



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 26 OF 2017

WANJIKU GITAU.....1ST PLAINTIFF/APPLICANT

MWANGI GITAU.....2ND PLAINTIFF/APPLICANT

BERNARD GITAU.....3RD PLAINTIFF/APPLICANT

VS

SAMUEL MWANGI WAICHERE.....1ST DEFENDANT/RESPONDENT

JAMES KINUTHIA WAICHERE.....2ND DEFENDANT/RESPONDENT

JAMES KAMANDE WAICHERE.....3RD DEFENDANT/RESPONDENT

FRANCIS MUKONO WAICHERE.....4TH DEFENDANT/RESPONDENT

RULING

1. This ruling relates to the Notice of Motion filed on dated the 23/7/18 filed under Order 8 rule 3(1) of the Civil procedure Rules and Article 159 of the Constitution and all other enabling provisions of the law.

2. The Applicant has sought orders as follows;

a. That the Court allows the Applicants to amend the originating summons dated the 28/5/15 and which was adopted as the plaint for the purposes of these proceedings by adding the names of the intended 1st 2nd and 3rd Defendants as per the attached copy of the amended draft.

b. That the Applicants be directed to serve the amended draft and all the requisite annexures to the added Defendants in the ordinary mode of service as encapsulated under Order 5 of the Civil Procedure Rules.

c. Costs of the suit.

3. The application is based on the grounds that the 1st Defendant and the intended Defendants are brothers. The intended Defendants filed a suit against the 1st Defendant in (Environment and Land Court) ELC Murang'a No 249 OF 2017 in which the Court declared a declaration of trust in respect to the suit land. That the said intended parties are now owners of the suit land together with the 1st Defendant. The suit land is the subject matter of this suit. It has therefore become necessary and just to include the intended Defendants in the proceedings for the just and fair determination of the suit herein.

4. In support of the said application the Applicant stated that at the institution of this suit the suit land was registered in the name of the 1st Defendant. That on the 2/5/2018 she discovered that the suit land is now registered in the names of the 1st Defendant and his 3 brothers who are the intended parties in this suit.

5. In opposing the application, the 1st Defendant termed the application defective incompetent frivolous vexatious and an abuse of the process of the Court. He admitted that the suit land was the subject of ELC 349 of 2017. The Plaintiffs were the intended 3 parties against the 1st Defendant. He has annexed a decree wherein the parties by consent recorded an order that the trust subsisting over the suit land be dissolved and the suit land divided between the 4 brothers. Opining that the decree being a legal judgment of the Court, the same has not been appealed vacated and or set aside. He contends that in that regard the application and the suit herein is rendered void and incompetent. He contends that the issue of ownership/proprietary rights over the suit land has been adjudged by the Court and therefore this suit is

resjudicata. That the record of the Court shows that the Applicant has all along known that the existence of the suit.

6. In their submissions the Applicants state that they were not parties to the concluded Case No. 349 of 2017 as it was between the 1st Defendant and the 3 intended Defendants. That the cause of action in the concluded case and the instant case are fundamentally distinct in that the concluded case was for dissolution of trust which was instituted through a plaint whilst the instant suit centres around adverse possession which has been instituted through originating summons in line with the procedural law, to that extent the Plaintiffs herein aver that they were not subject to the Judgement rendered in Murang'a ELC No. 349 of 2017. That since the Applicants herein were not parties to the concluded case they would not file for review/ appeal against the Judgement in ELC No. 349 of 2017 which does not affect them. He opposed the averment that the instant suit is res judicata on grounds that the concluded suit involved different parties, the cause of action therein was dissolution of trust and the current one is for a declaration of ownership rights for adverse possession and that this Court is not functus officio because it has not adjudicated upon a claim for adverse possession over the suit land before. He clarifies that the Applicants would not have applied to be enjoined in the concluded suit for dissolution of trust as that cause of action was incompatible with the cause of action they intended to pursue being ownership through adverse possession. They seek to be absolved from allegations of indolence as they quickly moved to make the instant application to enjoin the intended Defendants as soon as they learnt that the intended co-Defendants were registered as co-proprietors to the suit land. They conclude that the proposed amendments are fundamental because should the Court find in favour of the Applicants in the main suit the adverse possession would override the title of all the Defendants herein. Further that the Applicants herein would not have applied to be enjoined in the concluded suit which was instituted by way of a plaint since the procedural law as prescribed by Order 37 rule 7 for adverse possession claim must be must instituted through originating summons.

