the respondent applied to set aside the ex parte judgment. Within that application, the respondent pointed out that the suit land had already been subdivided into the land parcels West Kitutu/Bogusero/4342, 4343 and 4344, and that the latter two were registered in names of Joseph Magaki Isaboke and Joshua Felix Machogu, who were not parties to the case. The application to set aside the judgment was allowed through a ruling delivered on 24 January 2014. The court (Okong'o J) found that the respondent had been duly served but was of opinion that the issues raised by the respondent, particularly that the suit land had been subdivided, were sufficiently compelling to allow for the setting aside of the ex parte judgment. Within the same ruling, the court ordered a restriction to be registered in the register of the land parcels No. 4342, 4343, and 4344, for within the hearing of that application to set aside the judgment, the applicant had contended that if there was any subdivision of the suit land, then it was done through fraud.

4. What followed was an application dated 23 June 2015, filed by Joseph Magaki Isaboke and Felix Joshua Machogu, seeking leave to be joined to the case as interested parties, on the basis that they are respectively the registered owners of the land parcels No. 4343 and 4344, subdivisions of the suit land. Within that application, they annexed certificates of official searches to demonstrate proprietorship of the said parcels of land. The original plaintiff nevertheless opposed the application for joinder asserting that the subdivision of the land was done irregularly and that the applicants were facing criminal charges relating to the said subdivision. That application was heard by Mutungi J who delivered ruling on 17 February 2017. The court found that the applicants had demonstrated interest in the subject matter of the suit and that their presence in the case was necessary. Within the ruling, the court urged the original plaintiff to consider amending the Originating Summons to bring in the interested parties as respondents in the suit. The original plaintiff was indeed given 21 days to amend the Originating Summons to join the interested parties as respondents, and if he failed to do so, the two would be joined in the suit as interested parties. No amendment was done as advised by the court and the two persons remained in the suit as interested parties.

5. Subsequently, on 5 May 2017, Felix Joshua Machogu, the 2nd interested party, filed a replying affidavit. In it he asserted ownership of the subdivision in his name. He added that when the original plaintiff filed this suit, he was aware that he had already taken possession and that he later filed criminal proceedings against him and others, which case was dismissed.

6. On 22 November 2019, the original plaintiff appointed the law firm of M/s O.M Otieno & Company Advocates, to act for him alongside the law firm of M/s Nyariki & Company Advocates.

7. In the course of time, it was said that the original plaintiff was unwell and could not attend court. He donated a power of attorney to his son, one Makori Nyaata, to proceed with the case on his behalf. The said Makori Nyaata testified on 27 January 2020 before Onyango J and the case was then adjourned for further hearing. On 4 July 2020, the original plaintiff died. An application to substitute him, with Makori Nyaata, as his legal representative, was allowed and an amended Originating Summons was filed on 6 May 2021. That amended Originating Summons only has Jones Abuto as the defendant and does not contain the names of the interested parties.

8. On 5 February 2022, the applicant called two other witnesses, and closed his case. On 25 May 2023, the case came up for defence hearing before me as Onyango J had been moved to another station. On that day, it was raised that the Originating Summons had not been amended as directed and Mr. Otieno, learned counsel for the applicant, sought an adjournment to confirm the position regarding the subdivision of the suit land. I adjourned the matter to facilitate this, and the applicant lodged a further list of documents, being the Green Card to the suit land. It showed subdivision of the same into the parcels No. 4342 – 4344 registered on 7 April 2011. Mr. Otieno then sought to 'regularise' his pleadings and I directed a formal application to be filed. It is then that this application for amendment of the Originating Summons was filed.

9. What the applicant wants in this application is to amend the Originating Summons so as to make the interested parties the 2nd and 3rd respondents in the suit. The supporting affidavit is sworn by the applicant. He inter alia avers that need has arisen to amend the Originating Summons so as to clearly bring out the issues in dispute. He avers that the names of the interested parties were inadvertently omitted when amending the Originating Summons on 16 April 2023 (upon substitution). He deposes further that failure to regularize the pleadings, to accord with the observations of the Judge in the ruling of 17 February 2017, is owing to the fact that the matter was initially being handled by the law firm of Nyariki & Company Advocates, and that the current advocates (meaning M/s O. M Otieno & Company) took over the conduct of the suit while oblivious of the existence of the said ruling. He has added that the state of the records in the Land Registry keep mutating and it is not very clear whether the suit land exists as West Kitutu/Bogusero/872 or it exists in the subdivided format as West Kitutu/Bogusero/4342 – 4344 thus need to factor in the two possibilities in the amendment. He does not see any prejudice to the other parties in the suit.

10. The defendant filed a replying affidavit to oppose the application. Inter alia, he has deposed that the applicant has already offered evidence and closed his case. He has also deposed that the subdivision of the property was done before this case was filed and the property West Kitutu/Bogusero/872 no longer exists. He contends that the

applicant has filed pleadings based on a fishing expedition. He adds that the intended amendment will not bear fruit, but cause unnecessary delay, and has pointed out to the age of this case. He avers that he stands to be prejudiced if the applicant is allowed opportunity to reopen his case which was prematurely filed and prosecuted. He has also gone at length to contest the veracity of the claim for adverse possession.

11. I invited counsel to file written submissions towards the application, and I have seen the submissions of Mr. Otieno, learned counsel for the applicant, and Mr. Nyambati, learned counsel for the respondent and the interested parties. I have taken these into account before arriving at my decision.

