



Janefa Okuyoti Owino & 4 others v Peter Barasa Wandabusi & 4 others (Environmental and Land Originating Summons 64 of 2018) [2022] KEELC 12716 (KLR) (6 July 2022) (Ruling)

Neutral citation: [2022] KEELC 12716 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 64 OF 2018**

BN OLAO, J

JULY 6, 2022

BETWEEN

**JANEFA OKUYOTI OWINO 1ST APPLICANT
JERALD NALO ONGANDO 2ND APPLICANT
WILSON ODUOR ONGANDO 3RD APPLICANT
JOHN OKELLO ONGANDO 4TH APPLICANT
PETER ONYANGO OKELO 5TH APPLICANT**

AND

**PETER BARASA WANDABUSI 1ST RESPONDENT
CONSTANT BARASA WANDABUSI 2ND RESPONDENT
JULIUS JUMA WANDABUSI 3RD RESPONDENT
CHARLES JUMA WANDABUSI 2ND RESPONDENT
JULIUS JUMA WANDABUSI 4TH RESPONDENT
SILVESTER BARASA WANDABUSI 4TH RESPONDENT
CONSTANT BARASA WANDABUSI 5TH RESPONDENT**

RULING

(1) In *Eastern Bakery .v. Castelino* 1958 E.A 461, it was held that: -

“It will be sufficient, for purposes of this case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.”



2. In *Central Kenya Ltd. v. Trust Bank Ltd* 2000 2 E.a 365, the Court of Appeal had the following to say with regard to amendment of pleadings: -

“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.”

And in *Bullen And Leake Jacobs Precedents Of Pleading 12th Edition*, it is provided that: -

“..... power to amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side, that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh suit.”

The general power to amend pleadings is found in section 100 of the *Civil Procedure Act* which provides that: -

“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.” Emphasis mine.

Finally, order 8 rule 5 (1) of the *Civil Procedure Rules* reads: -

“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” Emphasis mine.

It is clear from the above that the principle guiding the courts in such applications is to freely allow amendments or pleadings at any stage of the proceedings. The court should however ensure that no prejudice is caused to the other party which cannot be made good by an award of costs. Such amendments should be geared towards ensuring that the court is able to determine the real issues in controversy between the parties.

2. When the applicants herein first approached this court *vide* their originating summons dated November 28, 2018, they sought the main order that they are entitled by way of adverse possession to a portion of land measuring 23.42 acres comprised in the land parcel No West Bukusu/south Mateka/1892 having occupied it since 1975 when they purchased it from one Lazaro Wandabusi Masikini now deceased and whose estate is represented by the respondents.
3. The respondents disputed the claim by filing replying affidavits denying that the applicants had purchased the suit land from the deceased who was their father. They added that they acquired the suit land by way of transmission and that each had been given a share thereof.
4. Unknown to the applicants, so they claim, the land parcel No West Bukusu/south Mateka/1892 had in fact already been sub – divided to create land parcels NO WEST Bukusu/south Mateka/6174 to



6181 both numbers inclusive (the suit lands). This prompted the applicants to approach this court *vide* their notice of motion dated March 2, 2022 and predicated under the provisions of sections 1A, 1B, 3, 63(e) of the Civil Procedure Act, order 8 rule 3 of the Civil Procedure Rules and article 159(2) (d) of the Constitution seeking the following orders: -

1. That leave be granted to the applicants to amend their originating summons.
2. That the amended originating summon be deemed as duly filed and served.
3. That costs of this application be provided for.

The application which is the subject of this ruling is premised on the grounds set out therein and is supported by the affidavit of Jerald Nalo Ongando the 2nd applicant herein.

