



**Kipchillat v Boit (Environment & Land Case E003 of 2023)  
[2024] KEELC 6642 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6642 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E003 OF 2023  
JM ONYANGO, J  
OCTOBER 9, 2024**

**BETWEEN**

**SILAS KIPCHILLAT ..... PLAINTIFF**

**AND**

**SARAH CHELEL BOIT ..... DEFENDANT**

**RULING**

1. By a Notice of Motion dated 26<sup>th</sup> September, 2023, the Applicant sought the following orders; -
  - a. Spent.
  - b. That this honourable court be pleased to set aside the orders of 21<sup>st</sup> September, 2023 (erroneously indicated as 21<sup>st</sup> September, 2021) allowing the application for leave to amend the originating summons dated 9<sup>th</sup> May, 2023 and the same be heard on its merits.
  - c. That the costs of the application be in the cause.
2. The Application is based on the 9 grounds on its face and on the Applicant's Supporting Affidavit sworn on even date. The Applicant avers that the court did not issue any directions on the application dated 9<sup>th</sup> May, 2023; that the time set for inter-partes hearing of the said application coincided with an earlier application dated 2<sup>nd</sup> March, 2023, which was pending for ruling.
3. It is her contention that directions were supposed to be given after the delivery of the earlier ruling on 23<sup>rd</sup> September, 2023. However, on the said date, the court issued the ruling and also granted orders regarding the application for amendment dated 9<sup>th</sup> May, 2023.
4. She further avers that she intended to oppose the said application since the issues raised in the proposed amendment are incompatible with the nature of the claim under adverse possession, she thus sought for a chance to be heard on the said application.



5. The application was opposed, the Plaintiff/Respondent filed an undated Replying Affidavit on 25<sup>th</sup> October, 2023. It was his assertion that the court issued directions on the applications dated 9<sup>th</sup> May, 2023 after delivering the ruling on 21<sup>st</sup> September, 2023. On the same date, counsel for the defendant indicated that she would file their respective responses.
6. He contended that the application to amend was not in contravention of Order 37 of the Civil Procedure Rules and that the same would not cause any prejudice to the defendant.
7. The court issued directions on 16<sup>th</sup> July, 2024 that the Application be canvassed by way of written submissions. The defendant/applicant filed her submissions dated 2<sup>nd</sup> September, 2024 while the plaintiff/respondent filed her submissions dated 16<sup>th</sup> September, 2024; which I have read and carefully considered.

### **Analysis and Determination**

8. Having carefully considered the application, response, the annexures thereto and the rival submissions; in my opinion, the sole issue arising for determination is whether the Defendant/Applicant has made out a case for setting aside the orders issued on the 21<sup>st</sup> September, 2023.
9. The grounds for setting aside an order of the court are well settled and the court in exercising such discretionary powers ought to consider the circumstances of each case. The court in the case of MBOGO VS SHAH 1968 E.A 93 held as follows: -

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice”

10. The Applicant avers that the court did not give directions on the application dated 9<sup>th</sup> May, 2023 but went ahead to give orders on the presumption that she had not filed a response to the Originating Summons and hence pleadings had not been closed, she contends that she entered appearance and filed a Replying Affidavit on 17<sup>th</sup> March, 2023. She further asserts that the proposed amendments are incompatible with the nature of the claim under adverse possession and they amount to an introduction of a new cause of action hence the instant application.
11. The Respondent on his part maintained that at the time of delivering the said orders, no response had been filed by the Defendant despite being given an opportunity, that the amendments were sought prior to the trial commencing and further that the proposed amendments would not cause any prejudice.
12. The question that arises from the rival position is whether the orders issued on the 21<sup>st</sup> September, 2023 were issued before or after the close of pleadings and whether the proposed amendments introduced a new cause of action.
13. Order 8 Rule 1(1) of the Civil Procedure Rules provides as follows:  

“(1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.”



14. Order 2 Rule 13 further provides as follows:

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”

15. It is the Applicant’s contention that she entered appearance and filed a Replying Affidavit on the 17<sup>th</sup> March, 2023. Thus, at the time of delivering the order for amendment, pleadings had already been closed and she was therefore locked out from raising her objection to the application. The Plaintiff on the other hand maintained that the amendment was sought prior to the trial commencing.

16. It is not in dispute that the Defendant/Applicant filed their Replying Affidavit in response to the Originating Summons on the 17<sup>th</sup> March, 2023 and at the time of issuing the order of amendment on 21<sup>st</sup> September, 2023, fourteen days had since lapsed and consequently pleadings had been closed. The close of pleadings is not determined by whether or not trial has commenced as alleged by the plaintiff but the same is governed by the provisions of the Civil Procedure Rules above.

17. The next question is whether the proposed amendments introduced a new cause of action. I have looked at the amended Originating Summons and I do note that the same indeed included a challenge on the validity of the acquisition and title/allotment letter of the suit land. The Applicant contends that the said amendments are incompatible with the nature of the claim of adverse possession and thus introduces a new cause of action.

18. Order 8 Rule 3(5) of the Civil Procedure Rules provides that: -

“an amendment can be allowed even if its effect is 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.”

19. In the case of *Central Kenya Limited v Trust Bank Limited & 5 Others* [2000] eKLR the Court of Appeal (Gicheru, Bosire & Owuor, JJA) whilst referring to commentaries on the Indian Civil Procedure Code by Chittaley and Rao stated as follows with regards to the settled rule to amendment of pleadings:

“... that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

20. I have looked at the Amended Originating Summons and the amendments introduced therein and I note that among the questions sought to be determined in the Amended Originating Summons include questions touching on the validity of the allotment letter and the registration of the suit land in the defendant’s deceased husband in the alternative. I must however point out that all the orders sought relate to the claim of adverse possession.

21. Taking the above in totality, can it be said that the order allowing for the amendment of the Originating Summons as sought by the Plaintiff/Respondent is prejudicial to the Defendant/Applicant? The



Court of appeal in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & others (2013) eKLR, held as follows:

“... it is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”

22. The power to allow amendment of pleadings is within the discretion of the court and where a court is convinced that there exists justifiable cause to amend it may allow the same. I find that the issue of registration and the validity of the allotment letter, as much as the same may be viewed a new cause of action; the question arises from the same facts of which relief has already been claimed. Consequently, I find that the same would not be prejudicial to the applicant. Claims under adverse possession touch on and affect the issue of title and ownership of land.
23. In view of the foregoing; I find that the Applicant has not met the standard set to warrant the grant of the orders sought.

### **Conclusion**

24. In the premises, I find that the Notice of Motion dated 26<sup>th</sup> September, 2023 is not merited and I accordingly dismiss the same with costs to the Plaintiff/ Respondent.

It is so ordered!

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 9<sup>TH</sup> DAY OF OCTOBER, 2024.**

.....

**J.M. ONYANGO**

**JUDGE**

**In the presence of;**

1. Mr. Mogambi for the Plaintiff
2. Miss Jeruto for the Defendant

Court Assistant: Brian

