



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 39 OF 2017

MARJORY NJERI NJOROGE.....APPLICANT /PLAINTIFF

VS

JOSEPH MUCHIRI NJUGUNA.....RESPONDENT /DEFENDANT

RULING

1. The application is brought by the Plaintiff/Applicant seeking leave to further amend the previously originating summons on the 4/10/17. The amendment seeks to introduce the prayer of adverse possession which according to the Applicant is the subject of the suit.
2. The grounds upon which the application is premised are annexed thereto as well as the supporting affidavit which anchor the application. The Applicant avers that the prayer of adverse possession was advertently omitted. That the Defendant stands to suffer no prejudice if the prayer is included in the Originating summons.
3. In opposing the application, the Respondent filed grounds of opposition dated the 25/6/2021. The Respondent faults the Applicant for bringing the amendments late in the day and at the final stage of the trial hence violating his right to fair trial. That the application is prejudicial beyond compensation because witnesses have since testified and cross examined. At best that the application is an abuse of the process of the Court and a waste of time. That the proposed amendment is not in good faith and has no bonafides at all.
4. The Respondent was of the view that the real question in controversy and for determination by the Court is the doctrine of adverse possession and the sought amendments are merely semantics and the application is intended to cause delay to the detriment of the Respondent in the manner in which the Applicant intends to steal a match against the Respondent.
5. Parties elected to canvass the application by way of written submissions. The Applicant filed written submissions on the 8/7/2021. It is to be noted that the Respondent's written submissions are not on record despite the undertaking to the Court on the 27/7/2021 made by the Respondent's learned Counsel to file the same.
6. I have read and considered the written submissions on record.
7. The issue for determination is whether the Applicant is entitled to leave to amend the originating summons to include the prayer of adverse possession.
8. Amendment of pleadings are generally governed by 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".
9. 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."
10. Under Order 8 Rule 5 it is stipulated 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".

11. Further, **Halsbury's Laws of England, 4th Edition (re-issue) Vol.36(1) at Paragraph 76** sets out the requirements for an amendment thus;

“...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.”

12. In the case of **Eastern Bakery vs Castelino (1958) EA 461**, Sir Kenneth O'Conner, President of the predecessor of this Court stated that;

“It will be sufficient ... 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.”

13. The Applicant has argued that the prayer for adverse possession was omitted in the suit and yet her whole case is anchored on the doctrine of adverse possession. It is to be noted that the Respondent in his opposition stated that the real question in controversy and for the determination by the Court is the doctrine of adverse possession. That the sought amendment was a matter of semantics. I understood this opposition to say that the proposed amendment is admitted on the basis that the controversy before the Court is whether or not a prayer for adverse possession is sustainable.

14. I have perused the Originating Summons dated the 10/10/2011 and under para 1 and 4 in her prayers the Applicant sought declaratory orders that she had acquired an overriding right over the suit land under section 30 of the Land Registered Land Cap 300 of the Laws of Kenya. Para 4 was more explicit as it sought declaratory orders under section 37 of the Limitations of Actions Act. Under para 10 of the supporting affidavit of the Applicant dated the 10/10/2011, the Applicant avers that she has been in possession of the suit land from 1981 which possession has not been interrupted.

15. In the subsequent amendments to the Originating Summons resting on the one dated the 4/10/2020, the issue of adverse possession can be gleaned from paras 1, 1a, and 4 of the said pleading.

16. I have also perused the defense of the Respondent and starting from the replying affidavit dated the 1/2/2012 under paras 2, 7 and 11 of the said pleading it is to be noted that the Respondent was clear that the issue in controversy is the propriety of the Applicant's prayer for a declaration of title by way of adverse possession.

17. It is also to be noted that without any doubt that the parties have so far conducted their case with the issue in controversy being that of adverse possession.

18. I therefore agree with the Respondent that the issue is known and has been canvassed by the parties and as such it is not new.

19. I am guided by the provisions of the substantive and procedural law that mandate this Court to allow amendments to pleadings at any time before judgement is delivered.

20. I have cautiously addressed my mind to the issue of prejudice on the Respondent. I see none. It is true that the parties' witnesses have testified and cross examined, the basis, being adverse possession. No prejudice has been demonstrated save for what is compensable by costs.

21. On the issue of delay precipitated by the various applications (filed justifiably) by the parties it is to be noted that to a large extent, the applications have contributed to the delay in finalizing this matter. The parties are best advised to expedite the matter to its logical conclusion.

22. In the end I allow the application and make the following specific orders;

a. The Applicant is hereby granted leave to file and serve the amended plaint within the next 7 days from the date hereof.

b. The costs of the application shall be paid by the Applicant to the Respondent but on the higher scale.

23. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 14TH DAY OF SEPTEMBER 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Mungai for the Plaintiff

Defendant: Absent