- (5) The gravamen of the application is that when the applicants filed their originating summons, they were not aware that the land parcel No West Bukusu/south Mateka/1892 had been secretly sub – divided to create land parcels No West Bukusu/south Mateka/6174 to 6181 both numbers inclusive. The proposed amendments will not prejudice the respondents who will have corresponding leave to amend their defence. That the intended amendments will allow for the hearing and determination of all the issues in this dispute which has been in court since 1995 and is made and in good faith. Annexed to the application are the following documents: -

1. The amended originating summons which now describe the suit land as West Bukusu/south Mateka/6174, 6175, 6176, 6177, 6178, 6179, 6180 and 6181 (the suit lands).
2. Verifying affidavit.
3. Proceedings in land dispute case between *John Okello .v. Lazaro Wandabusi* in respect of land parcel West Bukusu/ South Mateka/336.

I must at this point observe that all the certificates of search for the suit lands are not annexed to the supporting affidavit but upon perusal of the pleadings, I have been able to see the certificates of search in respect of the land parcels No 6174, 6175, 6176, 6178 and 6180. However, there is no doubt that indeed the land parcel No West Bukusu/south Mateka/1892 has since been sub – divided to create land parcels No West Bukusu/south Mateka/6174 to 6181 as this is confirmed in paragraph six of the replying affidavit of Peter Barasa Wandabusi (the 1st respondent) herein. I must therefore take this earliest opportunity to direct counsel for the applicants to file all the relevant documents by the time this suit is listed for pre – trial.

- (6) In opposing the application, the 1st has by his replying affidavit dated March 12, 2022 deponed, inter alia, that by a grant issued and confirmed in *Bungoma H c Succession Cause No 477 of 2009*, he was appointed as the administrator to the estate of the late Lazaro Wandabusi Masikini. Pursuant to that grant, the land parcel NO West Bukusu/south Mateka /1892 was sub – divided and the applicants were informed of their entitlement as far back as February 26, 2018 by the Deputy Commissioner Bumula and therefore they cannot claim not to have known about the sub – division of the land parcel No West Bukusu/south Mateka/1892. That indeed the applicants filed an application dated March 9, 2018 seeking to stop the said sub – division but the said application was later withdrawn with costs. That this application has not been made timeously and will, if allowed, prejudice the respondents who have already filed their defence. This application should therefore be dismissed with costs. The following documents are annexed to the replying affidavit: -

1. Confirmed grant issued in *Bungoma H c Succession Cause No 477 of 2009* on June 18, 2014.



2. Letter of consent to sub – divide the land parcel NO West Bukusu /south Mateka/1892.
 3. Letter dated February 26, 2018 from the Deputy County Commissioner Bumula Sub – County in respect to the land parcel NO West Bukusu/south Mateka/1892 – Lazaro Wandabusi Masikini.
 4. Application filed by the applicants in Bungoma H c *Succession Cause No 477 of 2009* on March 15, 2022 seeking to review the grant issued therein and to preserve the land parcel NO West Bukusu/ South Mateka/1892 pending the hearing of the application.
 5. Supporting affidavits of Janefa Okutoyi Owino, Jerald Nalo Ongando And Wilson Oduor Ngando.
- (7) When the application was placed before me on June 28, 2022, I directed that it be canvassed by way of written submissions to be filed on or before March 3, 2022, I directed that it be canvassed by way of written submissions to be filed before March 16, 2022 and meanwhile, the hearing of the suit which had been slated for that day was put on hold pending the determination of this application.
 - (8) Meanwhile by a consent order dated June 30, 2021, John Okello Ongundo (the 4th applicant) was substituted with his son Peter Onyango Okelo.
 - (9) Submissions were filed both by MR Ashioyainstructed by the firm of Ashioya & Company Advocatesfor the applicants and by MR Makaliinstructed by the firm of J O Makali & Company Advocatesfor the respondents.
 - (10) I have considered the application, the rival affidavits and annexures as well as the submissions by counsel.
 - (11) It is well settled that the main purpose in allowing amendments of pleadings is so as to ensure that the real issues in a dispute are determined. The green card to the land parcel No West Bukusu/south Mateka/1892 has not been availed but it is clear from a perusal of the certificate of search in respect to the land parcel NO West Bukusu/south Mateka/6174 that the suit lands were created in 2018 which is the same year this suit was filed. And as has already been stated above, the existence of the suit lands is not in doubt and has been conceded by the respondents. In paragraphs six (6) and seven (7) of his replying affidavit while making reference to the sub – division of the land parcel NO West Bukusu/ south Mateka/1892, the 1st respondent stated thus: -
 6. “That subsequently, the said land was subdivided in accordance with the certificate of confirmation of grant after consent was duly given. A copy of the consent is annexed hereto and marked PBW 2.”
 7. “That the applicants cannot allege that they were not aware of this as by letter dated February 26, 2018 issued by the Deputy County Commissioner Bumula at their insistence, we were summoned to his offices. The applicants attended and were duly informed of their entitlement, if any, as per the succession case. A copy of the letter is annexed herein and marked PWB 3.”

