



**Nalyanya v Opati; Wepukulu (Interested Party) (Environment & Land Case E007 of 2023) [2024] KEELC 6724 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6724 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E007 OF 2023  
EC CHERONO, J  
OCTOBER 11, 2024**

**BETWEEN**

**RICHARD MAKOKHA NALYANYA ..... APPLICANT**

**AND**

**PETER KANG'ASHI OPATI ..... RESPONDENT**

**AND**

**MARGARET NASIBWONDI WEPHUKULU ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of the Applicant's Notice of Motion application dated 6<sup>th</sup> April 2024. The said application is expressed to be brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 8 Rules 3, 5 and 7, Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following Orders:
  - a. The Applicant be granted leave to amend his originating summons dated 20.11.2023 in accordance with the proposed draft amended originating summons.
  - b. Costs of this application be provided for.
2. The application is based on grounds apparent on the face of the application supported by the affidavit of Richard Makokha Nalyanya sworn on the 6<sup>th</sup> April, 2024.
3. It is the Applicants case that his claim over L.R No. East Bukusu/south Kanduyi/7676 is on the basis that he purchased the same with the consent of the registered owner. He contends that he entered into the property and has been in occupation of the same since the year 1999. It is also his contention that being a purchaser of the suit land with the consent of the registered owner, he believes that his claim is best brought under the doctrine of constructive trust as opposed to the doctrine of adverse possession. It is argued that this matter has not yet been substantially heard and that allowing the application will



serve to meet the ends of justice and no party will be prejudiced. The Applicant urged the Court to exercise its unfettered discretion to grant leave as sought.

4. The Respondent filed a replying affidavit sworn on 22<sup>nd</sup> May, 2024 in which he deposed that by his application, the Applicant herein seeks to change the nature of the claim making his application frivolous, vexatious and otherwise and abuse of the Court process. He asked the Court to dismiss the application with costs.
5. The Interested party on his part filed grounds of opposition dated 16<sup>th</sup> May, 2024 where she argued that the amendments are inconsistent with the original pleadings and entirely alters the nature of the Interested party's defence and counter-claim. He argued that the application will therefore occasion an injustice and the same ought to fail.
6. After directions were taken to have the said application canvassed by way written submissions, the Applicant filed his submissions dated 15<sup>th</sup> May, 2024 in support of the application where he relied on the provisions of Order 8 Rule 3 and 5 of the Civil Procedure Rules. They equally relied in the case of Institute for Social Accountability & Another vs. Parliament of Kenya & 3 Others (2014) eKLR, Elijah Kipngeno Arap Bii vs. Kenya Commercial Bank Limited (2013) eKLR and Migori Civil Appeal No. 5 of 2019 Lewar Ventures Limited vs. Equity Bank (Kenya) Limited (2022) eKLR.
7. The Interested party also filed submissions dated 16<sup>th</sup> May, 2024 where they placed reliance in the following cases; Abdul Karim Khan vs. Mohamed Roshan 91965) EA 289(C.A) and Raleigh vs. Goschen (1898)1 Chapter 73.

### **Factual Background**

8. It is not in dispute that this suit was commenced by way of Originating Summons and filed on 20<sup>th</sup> April, 2023. In the said Originating Summons, the Applicant is seeking various declarations and orders. The said declarations and orders are hinged on determination of several questions as set out below:
  - a. Whether the Respondent should be restrained from entering, utilizing and/or in any way alienating Land Reference Number East Bukusu/south Kanduyi/7676 until the hearing and determination of this suit.
  - b. Whether the Applicant is entitled to be declared as the proprietor of L.R No. East Bukusu/south Kanduyi/7676 by virtue of adverse possession.
  - c. Whether the registrar of lands is to be directed that the order made be an instrument of ownership of L.R No. East Bukusu/south Kanduyi/7676 from the Respondents to the Applicant herein.
  - d. Whether the Applicant is entitled to costs of these proceedings.
9. The gist of the application is for the amendment of the originating summons dated 20<sup>th</sup> April, 2023. The Respondents main contention however seems to be the fact that the proposed amendment seeks to introduce a new cause of action which will change the cause of action into a substantially different character. It is therefore my view that the single issue for determination is whether this application is merited. The Notice of motion is expressed to be brought under Section 1A,1B & 3A of the Civil Procedure Act Order 51 Rule 1 and Order 8 Rule 3,5 & 7 of the Civil Procedure Act which deals with leave to file pleadings out of time.
10. The general rule is that amendments to pleadings sought before the hearing should be freely allowed if they are necessary for the purpose of determining the real questions in controversy between the parties, are not made in bad faith and can be made without injustice to the other side; and there is



no injustice if the other party can be compensated by costs. In *Harrison C. Kariuki vs. Blueshield Insurance Company Ltd* (2006) eKLR, the Court referred to the Court of Appeal decision in *Central Kenya Ltd v Trust Bank Ltd* (2000)EALR 365 and held;

“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The Main this is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined.

11. Again see *Social Accountability & Another V Parliament of Kenya and 3 Others* 2014 eKLR and *Daniel Ngetich & Another Vs KRep Bank Limited* 2013 eKLR .
12. Order 8 Rule 5 (1) of the Civil Procedure gives the court a wide discretion as far as amendment of pleadings is concerned. This discretion may be exercised at any stage of the proceedings, that is to say, before or at the trial, after the trial, after judgment or on appeal on merit.
13. In determining an application such as the current one, the court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are really brought out, the other party is not prejudiced, the character of the suit or defence is not altered and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work an injustice.
14. I have looked at the proposed amendments sought by the Applicant. From the draft amended originating summons attached to the application, it is evident that the Applicant seeks to introduce the concept of ownership by way of constructive trust, which is essentially a new cause of action from the one pleaded in the originating summons filed initially. The question that begs answers is whether one can introduce a new cause of action through amendment of pleadings.
15. The applicant has expressed the application through Order 8 rule 5 of the Civil Procedure Rules which provide that;

“ An amendment shall be allowed under subrule (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”.
16. From the nature of the amendment sought, I do not see any prejudice that will be occasioned to the Respondents if the application is allowed. The Applicant has maintained the set of facts initially pleaded and the Respondent will have a chance to respond to the amended originating summons. Further, this suit has not proceeded for hearing and the parties shall have a chance to challenge and interrogate the new cause of action introduced by the Applicant. Although, there was a delay in filing the application, the same is not so inordinate such as to cause an injustice and is therefore excusable.
17. The upshot of the foregoing is that the application dated 6<sup>th</sup> April 2024 is allowed as follows;
  - a. Thrown away costs to be paid to the Respondent and the Interested party each of Kenya Shillings ten thousand.
  - b. The Applicant to file the draft Amended Originating Summons within 7 days from the date of this Ruling
18. Orders accordingly.



**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

M/S Wanyama H/B for Mr. Mwonchiri for the Interested Party

Respondent-present

Mr. Shikhu H/B for Mugisu for the Applicant

Bett C/A

