



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**LAND AND ENVIRONMENTAL DIVISION**

**ELC CIVIL SUIT NO. 483 OF 2011**

**AARON TAFARI OUKO.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**ROSALYN DOLA OUKO.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**(Suing as administrators of the estate of the late Jason Atinda Ouko)**

**VERSUS**

**SOLOMON BOIT.....DEFENDANT/APPLICANT**

**RULING**

1. Before this Court for determination is the Application of the defendant/applicant dated 26/06/2021 which seeks leave to amend their statement of defence and counterclaim. The grounds upon which the application is founded are set out on the body of the application as filed under Sections 1A,1B, 3A & 100 of Civil Procedure Act and Order 8 Rule 3, Order 51 Rule 1 of Civil Procedure Rules and all enabling provisions of the law. The Applicant is seeking for the following Orders;

- a. Spent.
- b. THAT leave be granted to the Defendant / Applicant to amend his Defence out of time in terms of the annexed draft Amended Defence and Counterclaim.
- c. THAT corresponding leave do issue to the Plaintiffs/ Respondents to reply to the Defendant/ Applicant's Amended Defence and Counterclaim upon service if need be.
- d. THAT in the event prayer 2 and 3 above are granted, this Honourable Court orders parties herein to comply with Order 11 of the Civil Procedure Rules 2010 before the matter is certified ready for hearing.
- e. THAT the costs of this application be in the cause.
- f. THAT this Honourable Court do make such further orders as it deems just and expedient in the circumstances.

The defendant/applicant has also sworn an affidavit in support of the application basically reiterating the grounds and has annexed a draft of the intended amended statement of defence and counter claim as **SSB 1**

**A. THE APPLICANT'S CASE**

2. The grounds of the Application are contained at the foot of the said Application and the Application is further grounded on the supporting affidavit sworn by Solomon Sirma Boit, on 24<sup>th</sup> June 2021.

3. For clarity, the deponent to the supporting affidavit has averred as follows; -.

- (a) It is imperative to amend the Defendant's Defence so as to narrow down the real issues for determination by this Honourable Court and to afford all parties a right to be heard on the ownership claim to the suit property.

(b) This application has been brought in good faith and the amendments sought to be made will not prejudice the Plaintiffs as they shall have an opportunity to respond to the Amended Defence and Counterclaim.

(c) If this application is not granted and heard on a priority basis before the matter is heard, the Defendant shall be greatly prejudiced as the issue of ownership will not be justly determined.

(d) It is in the interest of justice that this application be heard on a priority basis before the matter is scheduled for hearing.

## **B. THE RESPONDENT'S CASE**

4. Mr. Aaron Tafari Ouko, the 1<sup>st</sup> Plaintiff/Respondent herein swore a Replying Affidavit dated 16<sup>th</sup> July 2021 in opposition and response to the Defendant's Notice of Motion Application dated 24<sup>th</sup> June 2021. He avers that at all material times the late Mr. Jason Atinda Ouko was the sole registered owner of the vast suit property measuring approximately 87.5 acres.

5. Furthermore, the 1<sup>st</sup> Plaintiff/Respondent states that he is aware through the instant proceedings, the defendant/applicant has laid claim over a portion of LR No. 3589/6 on account of purchase from one Mrs. Rachael Mumbi Mbugua. That the transaction was not sanctioned by the family of Jason Atinda Ouko (deceased) nor was the family informed of the same.

6. It is his contention that the Applicant who was then a senior officer of the government of Kenya in various capacities is engaged in a wider scheme intended to defraud the estate of Jason Atinda Ouko (deceased) of its property and maintains that the Defendant is a trespasser having unlawfully, forcefully and without any permission moved onto the said piece of land.

7. THAT around 2008, about two (2) years after the Grant was issued, that the defendant/Applicant forcefully entered the portion of land in issue; this was done without any authority and/ consent of our family. Their attempts to stop the defendant/Applicant's invasion and/ or interference with the portion of land were frustrated by the fact that the defendant/Applicant who was a senior officer then used his connections within the administration circles to curtail their efforts; in addition, since as a family they were financially incapacitated, they could not do much at the time. It was not until around October 2011 when they were able to file the instant suit against the defendant/Applicant.

8. That he has been advised that the contention by the defendant/applicant that their application has been brought in good faith and the amendments sought will not prejudice the plaintiffs/respondents is greatly misplaced; that is clear from the conduct of the defendant/applicants of how he has handled the proceedings that the applicant wishes to prolong the proceedings for as long as possible and ultimately delay justice.