12. This is an application to amend and generally courts are liberal when it comes to such applications. I think O'Connor J, set out the general principles in the case of *Eastern Bakery vs Catellino* (1958) EA 461, in a way that I can put no better, and I opt to rehash his dictum where he opined as follows at page 462 :-

> " It will be sufficient for purposes of the present case, to say that amendments to pleadings sought before the hearing 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: *Tildesley v. Harper (10 (1878), 10 Ch. D. 393; Clarapede v. Commercial Union Association (2) (1883), 32 W.R. 262.* The court will not refuse to allow an amendment simply because it introduces a new case: *Budding v. Murdoch (3) (1875), 1 Ch. D. 42.* But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya vs. Maung Po Hnaung (4) (1921), 48 I.A. 214; 48 Cal. 832.* The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen (5), [1898] 1 Ch. 73, 81;* or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v. Neal (6) (1887), 19 Q.B.D. 394; Hilton v. Sutton Steam Laundry (7), [1946] K.B. 65.* The main principle is that an amendment should not be allowed if it causes injustice to the other side".

13. As noted above, applications to amend, which are sought before the hearing, ought to be freely allowed if no injustice is caused to the other party, and indeed, in such instance, it will be a rare case that will demonstrate the injustice, since the case has yet to begin and the defendant can very well amend his pleadings to accord to the amended plaint. However, as the case progresses, the possibility of prejudice or outright injustice to the defendant increases, since the defendant can only tailor his response according to the pleadings. If the plaintiff has testified and closed his case, and all that is awaited is hearing of the case of the defendant, the court needs to exercise even more caution. The applicant in such instance will need to give good reason why he never sought to amend his pleadings, be it plaint or defence, before the case commenced, or very shortly after commencement, and why he had to wait for so long before proceeding to apply to amend his pleadings.

14. The situation is more compounded where a party had already been given leave to amend, but failed to do so, then comes back to court subsequently, to seek the very

amendment for which he had previously been granted leave. Order 8 Rule 6 does provide for failure to amend after the order and it provides as follows :

> 6. Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.

15. In our case, the original plaintiff was given leave to amend the Originating Summons, to join the interested parties as respondents to the Originating Summons, within 21 days in the ruling of 17 February 2017. The original plaintiff failed to effect the amendment. In this application, the applicant herein wishes to effect the very amendment for which leave was given more than six years ago. Within the period of those six or so years he even proceeded with his case, and closed it, a clear indication that he was very comfortable proceeding with his case only as against the defendant. Indeed, the interested parties are only in this case in that capacity, because the original plaintiff failed to join them as substantive defendants in the case. Unless a very special reason is given, I would take it to be an abuse of the court process, when an applicant comes to court after six years to seek to make the same amendment for which he had been given leave to effectuate and refused to do so.

16. The explanation given by the applicant is that his current advocates on record were not aware of the ruling of 17 February 2017. That, I am afraid, does not wash. The record shows that the applicant is represented by the law firms of M/s Nyariki & Company Advocates and M/s O.M Otieno & Company Advocates. There was never a change of advocates filed to remove the law firm of M/s Nyariki & Company Advocates from the record. What was filed, as I have pointed out earlier, was only a notice of appointment of an additional advocate. It cannot therefore be said that the applicant's advocates on record were not aware of the ruling of 17 February 2017 as the very firm on record at the time the ruling was delivered is still on record to date. But even assuming that the said firm of M/s Nyariki & Company is, at the moment, not on record, I am not persuaded that such reason would be valid. The case is of the parties, not the advocates. The original plaintiff, and even the applicant herein, who proceeded with the case, were very much aware of the fact that the suit land had been subdivided (whether legally or not) and were aware that there were the titles West Kitutu/Bogusero/4342 – 4344 in existence. In fact, when the interested parties filed their application to be joined to the suit, they annexed searches which showed that the original plaintiff had registered cautions, on 3 May 2012, in their two properties, being West Kitutu/Bogusero/4343 and 4344, claiming a purchaser's interest. This caution was registered even before the original plaintiff testified ex parte on 5 March 2013. It cannot therefore be said that the original plaintiff was not aware of the existence of subdivisions to the suit land and that he is ignorant because of the representation by the law firm of M/s Nyariki & Company Advocates. Apart from the original plaintiff, even the applicant herein cannot plead ignorance. I have gone through his witness statement recorded on 25 October 2019 and in it he has *inter alia* referred to title deeds being issued to the interested parties which he claimed were issued despite existence of the suit Civil Case No. 44 of 2005. He was thus very much aware of the interest of the interested parties in 2019 and certainly before he proceeded to give evidence.

17. Given the scenario above, it is my opinion that the application to amend has not been brought timeously, and certainly I do not see the good faith in it, especially in light of the fact that leave to amend to effect the same amendment had been given more than six years ago. I am persuaded that the original plaintiff and the applicant must be beholden by the path that they chose to take, i.e, proceeding with the case despite the knowledge that two other parties may be holding titles to the same land. They made and prepared their bed and they must now lay in it. I do not see why the defendant should be prejudiced for he tailored his case in the knowledge that the original plaintiff and the applicant opted to proceed only against him without the title holders of the subdivisions of the suit land as substantive parties.

18. This court will not allow its process to be abused to allow a party to amend pleadings for which he was given leave more than six years ago but refused to do so.

19. I think I have said enough to demonstrate that I find no merit in this application and it is hereby dismissed with costs.

20. The applicant has the option of proceeding with the case as it is or withdraw it and file what he considers to be a good case.

21. Orders accordingly.

DATED AND DELIVERED THIS 13 DAY OF FEBRUARY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of: -

Mr. O. M Otieno for the Applicant

Mr. Okemwa Steve holding brief for Mr. G. M Nyambati for the respondent and interested parties.

Court Assistant – Lawrence Chomba