Mario v Kobuthi & 2 others (Environment & Land Case 46B of 2016) [2022] KEELC 15725 (KLR) (5 May 2022) (Ruling)

Neutral citation: [2022] KEELC 15725 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE 46B OF 2016

A KANIARU, J

MAY 5, 2022

BETWEEN

SAFERA WEGOKI MARIO ..... APPLICANT

AND

EDWARD NDWIGA KOBUTHI ..... 1ST RESPONDENT

THE LAND REGISTRAR EMBU ..... 2ND RESPONDENT

JOSEPH NTHIGA MUKUTHU ..... 3RD RESPONDENT

RULING

1. What is before the court for determination is a notice of motion dated November 6, 2020 and filed on July 26, 2021. The Application is expressed to be brought under Order 8 rule 3 &5(1) of the *Civil Procedure Rules* and all other enabling provisions of the law.

Application

2. The parties in the application are Safera Wegoki Mario the applicant and plaintiff in the suit while Edward Ndwiga Kobuthi, The Land Registrar Embu and Joseph Nthiga Mukuthu are the respondents in the application and defendants in the suit.

3. The motion came with two (2) prayers which are as follows:-

> Prayer 1: THAT the Plaintiff/Applicant herein be granted leave to further Amend her Plaint in terms of the draft further amended plaint annexed hereto.
>
> Prayer 2: THAT the costs of this application be in the cause.

4. The application is premised on the grounds on the face of the application and the supporting affidavit sworn by the applicant. She deposed that there was need to further amend the plaint in terms of

the annexed plaint and that the amendment sought was innocuous. She averred that the respondents would not be prejudiced as they would have a chance to amend their defence. The amendment was said to be necessary as it sought to clarify issues raised in the plaint to enable the court reach a just and fair conclusion. Further it was said that the plaint does not bring out properly the cause of action against the respondents. The court was urged to allow the application to enable it determine the real issues in controversy.

5. The 1st respondent opposed the application by filing a replying affidavit on February 18, 2021 and dated February 17, 2021. He deposed that the application was an abuse of the court process and an afterthought as, according to him, it introduces a new cause of action. The application was said to be a delaying tactic and one that would prejudice the expeditious disposal of the suit. It was further argued that it does not raise substantive reasons as to why it should be allowed and the court was urged to dismiss it.

6. The 3rd respondent equally opposed the application by filing a replying affidavit dated March 15, 2021 and filed on March 19, 2021. He too averred that application was bad in law and an abuse of the court process. It was his assertion that a claim on adverse possession ought to be brought by way of originating summons and that the applicant was attempting to bring a new cause of action unprocedurally.

7. The parties canvassed the application by way of written submissions. The appellant filed her submissions on November 8, 2021. She submitted that the application had merit as the law provided that a party could amend his or her pleadings at any stage of the proceedings. It is her contention that the respondents opposed the amendment for reason that the amendment sought to introduce a new cause of action and according to her Order 8 rule 3(5) of the Civil Procedure Rules allowed a party to amend pleadings notwithstanding that a new cause of action is being introduced.

8. It was averred that the amendment sought is meant to bring an alternative prayer for adverse possession while retaining the initial prayers in the plaint and it was said that this does not amount to introduction of a new cause of action in it's strict sense. The applicant pledged to rely on the same documents and evidence already on the court record.

9. Further, the court, in addressing the issue of prejudice on the parties, was called upon to balance the prejudice likely to be caused to either party by allowing or disallowing the application. On the issue on the intended amendment being a claim on adverse possession brought by way of a plaint as opposed to originating summons, the applicant was of the view that the respondent would have a chance to file a preliminary objection on the issue. She further submitted that the Court of Appeal in the case of *Chevron (K) Ltd v Harrison Charo wa Shutu* [2016] eKLR (Makhandia, Ouko & M'Inoti JJA had held that a claim on adverse possession could be brought by way of a plaint. In the end, the court was told to allow the application.

10. The 1st and 3rd respondents filed their submissions on 20.6.2021 and September 14, 2021 respectively. Their submissions are substantially similar. In the said submissions it was submitted that the introduction of a new cause of action would change the action into a substantially different character. The applicant was accused of attempting to bring a new cause of action unprocedurally through a plaint as opposed to an originating summons. The application was said not to raise substantive reasons as to why it should be allowed and it was argued that the applicant had failed to disclose the prejudice they would suffer if the application is not allowed while the respondents stood to be prejudiced. Ultimately the court was urged to dismiss the application as it was said to lack merit and was incompetent.

Analysis and Determination.

11. I have looked at the application, the responses made by the respondents and the rival submissions by the parties. The sole issue for determination is whether the amendment sought by the applicant should be allowed.

12. The legal provision governing amendment of parties is Section 100 of the *Civil Procedure Act* which provides as follows;

> " The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding".

13. Order 8 of the Civil Procedure Rules makes provision for amendment of pleadings. Order 8 Rule 1 (1) of the *Civil Procedure Rules* stipulates that; "The Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings."

14. Amendment of pleadings should be allowed freely and at any stage of the proceedings provided the amendment does not result in prejudice or injustice to the other party that cannot be compensated for by way of costs. See the case of *Central Kenya Ltd v Trust Bank & 4 others* Civil Appeal No 222 of 1998, [2000] eKLR.

15. The purpose for seeking an amendment was well stated in the *Halsbury's Laws of England, 4th Edition (re-issue)* Vol.36 (1) at Paragraph 76 as follows;

> "...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings and for this purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion."