9. The 1<sup>st</sup> plaintiff/respondent avers that the defendant/Applicant had failed to issue instructions to his Advocate for a long time and thus his Advocate sought to cease acting by making an application vide Chamber Summons dated 2nd November 2017 which was unopposed and allowed on 31st October 2018. The defendant/Applicant's history clearly indicates that his only objective is to delay the proceedings by any means necessary.

10. It is his contention that if the defendant/Applicant was serious about filing the Counterclaim and amending his Defence, he would have done so many years ago.

11. Additionally, the 1<sup>st</sup> plaintiff/respondent states that the defendant/Applicant has failed to satisfactorily give compelling reasons as to why he intimates to amend the Defence this late. That the proposed amendment for adverse possession ten years later after the suit was instituted is merely speculative and has no merit. The Applicant simply wants to frustrate and delay the Respondents' cause of action.

12. Finally, the 1<sup>st</sup> plaintiff/respondents prays that the application should be dismissed with costs.

## **C. APPLICANT'S FURTHER RESPONSE**

13. In response to the Plaintiff/Respondent's Replying Affidavit, the Defendant/Applicant through Mr. Solomon Sirma Boit filed a further affidavit on 15<sup>th</sup> September 2021. Mr. Boit avers that it is necessary to respond to the issues raised in the Plaintiff/respondents' Replying Affidavit sworn on 16th July 2021 by Aaron Tafari Ouko to enable the court to reach a fair determination in this matter.

14. The defendant/applicant stated that the Plaintiff's averment that he is intent on retaining possession of L.R No. 3589/48 (the suit property) without paying for the same is a deliberate, misleading and blatant falsehood; the Plaintiffs/respondents are fully aware that their deceased father had entered into a sale agreement with Mr. Peter Mbugua (deceased) to transfer L.R No. 3589/6, which was upon subdivision sold to numerous interested parties, inclusive of the defendant/Applicant.

15. He avers that he entered the suit property rightfully having paid a significant percentage of the purchase price to Mrs. Mbugua, the widow of Mr. Mbugua and executrix of his estate as a purchaser, a fact that is within the full knowledge of the plaintiffs.

16. The defendant/Applicant contends that he has been in continuous occupation of the suit property, having developed the same and put up his matrimonial home on it. Further, the plaintiffs/respondents' contention as to the existence of a valid transaction for the purchase of the suit property notwithstanding, the defendant/Applicant states that he has acquired a statutory right to claim title to the land as an adverse possessor. And that in any event he has the right with the leave of this Honourable Court to amend any pleadings at any stage of the proceedings in the interest of justice.

17. The defendant/Applicant reiterates that they purchased in 1995, two parts comprising one acre for valuable consideration of Kshs. 1.5 million. (Full dates and documentation are available on the record). The plaintiff /respondent has all along been aware of this fact just like the late Jason Ouko. The deponent of the Replying Affidavit, Aaron Tafari Ouko, has all along been a regular visitor to my home and cannot feign ignorance of facts.

18. It is the defendant/Applicant's contention that the Plaintiffs' averment that he is intent on inordinately prolonging these proceedings could not be further from the truth. He adds that, if anything, the proceedings have occasioned untold distress on the defendant/Applicant and his family, owing to the profound apprehension that he may be dispossessed of my rightfully acquired land.

19. It is deponed that once the late Jason Ouko sold a part of the land comprised in the title, he willfully and by an act of disposition empowered the party purchasing to deal further with such excised portion. In effect, he lost control of the same and the defendant/Applicant was at liberty to purchase from Rachael Mumbi Mbugua who is the administratrix of the estate of Patrick Mbugua.

20. The defendant/Applicant added that on account of his long and continuous use and occupation of the suit property, a prescriptive right has arisen in my favour and my claim for title to the suit parcel is therefore merited. He maintains that he is not a trespasser. In any event, the Plaintiffs claim being under trespass is not open to them to bring and maintain this claim as he is advised by his counsel, that being a claim in tort, the limitation period is three (3) years.

21. The defendant/Applicant avers that contrary to the Plaintiffs' averment, the right to claim title to the suit property as an adverse possessor is a sufficiently compelling ground which should warrant his application to amend his Defence.

22. It is deponed that the Plaintiffs' averment is a deliberate misrepresentation of facts as the defendant/Applicant took possession of the suit property in 1995 and commenced construction of two houses in 1997 and not 2008 as alleged.