7. The Respondent has reiterated grounds of opposition as postulated in his supporting affidavit, that is to say that the application does not affect the 2nd -4th Defendants as at this point, they have not been enjoined in the case. Contending that the suit land was held by the 1st Defendant in trust for his brothers, the land being clan/ancestral land. That since the judgement in ELC 349 of 2017, the parties have executed the judgment and the suit land has accordingly been vested with the 1st Defendant and his 3 brothers. The suit land has since been subdivided and no longer exists. He faulted the Applicants by electing to be indolent despite having knowledge of the existence of ELC No 349 of 2017.

8. Order 8 Rule 3 the Civil Procedure Rules gives the Court discretion to allow the amendments of pleadings 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.

9. Under Order 8 Rule 5(1) the Court could on its own motion Order or on application of a party Order any document to be amended in such manner as to such terms as to costs or otherwise as are just. This may be done for purposes of determining the real question in controversy between the parties.

10. In the case of **Eastern Bakery vs Castellino 1958 EA 461** the Court held;

“amendments to pleadings sought before the hearing should be freely allowed if they are made without injustice to the other side, and there is no prejudice if the other side can be compensated by costs. But there is no power to enable one distinct cause of action to be substituted for another....”

Further the Court of Appeal in **Central Kenya Ltd. Vs. Trust Bank Ltd (2000) 2 EA 365** said;

“a party would be allowed to make such amendments of pleadings as was necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (1) there has been no undue delay, (2) no new inconsistent cause of action was introduced, (3) no vested interest or accrued legal right was affected and (4) the amendment could be allowed without injustice to the other side”.

11. The claim of the Plaintiffs/Applicants in the amended originating summons is adverse possession. They have argued that as at the time of filing this suit the registered owner of the suit land as shown on the copy of the title on record was the 1st Defendant. Whilst this suit was pending the 1st Defendant and his 3 brothers were litigating in ELC 349 of 2017 over the suit land in respect to the issue of customary trust. It is on record that the parties resolved their dispute by consent and an order of the Court was recorded as the judgement in the matter.

12. Armed with this revelation that the suit land has now been vested in the 4 brothers. The Applicants have filed the application to amend the Originating summons by adding the remaining 3 brothers. Order 37 rule 7(2) provides that the extract of title to the land in question should be attached to the supporting affidavit of the claimant. I note that the Applicants have not annexed the certified copies of the titles thereto. However, it is the view of this Court that this does not make the application fatal in any way.

13. Going by the orders of the Court in ELC 349 of 2017, it is not in dispute that the suit land is now vested in the name of the 4 brothers, the 1st Defendant included. It is also likely that any orders granted in this suit shall affect the 3 intended parties that the Applicants wish to add in the case.

14. Section 100 of the Civil Procedure Act and Order 8 rule 3 of the Civil Procedure Rules, provides a broad criteria which should guide the Court in the exercise of discretion in regard to amendment of pleadings that; 1) the amendment should be necessary for purposes of determining the real question or issue which has been raised by parties; and 2) is just to do so.

15. The Court holds that the 3 intended Defendants are necessary parties to the suit because they are part owners of the suit land and any orders that may be made in this case are likely to affect them. The Court is giving them the opportunity to be heard.

16. Guided by the above case law, the Court finds and holds that the application is merited. It is allowed with costs in favour of the 1st Defendant.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF JANUARY, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

1st – 3rd Plaintiff – Absent

Opiyo HB for Kirubi for the 1st Defendant

Intended Defendants: 2 – Present in person

3 – Absent

4 – Present in person

Irene and Njeri, Court Assistants