



REPUBLIC OF KENYA



**KENYA LAW**  
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**Matara & another v Parish) & 6 others (Environment & Land Case  
80 of 2021) [2022] KEELC 3237 (KLR) (7 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3237 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT & LAND CASE 80 OF 2021**

**JM KAMAU, J**

**JUNE 7, 2022**

**BETWEEN**

**TRUPHENA KWAMBOKA MATARA ..... 1<sup>ST</sup> PLAINTIFF**

**RUTH KEMUNTO MATARA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**THE REGISTERED TRUSTEES DIOCESE OF KISII (NYANSIONGO  
PARISH) ..... 1<sup>ST</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR NYAMIRA COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**THE COUNTY SURVEYOR NYAMIRA COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**SELINA KWAMBOKA NYANSAGARA ..... 4<sup>TH</sup> DEFENDANT**

**JOHN OUMA ZACHARIAH ..... 5<sup>TH</sup> DEFENDANT**

**AGNES KEMUNTO AGWACHA ..... 6<sup>TH</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. This suit was commenced on September 3, 2020 by way of a Plaint for the following orders: -
  - (a) An order of revocation, nullification and/or cancellation of all titles created within and/or superimposed over the Plaintiffs land parcel number Nyansiongo Settlement Scheme/138 otherwise touted as Nyansiongo Settlement Scheme/519,976, 977, 978 and 979.
  - (b) An order of declaration that the defendants conduct of purporting to deal and/or affect the boundaries and limits or parcel number Nyansiongo Settlement Scheme/138 without the plaintiff's knowledge or consent of the Land Control Board, to be illegal, null and void.



- (c) An order directing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to forthwith delete all the parcels created and superimposed on or the suit land from the area index Map of the suit land and such entries and records be expunged from the records held by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
  - (d) An order of permanent injunction restraining the defendants, their agents or servants from whatsoever manner interfering with the suit land in whatsoever manner.
  - (e) Costs of the suit and interests.
  - (f) Any such further and/or other relief as the honourable court may deem fit and expedient so to grant.”
2. The cause of action as alleged by the plaintiffs arose from what they perceive to be criminal conduct by the Defendants of delineating and alienating part of the parcel of land known as LR No. Nyansiongo Settlement Scheme/138 which has now created LR Nos. Nyansiongo Settlement Scheme/519, 976, 977, 978 and 979. There are respective Defences denying all these averments. After the filing of an inconclusive report which was meant to ascertain the beacons on the ground by the Land Registrar and County Surveyor on March 4, 2021 the court ordered that the Nyamira Land Registrar and County Surveyor do re-survey the parcel of land herein and file in court a Conclusive Report with the parties given liberty to engage their private Surveyors in the exercise. This was on October 26, 2021. Once again an Inconclusive Report dated March 4, 2021 was filed in court on December 14, 2021. A final report was filed on February 15, 2022. In the meantime, the plaintiffs filed an application on March 18, 2022 for leave to amend the plaint. The same is meant to introduce the claim of adverse possession. A draft amended plaint is attached to the application with prayer number (e) being dedicated to adverse possession.
  3. The main grounds of opposition by the 1<sup>st</sup> defendant is that the Application is meant to avoid the effect of the latest surveyor’s report and that the Application offends the provisions of section 30 of the Limitation of Actions Act and order 37 rule 7 of the Civil Procedure Rules. The 5<sup>th</sup> and 6<sup>th</sup> defendants have opposed the application on the ground that the same is meant to introduce a new cause of action that cannot be pleaded in a plaint.
  4. I have sifted through the submissions by Counsel for both sides and I agree with the 6<sup>th</sup> defendant that the court will not permit an amendment that is inconsistent with the original pleadings and entirely alters the nature of the defence or plaint and that the power of amendment is to be jealously exercised in all circumstances of each individual case so that a party may not turn his suit or defence into a gamble at the opponent’s expense. However, I do not see the amendment proposed as one that would change the cause of action into one of substantially different character.
  5. The Court of Appeal referring to the holding in the Njuguna Ndatbo case in Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR Malindi Civil Appeal No 17 of 2016 stated thus: -

