



**Okello v Osalo & 2 others (Environment & Land Case 52 of 2013)
[2023] KEELC 19841 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 52 OF 2013
BN OLAO, J
SEPTEMBER 19, 2023**

BETWEEN

SYLVESTER OKUMU OKELLO PLAINTIFF

AND

JOACHIM OUMA OSALO 1ST DEFENDANT

PASCAL OJIAMBO OSALO 2ND DEFENDANT

EDWARD AWORI OSALO (DECEASED) 3RD DEFENDANT

RULING

1. It is unfortunate that not a single witness has testified in this suit which was filed way back on July 12, 2013. However, I can see from the record herein that the original land mutated and was the subject of other cases including Nairobi High Court civil case No 6695 of 1992 involving Sylvester Okumu and the Attorney General. There have also been applications for injunctions and for the Land Registrar and Surveyor to visit the land in dispute as well as applications to amend pleadings. Many judges all now retired have at one time or another handled this dispute which appears to have commenced at the then Funyula District Court as case No 24 of 1967.
2. I beseech the parties and their counsel, in the spirit of article 159(2) (b) of the *Constitution* and the overriding objectives set out in sections 1A & 1B of the *Civil Procedure Act* - to play their roles in expediting this case.
3. The subject of this ruling is the defendants' notice of motion dated April 18, 2023 in which they seek the following orders:
 - a. Spent
 - b. Spent



- c. That the late Edward Awori Osalo the deceased 3rd defendant be substituted by the legal representative of his estate by the name Joachim Ouma Osalo who is the 1st defendant herein.
 - d. That leave be granted to the 1st and 2nd defendants to amend their statement of defence and counter-claim in terms of the annexed draft.
 - e. That the costs of the application be in the cause.
4. The application which is premised on the provisions of section 3A of the Civil Procedure Act and orders 8 and 24 of the Civil Procedure Rules is based on the grounds set out therein and supported by the affidavit of Joachim Ouma Osalo the 1st defendant herein.
 5. The gravamen of the application is that the 1st and 2nd defendants are sons of the 3rd defendant now deceased. That the plaintiff had initially filed this suit against the 1st and 2nd defendants only before amending the plaint to include the deceased. Following the demise of the deceased, who was well placed to prosecute their counter-claim because he (deceased) was the one who erected their home in 1955 prior to the Land Adjudication process, there is need to amend their defence to enable the court to fairly and effectually decide on all the issues.
 6. Annexed to the application are the following documents:
 1. Draft amended defence and counter-claim.
 2. Copy of limited grant of letters of administration issued to 1st defendant in respect to the estate of the deceased in Busia CMCSuccession Cause No 603 of 2022.
 7. The application is partly opposed and the plaintiff has filed a replying affidavit dated May 3, 2023.
 8. He has deposed, inter alia that he has no objection to prayer (a) (b) and (c) being granted.
 9. However, he opposes the grant of prayer (d) on the ground that it is not anchored on the law and is made in bad faith to bring in another parcel of land being Samia/budongo/245. That there is another suit in ELC 55 of 2015 coming up for hearing on September 26, 2023 in which the said parcel of land is part of the defendant's defence. That his claim herein involves the defendants' trespass on the land parcel No Samia/budongo/1699 which the defendants voluntarily vacated following a survey yet they now went to lay claim to by virtue of adverse possession. That their proposed counter-claim is frivolous and the sole purpose of this application is to import ELC Case No 55 of 2015 into this case yet there is no relationship between the land parcels No Samia/budongo/1699, 245 and 370. That there is already a judgment where the defendants were ordered to remove their house within three (3) months. There is also Kakamega HC Appeal No 7 of 1968 originating from the Funyula District Court civil case No 24 of 1967. The issues concerning the land parcel No Samia/budongo/1699 have therefore been adjudicated previously and this counter-claim is therefore *res judicata*. This application should therefore be dismissed with costs.
 10. The following documents are annexed to the replying affidavit:
 1. Notice of motion dated March 24, 2014.
 2. Replying affidavit dated April 4, 2018 filed in Busia CMC ELC Case No 19 of 2018.
 3. Plaint filed in Busia High Court civil case No 52 of 2013 (ELC).
 4. Register for the land parcel No Samia/budongo/245.
 5. Defence and counter-claim in Busia High Court civil case No 52 of 2013 (ELC).



6. Plaintiff's affidavit dated March 24, 2014.
 7. Proceedings in Funyula Land Disputes Tribunal Case No 24 of 1967.
 8. Proceedings in Resident Magistrate's Court Kakamega civil appeal No 7 of 1968.
 9. Judgment in High Court Kisumu civil appeal No 15 of 1971.
 10. Order issued on March 14, 2018 in Busia Cm civil case No 19 of 2018.
 11. Order issued on October 23, 2013 in Busia High Court civil case No 52 of 2013.
 12. Confirmed grant issued to the plaintiff herein in respect to the estate of Okello Ouchi Sindu In Busia High Court succession cause No 63 of 2012 on October 6, 2014.
11. The application has been canvassed by way of written submissions. These have been filed by Mr Wanyama instructed by the firm of Wanyama & Company Advocates for the Defendants and by Ms Maloba instructed by the firm of Maloba & Company Advocates for the plaintiff.
 12. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
 13. The defendants seek two (2) substantive remedies. These are:
 1. That the late Edward Awori Osalo the deceased 3rd defendant be substituted by his legal representative who is Joachim Ouma Osalo the 1st defendant.
 2. Leave to amend the defence and counter-claim.

