



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 1 OF 2018**

**JOSEPH S. WAFULA.....PLAINTIFF**

**VERSUS**

**ELENA CHEPKURGAT TALAM**

**(Sued as the Legal Administrator of the Estate of the late**

**KIPTALAM ARAP KOGO.....DEFENDANT**

**RULING**

1. The application before this court is a Notice of Motion dated **6<sup>th</sup> February 2019** brought by the Plaintiff under **Order 8(1),8(3) sub rule 5 Sections 3,3A 1A, 1B and 63(c) and 100 of the Civil Procedure Act.**
2. By that application the Plaintiff seeks leave to amend his originating summons to convert it into a plaint with all the contents as laid out in the attached draft copy of the amended Originating Summons.
3. The Plaintiff has also sought that the amended pleadings be deemed as duly filed after payment of the requisite court fee and costs of the application.
4. The application is premised on grounds that the plaintiff's claim herein is based on adverse possession; that adverse possession runs against a title deed of a registered owner; that the Title deed the subject matter of adverse possession was obtained in the year **2016** although the Applicant has been on the land ,the subject matter of this case since **1996**; that this court is a court of justice and parties may be allowed to put their pleadings in order to avoid legal technicalities which do not confer on the parties their rights; that this matter should be determined on merit and not on legal technicalities and that it would meet the ends of justice if the applicant is allowed to amend his pleadings.
5. The application is further supported by an affidavit sworn by the Plaintiff on the **6/2/2019**. The Plaintiff avers that, on **4/1/2018** he filed this suit against the respondent by way of originating summons claiming **1 ½ acres** by way adverse possession and that he has been staying in **Plot No. 315** which formed part of Title deed no. **MARIRADI/KOSPRIN/381** from **1996**.
6. The Plaintiff contends that the respondent herein obtained Title deed in the year **2016**, meaning that the Title deed is only three years old and that the twelve years period is not over.
7. It is his further disposition that as per the provisions of **Order 8** of the **Civil Procedure Rules**, amendments goes to the extent of even substituting the cause of action and that his claim can be best addressed by amending the pleadings into a Plaint.
8. According to the plaintiff, it would be in the best interest of justice if the amendment is allowed so that the case proceeds without wasting court's time.
9. The application was opposed by the Defendant vide the Grounds of Opposition dated **25/2/2019**. The Defendant contends that the proposed amendments are prejudicial to the Defendant and are an abuse of the court process as they seek to replace an existing suit by way of a plaint through amendment. It is also the Defendant's contention that the proposed amendments cannot be allowed as they seek to introduce a completely new cause of action from the one originally contemplated in the pleadings filed in court. The Defendant has also averred that the proposed amendments seek to change the cause of action into one of a substantially different character which could more conveniently be made the subject of a fresh cause of action, hence the same should not be allowed.

10. According to the defendant, not all amendments of pleadings are allowed under order **8(1), 8(3)** and **8(5)** of the Civil Procedure Rules and sections **1A, 1B, 3, 3A, 63(e)** and **100** of the **Civil Procedure Act**.

11. While stating that the application should not be allowed, the Defendant avers that the proposed amendments are not made in good faith as they seek to deprive the defendant of her defence.

12. The application was canvassed by way of written submissions and the Plaintiff in submissions dated **1/3/2019** stated that the Court has inherent powers to allow the instant application. Counsel submitted that there is nothing fatal to amend the pleadings to address real issues determined by the court as per the provisions of **Order 8(5)** of the **C.P.R. 2010** hence the instant application is properly before this court and the court was urged to allow the amendment so as to address the real issues. The Plaintiff placed reliance on several authorities being; **Ngurakapel Ng'iro v Alexander A. Reuben [2017] eKLR, Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** and **Nairobi Civil Appeal no 186 of 2002 Stephen Kuguku Mariba vs Kibe Mariba** which propositions were that amendments to pleadings of this nature are to be freely allowed.

13. The Defendant filed submissions dated **4/3/2019** where it was contended that although the law allows amendments to be done at any stage of the proceedings for determination of real questions in issue, not all amendments are allowed. Counsel made reference to Order **8(5)** of the **Civil Procedure Rules** which provides that an amendment may be allowed under **sub rule 2** notwithstanding that its effect will 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.

