



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 69 of 2006

**ENOCK CHIRCHIR KATAM.....1ST
PLAINTIFF**

**MARK KIPYEGO KATTAM.....2ND
PLAINTIFF**

MUSA K. ARUSEI.....3RD PLAINTIFF

VERSUS

WILLIAM MAIYO.....1ST DEFENDANT

PIUS CHERONO KENGO.....2ND DEFENDANT

RULING

This is an application by the 1st defendant for leave to amend his defence and counter claim. The application is expressed to be brought under sections 3, 5 and 8 of the Civil Procedure Rules and all other enabling provisions of the law. There are two grounds for the application namely that the intended amendment would bring out clearly the real issues in controversy between the parties and that the application has been brought in good faith and without undue delay. The application is supported by the affidavit of the 1st defendant which affidavit elaborates the above grounds. The same defendant has also sworn a further affidavit in answer to the plaintiff's replying affidavit.

The application is opposed and in this regard there are replying affidavits sworn by all the plaintiffs. The substance of the affidavits is that the intended amendments seek to introduce a claim for adverse possession which claim cannot be commenced by way of plaint and that the application has been made too late in the day.

When the application came up for hearing before me on 28th March, 2012, counsel agreed to file written submissions which were duly in place by 18th July, 2012. the submissions reiterated the positions taken by the parties in their respective affidavits.

I have carefully considered the application, all the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. From the replying affidavits and the submissions of counsel, for the plaintiffs, it appears to me that the main objections raised against the application for leave to amend are that the proposed amendment intends to introduce a claim for adverse possession which relief cannot be made by way of a plaint. In the plaintiffs' view allowing the application is an exercise in futility. The plaintiffs further challenge the capacity of the 1st defendant to make the said claim as the administrator of the estate of **Kimoi Kimaiyo**. Lastly the plaintiffs contend that the 1st defendant is guilty of inordinate delay in bringing the application.

With respect to the objection that the application has been made after inordinate delay I note that the suit is yet to be set down for hearing. Indeed it would appear that all the pre-trial formalities have not been completed. Order 8 Rule 3(1) of the Civil Procedure Rules reads as follows:-

“3(1) Subject to Order 1 rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, 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.”

So, under the said sub-rule, the court has power to allow any party to amend his pleadings at any stage of the proceedings on terms as may be just. In the premises, I am not persuaded that this application has been made too late in the day.

With regard to the challenge that the 1st defendant has no capacity to make the claim for adverse possession as an administrator of the estate of **Kimoi Kimaiyo**, I hold the view that the objection is on the validity of the claim and not on whether leave should be granted.

The plaintiffs' main objection is however predicated on the 1st defendant's intention to claim the subject parcel of Land by way of adverse possession in the proposed counter-claim. The plaintiffs placed reliance upon the case of **Kiprop Kanda -Vs- Gabriel Biwot Kanda & 3 Others (Eldoret CA No. 219 of 2003) (UR)** where it was held, *inter alia*, as follows:-

“The claim for title by adverse possession is to be mandatorily sought by way of originating summons under Order XXXVI Rule 3D of the Civil Procedure Rules and this procedure having been breached the claim cannot succeed and on this basis alone the respondents' suit was doomed to fail.....”

so, the position in law is clear that a claim for adverse possession must be made by way of originating summons. The 1st defendant in this case is in a unique position. He was brought to court by the plaintiffs. His pleadings are determined by the case laid against him. In that capacity, in my view, he is entitled to defend himself as he deems fit and cannot at this stage, be prevented from stating any claims he may have against the plaintiffs. An adverse possession claim, in my view may very well be used as a shield.

At this stage, I am not hearing the 1st defendant's counter-claim. I am only considering a simple application for leave to amend. The merits and/or demerits of this proposed amendments are not the concern of the court. That is the prerogative of the trial judge. The mere desire to amend the counter-claim to incorporate a claim for adverse possession cannot possibly prejudice the plaintiffs. They will have the liberty to challenge the same in their subsequent pleadings.

In **Eastern Bakery -Vs- Castelino [1958] E.A. 461 at page 462, Sir Kenneth O Connor P** rendered himself as follows:-

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be allowed freely, if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs..... the court will not refuse to allow an amendment simply because it introduces a new case.....”

In the end, I hold that the proposed amendments would not prejudice the plaintiffs to the extent which could not be compensated in costs. I also hold that the said proposed amendments are necessary for the determination of the real issues in dispute in this suit. I have also taken into account the fact that if the defence and counter-claim are not amended the 1st defendant may be precluded from raising issues not made in the original pleadings.

In the result and for the reasons given above, I am satisfied that the 1st defendant has made out a case to warrant leave to amend his defence and counter-claim in accordance with the draft annexed to the affidavit in support of this application. The amended defence and counter-claim shall be filed within the

next fourteen (14) days from today. The same should be served upon the plaintiffs within fourteen (14) days of filing.

I grant to the plaintiffs leave to file and serve their amended responses, if any, within fourteen (14) days of service.

The 1st defendant will pay the costs of this application in any event as the responsibility for the inadequacies of the original defence and counter-claim rests squarely on the shoulders of the 1st defendant.

Orders accordingly

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF SEPTEMBER, 2012

F. AZANGALALA
JUDGE

Read in the presence of:

Mr. Wafula for the Plaintiffs and

Mr. Kimani for the Defendant.

F. AZANGALALA
JUDGE

5TH SEPTEMBER, 2012`