“The courts, have since this decision, held that a claim by adverse possession can be brought by a plaint. See *Mariba v Mariba* Civil Appeal No 188 of 2002, Counterclaim or defence as was the case here. In *Gulam Mariam Noordin -vs- Julius Charo Karisa* Civil Appeal No 26 of 2015, where the claim was raised in the defence this court in rejecting the objection to the procedure stated as follows: -

“Where a party like the respondent is 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 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 -vs- 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 -vs- Kosgey (1998) LLR813 where the plaintiff made no specific plea for adverse possession, the plea was nonetheless granted”.

6. In Emily *Chepkor Chepkwony v Paul Arap Chandoek* [2021] eKLR Nakuru ELC No. 35 of 2019 Justice Mutungi observed as follows:

“It is not lost to the court that in the majority of cases where the plaintiff instituted a claim for title on the basis of adverse possession commenced by an originating summons, the court invariably directs that the originating summons be deemed to be a plaint and the response thereof a defence and that the suit be heard by way of Viva voce evidence. This essentially is to enable the evidence of the parties to be tested under cross examination. Order 37 Rule 19 of the Civil procedure empowers the court to convert an originating summons into a plaint and to proceed with the hearing of the matter as if the action had been commenced by way of a plaint. It cannot therefore be argued that where the suit that pleads adverse possession and is commenced by way of plaint is fatally defective. The nature of the prayers sought in the plaint are such as would invite oral evidence and I am satisfied an originating summons would not have been an appropriate pleading to afford the parties the opportunity to fully ventilate their issues. No party would suffer any prejudice if the suit was permitted to proceed to formal trial as each party will have the opportunity to adduce evidence and cross examine the witnesses of the other party. It is my view that if the preliminary objection were to be upheld and the plaintiff’s suit struck out, it would amount to elevating reliance on procedural technicalities to a very high pedestal and to ignore the edict *the constitution* under article 159 (2) (d) gives to the court to administer justice without undue regard to the technicalities of procedure. The *Civil Procedure Act* under sections 1A,1B and 3A enjoins the courts to administer justice in a just expeditious, efficient and cost-effective manner.”

7. I would also add that if we locked out the Plaintiff’s claim of adverse possession, they would not get an opportunity of prosecuting it elsewhere. This is because any subsequent suit would be *Res judicata* under Explanation number (4) of section 7 of the *Civil Procedure Act* which provides as follows: -

“Any matter which might and ought to have been made ground of Defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

Read alongside section 7 of the Act,

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



8. One would appreciate why the court would not wish to lock out the plaintiff's claim of adverse possession. The plaintiff's claim number (d) in the plaint asking for:

“An order of permanent injunction restraining the defendants, their agents or servants from whatsoever manner interfering with the suit land in whatsoever manner.”

is a matter directly and substantially in issue with the prayer of adverse possession. The set of facts are the same.

9. The fears raised by the 1<sup>st</sup> defendant that the application is meant to avoid the effect of the latest surveyor's report should not cause uneasiness to anyone since immediately after the exercise of amendment is over, we shall proceed from where we left.

10. In the premises I allow the application for amendment as follows: -

(a) The plaintiff's draft amended plaint be deemed to have been filed upon payment of the requisite fee which must not exceed seven days from the date hereof inclusive of the service period.

(b) The defendants are allowed fourteen (14) days to file and serve amended defence if any.

(c) The matter will then be mentioned in open court on July 4, 2022 for further directions.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 7TH DAY OF JUNE, 2021.**

**MUGO KAMAU**

**JUDGE**

**In the Presence of: -**

**Court Assistant – Sibota**

**Mr. Ondande for the Plaintiffs**

**Ms. Nyaenya for the Defendants**

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