



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 372 OF 2014 (OS)

WILSON K. CHEPYEGON.....PLAINTIFF/APPLICANT

VERSUS

KIMOSOP CHEPYEGON.....DEFENDANT/RESPONDENT

RULING

Application before me is dated 8.10.2018 wherein the plaintiff seeks leave to amend the originating summons. The application is based on grounds that the plaintiff's late father, Chepyegon Chesire was the owner of the suit parcel. That prior to his demise, the deceased had vested in the plaintiff ownership of the suit parcel and who has since developed the same and reside with his family and mother.

However, the suit property is currently registered in the name of the defendant and which process was illegal and without due process.

That in light of the circumstances, there is need to amend the originating summons and include an additional prayer amongst the orders that the plaintiff is seeking as set out in the annexed draft amended originating summons herein. The supporting affidavit reiterates the ground of the application.

In the replying affidavit, the respondent states that he is the registered owner of the suit property and has developed it extremely by planting coffee, fruits and trees. That he resides on the suit property with his sons and have been in quiet and exclusive possession even before the demise of his father contrary to the plaintiff's allegation that he is in possession.

That his late father vested the suit property to him before his demise and even ordered one of his brothers who had attempted to fence it to remove his fence and move out contrary to the plaintiff's allegation that the property had been vested on him.

The plaintiff resides on an adjacent piece of land number SACHO/KABASIS/767 and has annexed the road to his property which he continues to maintain that it forms part of parcel SACHO/KABASIS/475.

That after the demise of his father, they sat down as a family in 1985 and shared out his property wherein the plaintiff was their secretary and he was given the suit property and he was given parcels numbers SACHO/KABASIS/24, 39 and 45.

That sometime in 1993, the plaintiff filed suit against him vide Kabarnet RMCC No. 13" A" of 1993 claiming a portion of the suit land and he filed a defence totally denying his claim. When the matter came up for hearing, it was referred to a panel of elders for hearing and determination. That the panel of elders though not having jurisdiction to deliberate on an issue touching on title purportedly made an award in favour of the plaintiff to the effect that his parcel of land was to be subdivided into two. That the court adopted the award on 15th December, 1994 as a judgment of the court and for 20 years the plaintiff did not execute it until 2013, when he attempted to execute it and it was declared time barred.

That by reason of the matters aforesaid, he verily believes that the plaintiff/applicant instant application is wholly unmerited and the same ought to be dismissed with costs on the following grounds:

(i) That the instant application is a disguised appeal against the ruling of the Honourable S. O. Temu (Principal Magistrate) delivered on 2nd December, 2014.

(ii) That the matters now the subject of the instant application were fully addressed in the ruling delivered on 2nd December, 2014 as it touches on issues of limitation.

(iii) That the proposed amendments in any event, are at complete variance with the evidence set out in the originating summons and the supporting affidavit.

(iv) That the amendment sought to be included in the originating summons is not supported by facts and is intended to confuse and prejudice the defendant.

The intended amendment to include a claim on trust is brought as an afterthought as it is premised on the notion that the elders award has not been executed, which goes back to the issue of limitation.

That he is advised by his Advocates on record which advice he verily believes to be true that the intended new cause of action ought to be originated by plaintiff and the two causes of action of adverse possession and trust cannot run concurrently in the same suit.

That under the circumstances, he verily believes that the plaintiff's/applicant's application dated 8th October, 2018 has no merit whatsoever and prays that the same be dismissed with costs to the defendant and he makes this affidavit in opposition to the plaintiff's said application.

I have considered the application and do find that it is in the interest of justice to allow the amendment of the originating summons to enable the court to determine all issues in controversy. The respondent suffers no prejudice if amended. There is no time limit in claiming trust. Application is allowed. Costs in the cause.

Dated and delivered at Eldoret this 12th day of April, 2019.

A. OMBWAYO

JUDGE