14. The Defendant did submit on the issue of institution of the suit in issue. According to the defendant, as much as a suit can be brought by way of plaint, an originating summons or even a petition, **order 8(5)** or any other provision on which the plaintiff wishes to rely on, do not provide that one form of instituting a suit can be substituted into another form through amendments. It was further submitted that amendments which seek to substitute an existing suit to another suit of a different nature cannot be allowed under the **Civil Procedure Rules**.

15. It was the defendant's contention that, amendments which seek to introduce a completely new cause of action from the one originally contemplated in the pleadings filed in respect of which a claim has already been made in court cannot be allowed.

16. The Court was referred to the case of **Joseph Ochieng & 2 others T/A Aquiline Agencies Vs First National Bank of Chicago(1995) eKLR** where it was stated that amendments which seek to change the cause of action into one of a substantially different character which could more conveniently be made the subject of a fresh action cannot be allowed.

17. In further submission, the Defendant stated that the application dated **6/2/2019** does not meet the threshold for amendments of pleadings hence the same should be dismissed with costs.

#### **Determination**

18. The main issue for determination is whether this court should exercise its discretion in the Plaintiff's favour and grant him leave to amend his Pleadings.

19. The Defendants have opposed the Plaintiff's application for among other reasons that the proposed amendments seek to introduce a new cause of action.

20. **Order 8 rule 3 (5)** provides as follows:-

**“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 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.”**

21. Thus, the overriding consideration in an application for leave for amendment ought to be whether the amendments sought are necessary for the determination of the suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.

22. The principles that guide the court in considering an application for amendment of pleadings were set out by the Court of Appeal in **Central Kenya Limited v Trust Bank limited (2000)2 E.A 365** as follows:-

**“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”**

23. **Bullen and Leake & Jacob's Precedents of Pleading, 12<sup>th</sup> Edition**, provides as follows concerning amendment of pleadings:-

**“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into**

*one of a substantially different character which could more conveniently be made the subject of a fresh action...*”

24. In the instant case, the applicant seeks leave to amend his originating summons to a Plaint. I have perused the proposed amended Plaint annexed to the Affidavit sworn in support of this Application.

25. In the case of **Ngurakapel Ng'iro v Alexander A. Reuben [2017] eKLR** the plaintiff was allowed to amend the plaint into an Originating Summons. In arriving at that conclusion this court referred to the reasoning in the cases of **George Arwonga Kombo -vs- Jackson Ondari Kombo [2011] eKLR - Kisii High Court Civil Suit No. 254 of 2009**, **Stephen Kaguku Mariba -vs- Kibe Mariba - Nairobi Civil Appeal No. 188 of 2002**, **Caltex Oil (K) Ltd -vs- Harrison Charo Washutu - Malindi Civil Appeal No. 17 of 2018**, and **Abubakar Herezo Bwana -vs- Twahir Mohamed Salim Said & 2 Others 1991 2 KAP 262**

26. In the instant case also no response had been filed to the Originating summons at the time the amendment application was filed on 6/2/2019.

27. In the **George Herezo** case the Court Of Appeal observed that though jurisdiction existed under **Order 36 Rule 10** (which then provided for Originating summons) of the **Civil Procedure Rules** to continue proceedings begun by originating summons as if they had been commenced by a plaint in an appropriate case, there did not exist any jurisdiction for the reverse procedure that is to say, to continue proceedings begun by plaint as though they were commenced by originating summons.

28. This court while dealing with the application to amend the plaint into an originating summons in **Ngurakapel Ng'iro v Alexander A. Reuben [2017] eKLR** observed that the Court Of Appeal in the George Herezo case supra was only concerned with courts' "*deeming*" an Originating Summons to be a plaint and thereafter proceeding as if the suit had been commenced by way of plaint and not with actual amendment of the plaint into an originating summons as is the case in the instant suit. This court stated as follows in the **Ngurakapel Ng'iro** case:

**“On the 22/11/2017, pleadings not having closed, the plaintiff filed without leave and he was in my view so entitled, an amendment converting the plaint into an Originating Summons. The Originating Summons was then served whereupon this instant Preliminary Objection was raised. It is noteworthy that at the time of amendment no defence had been filed to the plaint. In my view the defendant does not stand to be prejudiced by being required to file a replying affidavit on affidavit instead of a defence. Justice would still be done in the matter, especially in view of the fact that the amendment only changed the mode of proceeding but not the cause of action. It appears that the plaintiff's optimism that the cause could be proceeded with by way of plaint diminished and he opted to amend, notwithstanding the decisions cited above in which judgment in adverse possession claims was given in favour of persons who had not lodged any Originating Summons.”**

