



**REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

ELC NO. 400 OF 2017

JKN 'A' - 1ST PLAINTIFF/APPLICANT

SNN - 2ND PLAINTIFF/APPLICANT

JKN 'C' - 3RD PLAINTIFF/APPLICANT

VS

**TMN (SUING AS THE NEXT FRIEND OF SNK ALIAS NK A PERSON OF
UNSOUND MIND) - 1ST DEFENDANT/RESPONDENT**

MURANG'A LAND REGISTRAR - 2ND DEFENDANT /RESPONDENT

ATTORNEY GENERAL - 3RD DEFENDANT /RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 6/9/2018 brought by the Plaintiffs/Applicants and filed on 7/9/2018 seeking the following orders;

- a. That the Plaintiff be granted leave to amend the plaint as per the terms of the annexed plaint filled herewith.
- b. That the annexed plaint be deemed as duly filed upon payment of the request Court fees.
- c. The cost of those application be in the cause.

2. That application is premised on the following grounds;

- a. That the plaint as filed leaves out essential issues to the matter not pleaded.
- b. That the land parcel in dispute was to be held in trust and that the Applicants are now adult persons capable of owing land.
- c. That the Applicants have been in occupation of the suit land for over 12 years and are thus entitled to ownership through adverse possession.
- d. That the Respondent will not be prejudiced by the intended amendments.
- e. That it is in the interest of justice that the orders sought be granted.

3. In his supporting affidavit JKN 'C' the 3rd Plaintiff /Applicant avers that he and the co-Applicants learnt that some crucial details were omitted from their plaint filed on 17/6/2017 inadvertently and therefore some remedies were not sought. He claims that the suit land namely Land Reference Number LOC 4/GAKARARA/***** (muciiri) was registered in the name of NK 1st Defendant/ Respondent in trust by his brother JNK on behalf of the children of his three wives who are in occupation of that Land . He further contends that the occupation has been continuous and uninterrupted since 1960. He therefore believes that as a result of that long period of occupation the Plaintiffs /Applicants are therefore entitled to be the legal owners of the suit land .He concedes that the Applicants failed to claim for adverse possession in their plaint and he is convinced that only an amendment to the plaint can cure that omission .He concludes that the intended

amendments will not occasion any prejudice to the Defendants /Respondents.

4. The application is firmly opposed through the replying affidavit of TMN the 1st Defendant /Respondents who deposes that the application is fatally defective and ought to be struck out for breach of procedure. That the amendments as drafted seeks incompatible declaration in terms of prayer 4 of the amended plaint. That the amendments seek to alter the initial cause of action and is a complete departure from the original claim. The amendment sought is in express breach of the Civil Procedure Rules that mandatorily require Courts to be moved by way of originating summons in respect to adverse possession claims she clarifies that though she is aware pleadings cannot be defeated by want of form, the Limitation of Actions Act, and the Civil Procedure Rules do expressly prescribe the form in which a cause of action for adverse possession ought to be brought. Further the law does not provide in her words “for a reverse procedure” meaning that a plaint cannot proceed for an action that ought to be brought forth through a substantive originating process such as an originating summons. She has cautioned the Court against exercising its wide discretion in respect to its powers to allow for amendment of pleadings in aid of the Plaintiff’s application without merit.

5. The application was canvassed through written submissions.

6. The Applicant submits that the amendments to the plaint being sought seek to clarify certain pertinent issues that go to the substratum of the suit that were omitted not pleaded. That the amendments seek to explain that the suit land was registered in trust in favour of the children of the three wives of the deceased. Further that the Applicants have been in occupation of the suit land since the 1960’s which amounts to a period in excess of 12 years and that the said occupation has been continuous and uninterrupted for those reasons they believe they are entitled to ownership of the suit land by way of adverse possession. The Applicants are of the opinion that the prescribed procedure to be followed in seeking adverse possession orders by way of originating summons is discretionary and not mandatory. That this Court has powers to give leave for amendment of pleadings after close of pleadings and its good practice to do so. They contend that there are various prayers sought in the proposed amendments but the 1st Defendant seem to be opposed to only one prayer. The Applicants have invited the Court to invoke the provisions of Article 159 of the Constitution to the instant application. They have urged the Court to exercise its overriding jurisdiction and powers that befits its status and concludes that the intended amendments seek to avoid multiplicity of suits and save the time of the Court.