23. Finally, the defendant/Applicant prays that the Honourable Court grants his application to amend his defence and that they Plaintiff/Respondents have a right to reply to the amended defence.

#### **D. SUBMISSIONS**

##### **Defendant/Applicant's submissions**

24. The application was canvassed by way of written submissions. The defendant/applicant through their counsel filed their submissions on the 30/09/2021. In it, counsel submits that the application dated 24/6/2021 seeks leave to amend the defence so as to introduce a counterclaim by way of Originating Summons as well as corresponding leave to the plaintiffs to reply to the same upon service if need be.

25. The Defendant/ Applicant relies on the grounds adduced in the applicant's supporting affidavit sworn on 24/6/2021, Further Affidavit sworn on 15/9/2021 and this submissions in urging this Honourable Court to grant the application as prayed.

26. It is the Defendant/ Applicant's submission that Civil Procedure Rules 2010 donate wide discretion to this Honourable Court as far as amendment of pleadings is concerned. Under Order 8 Rule 5(1), this Honourable Court may of its own motion or upon application by any party order any document to be amended for the purposes of *inter alia*, determining the real question in controversy between the parties.

27. Counsel relied on and cited the case of **George Gikubu Mbutia v Consolidated Bank of Kenya LTD & Another [2016] eKLR** with regard to the discretion of this Honourable Court being exercisable at any stage of the proceedings before judgment.

28. Counsel submits that no prejudice will be occasioned upon the Plaintiffs if the application is granted and the Plaintiffs have not demonstrated the prejudice they will suffer if the application is granted. In any event, the Plaintiffs will be at liberty to reply to the amended Defence and they were put on notice when the Defendant/ Applicant filed his Defence that he would file a suit to claim adverse possession. Counsel relied on cases of **Eastern Bakery v. Castelino [1958] E.A. 461**, **Enock Chirchir Katam & 2 others William Maiyo & another [2012] eKLR**, **Ramco Investment Limited v Nairobi City Water & Sewerage Company Limited [2017] eKLR** and **Nicholas Okoth Okoyo v Prisca Ondiek Oketch & 4 others [2018] KLR**

29. Finally, counsel submits that the merits and demerits of their claim under adverse possession ought to be canvassed after leave is granted by this Honourable Court to amend the Defence. The Defendant/Applicant urges this Honourable Court to exercise its discretion to allow the application as prayed in the interest of substantive justice.

##### **Plaintiff's/ Respondent's submissions**

30. The plaintiffs/respondents herein have not filed written submissions in opposition to the application dated 24/6/2021.

#### **E. ISSUES FOR DETERMINATION**

Having considered the application, the supporting affidavit and further affidavit, the respondent's replying affidavit and applicant/defendant's submissions together with the cited authorities, there is only one issue for determination namely: whether the application to amend the defence ought to be allowed

#### **F. ANALYSIS**

The parties argued the application by way of written submissions. The defendants/applicants submissions were filed on 30/09/2021 while the plaintiffs/respondents did not file their written submissions but only a replying affidavit dated 16/07/2021. The gist of the defendants/applicants submission is that the court has unfettered discretion to grant leave to amend pleadings at any stage in the proceedings under the provisions of Order 8 Rules; 3 and 5 of the Civil Procedure rules. In support of their submissions the applicants have referred the court to various court decisions where the court has considered the factors to take into account before leave to amend pleadings is granted.

**Whether the application to amend the defence ought to be allowed.**

31. The Court's power to allow amendments of pleadings is donated under Order 8 of the Civil Procedure Rules 2010. More specifically, Order 8 Rule 5(1) of the Civil Procedure Rules provides that: **"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."**

32. Order 8 Rule 3(2) of the Civil Procedure Rules provides that: **"Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do."**

33. Order 8 Rule 3 (5) of the Civil Procedure Rules provides that: **"An amendment may 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."**

34. It is trite law that a party must be given a fair and reasonable opportunity to present its case. This includes the right to present its case in whatever form it deems fit. This position has been well laid out in several cases. Some of which include **DMM v RMM (2017) eKLR**, **Joseph Ochieng & 2 others t/a Aquiline Agencies vs First National Bank of Chicago Civil Appeal No 149 of 1991** and in **David Jonathan Grantham & Another vs National Social Security Fund**, Shah J.A. (as he then was) stated thus:-

**"...amendments should be timeously applied for...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..."**

35. The Court of Appeal for Eastern Africa in the case of **Eastern Bakery -v- Castelino (1958) EA 461**, set out that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs. Nevertheless, an amendment should not be allowed if it causes injustice to the other side.

