



Joseck & 10 others v Njue & 9 others (Enviromental and Land Originating Summons 38 of 2021) [2023] KEELC 19352 (KLR) (7 June 2023) (Ruling)

Neutral citation: [2023] KEELC 19352 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 38 OF 2021**

A KANIARU, J

JUNE 7, 2023

N THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF TITLE NOS MBEERE/MBITA/2278, 2279, 6886, 6889, 6890, 6891, 6892, 6893, 6894, 6386, 6887, 6388, 6389, 6390, 6391, 6392, 6393, 6394, 6873, 6874, 6831, 6832, 6833, 6834, 6835, 6836, 6837, 6838, 6839, 6840, 6841, 6842, 6843, 6844, 6845 AND 6765

AND

IN THE MATTER OF ADVERSE POSSESSION OF TITLE NOS MBEERE/MBITA/2278, 2279, 6886, 6887, 6888, 6889, 6890, 6891, 6892, 6893, 6894, 6386, 6387, 6388, 6389, 6390, 6391, 6392, 6393, 6394, 6873, 6874, 6831, 6832, 6833, 6834, 6835, 6836, 6837, 6838, 6839, 6840, 6841, 6842, 6843, 6844, 6845 AND 6765

BETWEEN

PHILEMON NJUE JOSECK 1ST APPLICANT
MBUKO NGARI 2ND APPLICANT
JOSECK NJIRU 3RD APPLICANT
JOHN NGARI NJIRU 4TH APPLICANT
CHARLES GITHINJI 5TH APPLICANT
JAMES PETERSON KINYUA 6TH APPLICANT
JAMES MBOGOH MUGOH 7TH APPLICANT
BERNARD MURIITHI MUGOH 8TH APPLICANT
HEZEKIAH NDAVI 9TH APPLICANT
SILVANO NYAGA NDII 10TH APPLICANT
JOSEPH BENJAMIN NJERU 11TH APPLICANT



AND

NJERU NJUE	1 ST RESPONDENT
LOISE WANJIRU IRUNGU	2 ND RESPONDENT
ANDREW MWENDIA NJERU	3 RD RESPONDENT
MONICA WAITHERERO EDWARD	4 TH RESPONDENT
GRACE MUTITU KIVULUTO	5 TH RESPONDENT
THOMAS MWANGI NJOROGE	6 TH RESPONDENT
DANIEL MACHARIA NJOROGE	7 TH RESPONDENT
MARGARET WANJIRU NJOROGE	8 TH RESPONDENT
NJUE NJERU	9 TH RESPONDENT
ALBERT NJERU GACHONI	10 TH RESPONDENT

RULING

1. This is a ruling on a summons in chambers dated 7/10/2022 and also filed in court on October 11, 2022. It is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21), Order 1 Rule 10 of the *Civil Procedure Rules, 2010*, and all other enabling provisions of law. The applicants – Philemon Njue Joseck & 10 others – are seeking joinder of a proposed defendant – Land Registrar, Mbeere South District Lands Registry – and, in addition, also seek that the same proposed party be ordered to produce some official searches, copies of greencard, and some mutation forms relating to several pieces of land. It is sought too that the same party be summoned to come and explain some anomalies – called “duplication” in the application – relating to subdivisions of some parcel of land. Finally, the applicants would wish that costs of the application be in the cause.
2. More precisely, the prayers sought are as follows:
 - Prayer 1: Spent
 - Prayer 2: That this honourable court be pleased to order that the Land Registrar, Mbeere South district lands registry be made a party to this suit as a defendant.
 - Prayer 3: That this honourable court do compel by way of an order of production directed to the proposed defendant herein being Land Registrar, Mbeere south District Lands Registry to produce before this court the following documents:
 - a. Certificates of official search for LR No Mbeere/Mbita/6893, 6393, 6395, 6836, 6837, 6838, 6839, 6840, 6841, 6842, 6843, 6844, 6845, 6886, 6887, 6888, 6890, 6891, 6892, 6893, 6894, 6873, and 6874, and any searches from resultant subdivisions emanating therefrom.
 - b. Certified copies of the register (Green card) in respect to the following parcels of land LR No Mbeere/Mbita/2276, 2277, 2278, 2279, 2281 and 6765.
 - c. Mutation forms in respect to the following parcels of land LR No Mbeere/Mbita/2276, 2277, 2280, 2281, and 6785.



Prayer 4: That this honourable court be pleased to issue summons to witness against Land Registrar, Mbeere South District Land Registry to appear and explain to this honourable court the duplication of resultant sub divisions in respect to LR No Mbeere/mbita/2280 And L.r. Mbeere/Mbita/2608.

Prayer 5: That the costs of this application be in the cause.