I shall consider them in that sequence:

1. Substitution Of The Deceased 3Rd Defendant By The 1St Defendant

14. Although the death certificate of the deceased 3rd defendant was not availed, it is clear from the annexed limited grant of letters of administration issued to the 1st defendant in Busia Cm succession cause No 603 of 2022 that the deceased died on November 7, 2020. order 24 rule 4(1) of the [Civil Procedure Rules](#) provides that:
 - 4 (1) "Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit."
 - (2) "Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant."
 - (3) "Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant." Emphasis mine since the 3rd defendant died on November 7, 2020, the suit against him abated by effluxion of the law on November 7, 2021. Any application to substitute him ought to have been filed within one year from November 7, 2020. This application was filed on April 19, 2023 well out of time and although the plaintiff has no objection to the deceased 3rd defendant being substituted by the 1st defendant, there is no subsisting suit against the deceased 3rd defendant in which he can be substituted by the 1st defendant. The abatement of the suit against the deceased 3rd defendant is automatic as a



matter of law and the fact that the plaintiff did not object to the prayer of substitution is of no consequence.

15. That prayer is hereby declined.

2. Leave To Amend The Defence & Counter-claim:

16. Order 8 rule 5(1) of the [Civil Procedure Rules](#) donates wide powers to the court to amend pleadings. It reads:

5 (1) “For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

17. The general principle is that amendments to pleadings should be freely allowed even if they introduce a new cause of action so long as the other party is not prejudiced. In the case of *Eastern Bakery v Castello* 1958 EA 461, it was held that:

“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect, there is no injustice if the other side can be compensated by costs.”

See also the case of *Central Kenya Ltd v Trust Bank Ltd* 2000 2 EA 365 where the Court of Appeal held 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.”

18. Among the objections raised by the plaintiff to this application as per the replying affidavit is that the proposed counter-claim by the defendants is *res judicata*. It is his case that the issues concerning the land parcel No Samia/budongo/1699 have been determined in other suits. Indeed in his replying affidavit he has annexed pleadings and judgments from various courts. Whether or not the defendants' proposed counter-claim is *res judicata* is a matter that can only be determined on evidence where all those previous suits will be considered and a ruling made either separately by application or even in the main suit. But that cannot be a bar to a party filing a claim. It is for the other party to plead and prove that the claim is *res judicata*. I think the claim that the proposed counter-claim is *res judicata* has been raised prematurely because the application to amend has not even been allowed.
19. The plaintiff has also in paragraph 19 of his replying affidavit deposed that the defendants have not been on the land in dispute for over 12 years to entitle them to orders in adverse possession. Again, it is premature for the plaintiff to make that claim at this stage. It will be upto the defendants to lead evidence to establish a claim based on adverse possession which the plaintiff will have an opportunity to rebut. The defendants are entitled to pursue their claim in a court of law no matter how weak it may appear to be. I do not see how such a claim can, at this stage, be frivolous, vexatious or an abuse of the process of this court as deposed in paragraph 10 of the plaintiff's replying affidavit. As to whether or not there is a relationship between the land parcels No Samia/budongo/1699, 245 and 370 or whether the plaintiff is being denied his rights unlawfully, that, again, is an issue which will be determined at the trial.



20. I am therefore persuaded that to enable this court determine all the issues involved in this dispute, the application for amendment should be allowed but only in so far as it seeks to amend the counter-claim as per the annexed draft defence and counter-claim. However, the proposed amendment to substitute the 3rd defendant with the 1st defendant is declined for the reasons given above.
21. As this court has been informed that there is Busia ELC Case No 55 of 2015 scheduled for hearing on September 26, 2023 and in which the issues being raised in the counter-claim have been pleaded, I will direct that both cases be mentioned on that day for directions so as to consider the possibility of consolidating the two suits.
22. The up-shot of all the above is that upon considering the notice of motion dated April 18, 2023, I make the following disposal orders:
 1. The prayer to substitute the deceased 3rd defendant with the 1st defendant is declined.
 2. The prayer to amend the defence to include the counter-claim as per the annexed draft defence and counter-claim is granted. However, there will be only the 1st and 2nd defendants in that defence and counter-claim.
 3. The amended defence and counter-claim be filed and served within 14 days from the date of this ruling.
 4. The plaintiff shall have 14 days from the date of service to file and serve his reply to the amended defence and his defence to the counter-claim.
 5. Either party is at liberty to also file any further documents together with their amended pleadings.
 6. This suit and Busia ELC Case No 55 of 2015 shall be mentioned on September 26, 2023 for further directions. For avoidance of doubt, Busia ELC No 55 of 2015 will not proceed to hearing on September 26, 2023 and parties are advised not to bring their witnesses on that day.
 7. Costs shall be in the cause.

BOAZ N. OLAO

JUDGE

19TH SEPTEMBER 2023

Ruling dated, signed and delivered on this 19th day of September 2023 by way of electronic mail.

BOAZ N. OLAO

JUDGE

19TH SEPTEMBER 2023