16. The factors to be considered in an application for amendment of pleadings was well set out in the case of *Central Kenya Ltd v Trust Bank Ltd and 5 others* [2000] eKLR where the court stated as follows;

    i. That the amendment is necessary for determining the real questions in controversy.

    ii. To avoid multiplicity of suits provided there has been no undue delay.

    iii. Only where no new or inconsistent cause of action is introduced "ie" if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.

    iv. That no vested interest or accrued legal rights are affected.

    v. So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

17. In the application herein, the applicant has sought leave to further amend the plaint. She avers that the amendment is necessary as it would bring out the real issues in controversy in the suit. She asserted that the amendment would aid in clarifying issues raised in the plaint to enable the court reach a just and

fair conclusion and she averred that the amendment sought would not prejudice the respondents. It was not also bringing a new cause of action against the respondents.

18. The 1st and 3rd respondents, in opposition to the application, averred that the application was an abuse of the court process. It was said to be an afterthought and a delaying tactic that would essentially prejudice the expeditious disposal of the suit. According to the respondents, the application did not raise substantive reasons as to why it should be allowed and the court was urged to dismiss it. Their main contention however seems to be the fact that the amendment seeks to introduce a new cause of action which is on adverse possession. They are of the view that it will change the cause of action into a substantially different character. The other argument they have advanced is that the new cause of action was being introduced unprocedurally through a plaint as opposed to an originating summons.

19. The applicant is however of the view that though the allegation is that they are introducing a new cause of action, they were not intent on introducing any new documents or evidence before the court but would rely on the same pleadings. With regard to the allegation of the amendment being introduced unprocedurally, they are of the view that a claim on adverse possession can still be argued through a plaint. They further said that the respondents would still have a chance to file a preliminary objection to object to the pleadings filed.

20. I have looked at the amendments sought by the applicant. From the draft further amended plaint attached to the application, it is evident that the applicant seeks to introduce the concept of ownership by way of adverse possession, which is essentially a new cause of action from the one pleaded in the plaint initially. The question that begs is whether one can introduce a new cause of action through an amendment of pleadings.

21. The applicant, in support of the amendment to introduce a new cause of action, sought to rely on Order 8 rule 5 of the *Civil Procedure rule* 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".

22. Further reliance was made on the case of *Chevron (K) Ltd v Harrison Charo wa Shutu* [2016] eKLR (Makhandia, Ouko & M'Inoti JJ.A where it was said that the Court of Appeal held that a claim on adverse possession could be brought by way of a plaint. The case relied upon was an appeal where among other issues, the learned judge in the lower court was said to have erred in failing to uphold the appellant's objection to the defence of adverse possession being raised in the statement of defence rather than by an originating summons or counter-claim.

23. The said court in it's determination had stated that a claim on adverse possession could be brought by way of a plaint. In the said decision it was stated as follows; "....a claim by adverse possession can be brought by a plaint." The said court went ahead to cite with approval the case of *Gulam Mariam Noordin v Julius Charo Karisa*, Civil Appeal No 26 of 2015, [2015] eKLR where the court stated

> " Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the

question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala v Okumu [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in Bayete Co Ltd v Kosgey [1998] LLR 813 where the plaint made no specific plea of adverse possession, the plea was nonetheless granted."

24. From the foregoing, a claim on adverse possession can therefore be brought by way of plaint. As already alluded to above, amendment of pleadings ought to be allowed freely at any stage of the proceedings provided the amendment does not result in prejudice.

25. On whether the respondents will be prejudiced, they have averred that they stand to be prejudiced if the amendment is allowed. The nature of the prejudice is said to be the hindrance in expeditious disposal of the suit. The applicant on the other hand has argued that the respondents would not be prejudiced as they would have a chance to amend their defence. From the nature of the amendment sought, I do not see any prejudice that will be occasioned to the respondents if the amendment is allowed. The applicant has stated that she does not intend to introduce any new evidence. Furthermore as rightly put by the applicantsthe respondents will still have a chance to respond to the amended plaint. Further still, this suit has not proceeded for hearing and the parties have shall have the chance to challenge and interrogate the new cause of action introduced by the applicant.

26. On whether the application has been brought timeously, I note that the parties did not submit on this issue. However from the pleadings, the applicant filed the suit in the year 2016 and amended the pleadings in 2018. He then filed this application in 2020. I find that there was a delay in bringing the present application. On whether the said delay was inordinate the court, in the case of *Utalii Transport Company Limited & 3 others v NIC Bank & another* [2014] eKLR, stated as follows:

> "... whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case ... caution is advised for courts not to take the word inordinate in its ordinary meaning ..."

27. Further in the case of *Central Kenya Limited v Trust Bank Limited* [2000] EALR 365], the learned judges stated;

> "....mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs.

28. Having already stated that no prejudice will be occasioned to the respondents, I do not therefore consider the delay to be a ground for declining to grant leave for the said amendments to be made.

29. The main aim of an application for an amendment is to ensure that the court determine the real issues in controversy between the parties. I find that though the amendment sought essentially introduces a new cause of action, it will enable the court determine all the questions in the suit and the real controversy between the parties. The said cause of action is allowed by law as it is based substantially on the same facts pleaded in the suit as filed.

30. The upshot of the foregoing is that the application is allowed. However considering that indeed there was a delay in bringing the application for the further amendment of the plaint, I order the applicant to meet the costs of this application.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 5TH DAY OF MAY 2022.

A.K. KANIARU

JUDGE

In the presence of Muthee for Andande for Plaintiff/applicant; M/s Muriuki for Ngige M/s for 1st defendant, Kathungu for 3rd defendant/respondent and M/s Muriuki for Kiongo for 2nd defendant.

Court Assistant: Leadys