The respondents are therefore correct when they state, as per paragraph fifteen (15) of the 1st respondent’s replying affidavit, that “the application has not been made timeously.” Even if the applicants claim, as they have, that the suit lands were secretly created, surely, with due diligence, by the time they were filing this suit on November 29, 2018 they should have done a search which could have confirmed to them that the suit lands were created in June 2018. What is clear to me, from the documents filed herein, is that the applicants were pursuing their claim to the suit



lands via the succession proceedings in Bungoma High Court *Succession Cause No 477 of 2009*. When those proceedings came to an end on November 27, 2018, they promptly filed this suit on November 29, 2018. That complaint by the respondents that this application has not been filed “timeously” is therefore well merited.

- (12) The delay in filing this application notwithstanding, it is clear from precedents that although there should be no undue delay in making such an application, such amendments can be made at any stage of the proceedings including appeal so long as no prejudice is caused to the other party. In his submissions on the issue of delay, counsel for the respondents has said as follows in paragraph four (4): -

“Applying the said principles, the respondents contend that the applicants are guilty of inordinate delay. In view of the fact that adverse possession runs against title, the respondents have not held title for a period of 12 years for it to be extinguished. Their accrued legal right is to be affected. The amendment would cause them an injustice. The application should therefore be dismissed with costs.”

The issue of whether the applicants have or have not held title to the suit lands for a period of 12 years is really one to be canvassed during the trial of the main originating summons. It cannot be a bar to an application for amendment of pleadings. The suit lands are registered in the names of the respondents and the delay in filing this application is one that can be ameliorated with an order of costs. I do not see what injustice it will cause to the respondents who will have the right to amend their replying affidavit. The spirit of article 50(1) of the Constitution is that every person be accorded an opportunity to be heard in his case. It is of course true that the suit lands were created following a succession process. The applicants’ claim however is that even before the sub – division of the land parcel No West Bukusu/ south Mateka /1892 to create the suit lands, they had occupied it for over 43 years. They are therefore seeking orders that they entitled thereto by way of adverse possession. That will be a matter of trial.

- (13) Ultimately therefore and having considered all the matters herein, I allow the notice of motion dated March 2, 2022 in the following terms: -
1. The amended originating summons together with all supporting affidavits and other documents be filed and served upon the respondents within 10 days from the date of this ruling.
 2. The respondents shall have 15 days from the date of service to file and serve their replying affidavits and other supporting documents.
 3. Parties must ensure that they file legible documents.
 4. I have seen among the documents filed by the respondents, a land sale agreement dated March 9, 1980 which is in Kibukusu language. An english translation be certified and filed.
 5. Affidavits of service be filed by all parties.
 6. Pre – trial shall be held virtually before the Deputy Registrar on August 2, 2022 who shall then take a date for hearing.
 7. The trial shall be by way of viva voce evidence in open court.
 8. The applicants shall meet the costs occasioned by this application.

BOAZ N. OLAO.



J U D G E

6TH JULY 2022.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMAON THIS 6TH DAY OF JULY 2022 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO.

J U D G E

6TH JULY 2022.