3. The grounds on which the application is anchored include that the applicants have been unsuccessfully trying to obtain from the proposed party the documents they are now seeking here; that the office of the proposed party has not been candid as to why it is refusing to provide the documents; that the applicants have now realized that the refusal to provide the documents has been because of duplication of the various subdivisions relating to the parcels of land mentioned; that it is necessary that the proposed party be made a defendant in the suit and also be compelled to issue the documents or be compelled to come to court to explain the confusion; and finally, that the prosecution of this matter has delayed because the documents asked for have not been provided.
4. The application came with a supporting affidavit which more elaborately explains why it is necessary to grant the orders sought.
5. The application was opposed by 1st and 10th respondents. The others indicated that they were not opposing it. The 1st and 10th respondents opposed the application by filing grounds of opposition and a replying affidavit. In the grounds of opposition, it is averred that adverse possession is always against registered owners of the land and the proposed party, being not such, can not be joined in the suit. It was stated also that the application seeks to include extraneous issues in the suit, and it attempts to plead fraud or illegalities against the proposed party without appreciating that that can not be done in an originating summons.
6. The replying affidavit shows the 1st and 10th respondents saying that the application is a non-starter and misconceived. Land parcel No Mbeere/Mbita/2280 was said to have been transmitted to one Phylis Ndita Njuki through a succession cause. Phylis is said to have subdivided the land into several other parcels, a fact the applicants are said to be aware of. Further, the originating summons as filed is said to focus on seven (7) land parcels – being Mbeere/Mbita/2276, 2277, 2278, 2279, 2280, 2281 and 2282 – and that parcel No Mbeere/Mbita/2608, though included in the originating summons, is not one of them and is infact situated about four (4) kilometers away from the other land parcels. The inclusion of this land parcel in the originating summons is said to be erroneous and the applicants were alleged to be on a fishing expedition.
7. Several other land parcels, notably land parcels No Mbeere/Mbita/2277 and Mbeere/Mbita/6391 (said to be a subdivision of parcel No 2277) were said to have their owners – said to be the deponent in the affidavit and the 10th respondent.
8. The application was canvassed through written submissions. The applicants submissions were filed on 16/04/2023. From the onset, the submissions are a bit misleading. The prayers captured or expressed in the submissions are totally different from the prayers actually sought in it. In the submissions, the applicants wrongly allege that orders of inhibition, and injunctions are sought. Then the submissions make reference to the substance of the application under consideration and the responses made in opposition to it. There is then mention of the prayers as currently sought in the application and the court is ultimately asked to allow the application.
9. The 1st and 10th respondent's submissions were filed on 17/4/2023. According to the 1st and 10th respondents joinder of the proposed party is not necessary. The case of [*Civicon Limited Vs Kivuwatt Limited & 2 others*](#) [2015] eKLR was cited and quoted to make the point that joinder of the proposed



party is not necessary since in a claim of adverse possession, only the claiming adverse possessor and registered owners can be said to be necessary parties in the eyes of the law. Another case – *Charles Lekereyo Vs Telkom Kenya Limited & another* [2018] eKLR, where joinder of Land Registrar as party was declined by the court was also cited to further reinforce the 1st and 10th respondents position.

10. The applicants were also faulted for failing to comply with the requirement of Order 37 Rule 7 of the *Civil Procedure Rules 2010*. It was pointed out that a duty is placed by that law on the adverse possessor to establish the correct owner of the land before filing a claim for adverse possession. The application now before the court was said to be an attempt to ensure compliance with that law. It was said to be a belated move aimed at addressing an issue which should have been addressed before the suit was filed. Ultimately, the court was asked to dismiss the application with costs.
11. I have considered the application, the responses made, rival submissions, and the suit as filed generally. A look at the prayers sought show that joinder of the Land Registrar is sought with a view to have him clarify issues of ownership of some parcels of land and to make available some documents of ownership. As pointed out by the 1st and 10th respondents, it is a requirement of Order 37 rule 7 of *Civil Procedure Rules* that ownership of the land being claimed by the adverse possessor be established first. Infact, subrule 2 of order 37 rule 7 requires that an extract of title be attached to the originating summons. It seems reasonably clear that the applicants are not very sure of the status of proprietorship of some of the parcels of the land they are claiming. The joinder now being sought and the documents required to be made available seem to be meant to address this problem.
12. The need to establish ownership before filing a case of adverse possession was emphasized by Dulu J in the case of *SYmon Gatutu & 587 others Vs East African Portland Cement* [2011] eKLR. Dulu J expressed himself as follows:

“requiring a certified extract is not a talismanic hoop to be jumped by an intended disseisor but the objective is to provide a means to the court to ascertain the existence and proprietorship of the suit land.”

Further, in *George Kamau Machora Vs Mary Gathoni Kamau: ELC No 89 of 2012, Nakuru* [2014] eKLR the court also observed thus:

“The main reason for the requirement is because proceedings for adverse possession can only be maintained against the title holder or current registered owner of the suit land. The purpose of the certified extract of the title is to show the status of the title and the registered details at the time of its extraction.”
13. It is clear then that a case of adverse possession can not be filed without first establishing conclusive proof of ownership. The applicants are therefore wrong to think that they can fill gaps relating to ownership while their case is already pending in court. That is something they should have done before filing the case.
14. I am also in agreement with the 1st and 10th respondents that joinder of the proposed party is not very necessary in a case of adverse possession. The matter is between the claiming adverse possessor and the registered owner. The land registrar is mainly a custodian of documents of ownership. He would not be well placed to know who possesses, occupies, or uses which land. In most cases, he would be as much of a stranger to these things as the court itself.
15. My considered view is that the applicants approached the issue of adverse possession wrongly. I have looked at the various documents of ownership made available. They do not relate to all the parcels of land mentioned. In some of them, there seems to be a mis-match in the description that shows



the identity of the land parcels. It is therefore clear that the merits of the application have not been demonstrated. I therefore dismiss the application but make no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF JUNE, 2023.

In the presence of Agness Maina for plaintiff/Applicants and Ndolo K. for the 4th to 8th defendants and Kimanzi for Kariuki for 1st, 9th & 10th defendants.

Court assistant: Leadys

A.K. KANIARU

JUDGE