36. In **Abdul Karim Khan -v- Mohamed Roshan (1965) EA.289**, the Court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and which entirely alters the nature of the defence or plaint. The Court again in **Ochieng and Others -v- First National Bank of Chicago, Civil Appeal Number 147 of 1991** set out as follows the principles under which Courts may grant leave to amend the pleadings:

- a) *the power of the court to allow amendments is intended to determine the true substantive merits of the case;*
- b) *the amendments should be timeously applied for;*
- c) *power to amend can be exercised by the court at any stage of the proceedings;*
- d) *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;*
- e) *the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.*

37. Applying the foregoing principles to this present application, in the original defence, the defendant/applicant herein had anchored his defence on the basis that he was the rightful proprietor of LR No. 3589/6 on account of purchase from one Mrs. Rachael Mumbi Mbugua. However in their amended defence and counterclaim the defendant/applicant has changed tact and now claim ownership of LR No. 3589/6 by way of adverse possession.

38. The defendant/respondent claim that vide an agreement in 1995 the defendant/applicant purchased the land and in 1997 took possession and started construction and has been in occupation since then. The defendant/applicant now claim that he has acquired title by adverse possession of the suit land and seek a declaration to that effect. The proposed amendment quite clearly alters the character of the suit. In the earlier statement of defence there was no mention of the fact that the defendant/applicant's claim arose out of a claim of entitlement by virtue of having been in adverse possession.

39. In **Catherine Koriko & 3 others v Evaline Rosa (2020) eKLR**, the court held:

**"The appellants' application to amend the statement of defence and counterclaim**

**was nothing but an indirect attempt to re-open litigation over the suit property with a view to circumventing the substantive effect**

of, and the rights of the parties as had been determined in the Kisii High Court Succession Cause No. 105 of 2010. I cannot be blind to this attempt and I decline to condone the same. A party cannot be allowed to amend pleadings in one case in order to re-open litigation between the same parties in another case.”

40. Hon. Mutungi J in Evaline Rosa v Catherine Koriko & 3 others [2016] eKLR held that:

*“The amendment of the defence and counterclaim proposed by the defendants quiet evidently introduces a new cause of action and for all intent and purposes constitutes a new action. The defendants as it were, wish to make a 360 degree turn and abandon their claim as beneficiaries entitled to the estate of the late Kimaiyo Ole Ntiira to one of being entitled as adverse possessors. The proposed amendment would totally change the character of the suit and in my view would not be without prejudice to the plaintiff who has had to battle claim.....”*

41. While dismissing the appellants’ application, Makhandia JA in Catherine Koriko (supra), stated that:

*“I note that the learned judge (in Evaline Rosa v Catherine Koriko & 3 others [2016]*

*eKLR) aptly stated that if the amendment were to be allowed, it would change the character of the suit and the respondent would be prejudiced as she had battled claims in the Succession Cause...”*

**G. DETERMINATION**

42. I am aware, that I am called upon to exercise my discretion to grant or not to grant the application, the exercise of such discretion has to be judicious and should not be whimsical.

43. The power to amend pleadings is not a panacea of all ills and should not be invoked by any party in a manner that may be perceived to be an abuse of the court process. It is a cardinal principle that in any dispute parties must not plead their cases in instalments but they should put their case forward holistically.

44. Having considered the facts and circumstances of this matter, I get the sense that the defendants are engaging in a fishing expedition in the hope that they could stumble onto something otherwise it is inexplicable why in the original defense had no suggestion at all of a counterclaim. The suggestion that the defendant/applicant is infact an adverse possessor is coming too late in the course of the case when the matter is scheduled for hearing. It should not have taken the applicant/defendant ten years to suddenly realize that they could claim adverse possession. While the defendants would nonetheless be entitled to seek to amend their pleadings at any stage of the proceedings, my view is that to allow amendment at this stage in these proceedings would occasion prejudice and injustice to the plaintiff.

45. In the instant having considered all the circumstances, I am not inclined to exercise my discretion in favour of granting the application. I accordingly decline to grant the application.

46. The cost of this motion to abide the outcome of the main suit.

47. It is so ordered.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021**

.....

**MOGENI J**

**JUDGE**

IN THE PRESENCE OF:

..... **FOR THE PLAINTIFFS/RESPONDENTS**

..... **FOR THE DEFENDANT/APPLICANT**

**VICTOR OWOUR COURT ASSISTANT**