7. The 1st Respondent submitted that an amendment to a plaint to include a claim for adverse possession is completely inadmissible in law as the procedural law as prescribed under Order 37 rule 7 of the Civil Procedure Rules is mandatory. That the amendments as sought would amount to a complete departure from the original cause of action the Plaintiffs had pleaded and sought for. That the wide discretion of the Court should not be invoked to defy the rules of procedure. She is of the view that Article 159 of the Constitution of Kenya cannot come to the aid of the Plaintiffs/Applicants herein because undue regard to technicalities does not remove the operation of the rules of procedure. She has referred the Court to various authorities which I have carefully considered and has urged the Court to dismiss the application with costs to the 1st Defendants.

8. The main issue for determination that emerges from the rival submissions as presented by the parties herein is whether a Court can allow for a claim of adverse possession to be canvassed in a plaint through an amendment or otherwise.

9. Order 37 rule 7 provides;

“An application under section 38 of the Limitation of Actions Act shall be made by originating summons.

10. That notwithstanding Courts, have since held that a claim by adverse possession can be brought by a plaint. See **Mariba v Mariba Civil Appeal No. 188 of 2002**, counter-claim or defence as was the case here. See **Wabala v Okumu (1997) LLR 609 (CAK)**. In **Gulam Mariam Noordin v Julius Charo Karisa, Civil Appeal No 26 of 2015**, where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated the law as follows;

“Where a party like the Respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of **Wabala v Okumu [1997] LLR 609 (CAK)**, which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in **Bayete Co. Ltd v Kosgey [1998] LLR 813** where the plaint made no specific plea of adverse possession, the plea was nonetheless granted.”

11. In the case of **Muthuita v Muthuita (1982 – 88) 1 KAR 42** the Court approved the decision of Madan J (as he then was) in **Gatimu Kinguru v Muya Gathangi (1976) KLR 253**, makes the point clear that in this country a claim for trust and adverse possession may well go hand in hand. In this case however the claim for title by way of adverse was pleaded in the alternative unlike the present case. In either way the claims must nevertheless be properly pleaded and adequately proved on a balance of probabilities.

12. Going by the above decisions and guided by the provisions of Article 159 of the Constitution I hold that the amendments the claims are admissible. However it is always helpful to plead them in the alternative.

13. 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 that; the amendment should be necessary for purposes of determining the real question or issue which has been raised by parties; and is just to do so.

14. The principles were set out by the Court of Appeal in **Central Kenya Ltd v Appeal No 222 of 1998** as shown; *That are necessary for*

determining the real question in controversy; To avoid multiplicity of suits provided there has been no undue delay; Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action; That no vested interest or accrued legal rights is affected; and So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

15. The Applicants herein have moved to the Court for leave to amend their plaint in order to clarify that they have been in occupation of the suit land since the 1960's therefore their occupation has been for a period in excess of 12 years as prescribed in law for entitlement to ownership of land by way of adverse possession. The unamended plaint on record is premised on alleged trust over the suit land registered in the name of the 1st Respondent/Defendant in favour of the Applicants/Plaintiffs. The proposed amendments therefore as proposed seeks to introduce a second cause of action being a declaration of an adverse possession right in favour of the Applicants over the suit land.

16. The Court is satisfied that allowing the application will not prejudice the Defendant beyond what can be compensated with costs.

17. The application is granted with costs in favour of the Defendant.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF JANUARY 2019

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

1st – 3rd Plaintiffs/Applicants – Absent

Njoroge HB for Nderitu for the 1st Defendants/Respondents

2nd & 3rd Defendants/Respondents – Absent

Irene and Njeri, Court Assistants