29. In the **Ngurakapel Ng'iro case (supra)** this court observed that the decision in the **Gulam Miriam Noordin case (supra)**, noted the difficulties faced by litigants in such circumstances where they sought adverse possession orders in a counterclaim and saw *no “harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the appellant;”* consequently the Court Of Appeal issued an order under **Section 3(2) of Appellate Jurisdiction Act**, even in the absence of an originating summons, to the appellant to **“...transfer the suit property to the respondent at the latter's expense within 30 days from the date hereof failing which the Deputy Registrar, High Court, Malindi will execute on behalf of the appellant all the necessary transfer documents.”**

30. It is with concern at the fluid state of affairs regarding the procedure followed by litigants in instituting their claims in relation to adverse possession that I consider the instant application.

31. It is clear now that the ideal situation obtains where a litigant files an Originating Summons in respect of adverse possession claim rather than a plaint or other pleading; but it is also clear that where the litigant has a good claim under adverse possession even a *defence* or a *counterclaim* can be considered to entitle him to orders. The question arises then, why, while no express legal provisions bar the proposed amendment, and the Originating Summons has not been even responded to, can not be amended into a plaint. In my view, a rejection of the application would only send the applicant to the drawing board where he would have to institute a fresh suit by way of plaint. I do not find any valid reason for the proposal to reject this application. It is for this reason that I consider that the proposed amendment of an originating summons into a plaint to be proper.

32. I also find that if there be any shortfall in fees payable for filing of a plaint it may be made up for by charging the shortfall at the filing of the amended document stage after the amendment is allowed to avoid loss of revenue.

33. In my view this accords well with the provisions of article **159(2)(d)** of the **Constitution Of Kenya 2010** that emphasizes that in exercising judicial authority, the courts and tribunals shall be guided by *inter alia* the principle that *“justice shall be administered without undue regard to procedural technicalities”*.

34. I have also looked at the main prayers in the both the originating summon and the draft amended Plaint and I entirely agree with the Defendant that the Plaintiff is seeking to introduce new causes of action. Are these expressly barred by the rules relating to pleadings?

35. **Order 8 rule 3(5)** provides as follows:

**“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.”**

36. **Order 8 Rule 3(2)** provides as follows:

**“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.”**

37. The replying affidavit and annexures thereto are the equivalent of a defence in a suit commenced by plaintiff. Amendments without leave are allowed by **Order 8 rule** where pleadings are not closed. I find the application herein irregular as pleadings can not be deemed to have closed; However be that as it may, as it is this same court that would have to determine any preliminary objection as to the validity of an amendment of an originating summons into a plaintiff if that were done without leave, that technicality is of little consequence for now.

38. What suffices for now is to note that **Order 8 rule 2(5)** allows the inclusion of new causes of action into the amended pleading if it arises from the same set of facts.

39. The facts that do not change even in the proposed amended Originating summons in this suit are that the plaintiff entered into a written agreement with the then owner of the suit land in **1996** for the sale of **1.5 acres** of the land he then held, and upon purchase, the plaintiff entered into and has been in peaceful, continuous and uninterrupted possession of the purchased portion since **1996** and has developed the same and that from the year **2016** the respondent has been issuing eviction threats against the plaintiff. Those facts supported the adverse possession claim until the plaintiff, realizing that the respondent obtained title over the land the plaintiff occupies in **2016**, viewed the prospects of success in an adverse possession claim to be dim and approached this court to allow the amendment of the originating summons into a plaintiff, with new prayers seeking a declaration of trust, specific performance and an injunction. In my view there is therefore nothing wrong with the proposed amendment as it meets the requirements of **Order 8 rule 3(5)**.

40. Consequently I allow the application dated **6<sup>th</sup> February 2019** and I order that the amended Originating Summons be served upon the defendant within **7 days**, and that the procedure henceforth shall be as if the cause had from inception been commenced by filing of plaintiff, and the **Civil Procedure Rules** shall be complied with to that extent.

It is so ordered.

**Dated, signed and delivered at Kitale on this 25<sup>th</sup> day of March, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**25/3/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Mr. Bungei holding brief for Teti for defendant

N/A for plaintiff

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**25/3/2019**