



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 33 OF 2019

SERAH SHILOO TIPIS

ERIC TIPIS LENGESANI (Suing as the legal representative .

of the estate of the late Justus Kantet ole Tipis.....**PLAINTIFFS**

VERSUS

LEMERIAN OLE MOIJOI.....**1ST DEFENDANT**

YUSSUF MOHAMMED.....**2ND DEFENDANT**

NANYIKU OLE NTUTU.....**3RD DEFENDANT**

LOOYIEYIO OLE NTUTU.....**4TH DEFENDANT**

RULING

(Application for amendment of an Originating Summons; suit filed in the year 2001 seeking orders for adverse possession; amendment being filed 18 years later to introduce a new land parcel in the claim and to further plead fraud; given the age of the matter, great prejudice will be caused to the litigants but no prejudice will be caused to the applicants as they can as well file a separate suit to seek orders of adverse possession for the new parcel of land; pleading of fraud acknowledged by counsel for the applicants to already exist in the original pleadings so no necessity in the amendment; application dismissed)

1. The application before me is that dated 18 June 2019 filed by the applicants (plaintiffs) in this Originating Summons. The application is said to be brought pursuant to the provisions of Article 159 of the Constitution, Section 3A of the Civil Procedure Act, and Order 1 Rule 10 (2) and Order 8 Rule 3 of the Civil Procedure Rules. The application seeks orders that one David Kimutai Kenduiwo be enjoined to this suit as the 5th defendant and service upon him be effected by way of substituted means. The applicants also wish to be granted leave to amend their pleadings in terms of an annexed draft amended Originating Summons. The application is opposed and before I go to the gist of it, I feel it necessary to lay some background to the suit.

2. The suit was commenced through an Originating Summons (O.S) which was filed on 15 March 2001 and later amended on 15 May 2008. The claim is one of adverse possession over the land parcels Cis Mara/Lemek/1757 in name of Lemerian Ole Moijoi, the 1st defendant; Cis Mara/Lemek/1851 in name of Yusuf Mohammed Hussein the 2nd defendant; Cis Mara/Lemek/1861, 1862, 1863 and 1864 in the name of Nanyiju Ole Ntutu the 3rd defendant; and Cis Mara/Lemek/1864 in the name of Looyieyio Ole Ntutu in the name of the 4th defendant. The suit is brought on behalf of the estate of the late Justus Kantet Ole Tipis (deceased) and the general claim is that the deceased was allocated the land parcel Cis Mara/Lemek/161, but also, in the year 1971 or thereabouts, the deceased and/or his family took possession of some unregistered land bordering the said land parcel No. 161. It is alleged that the said land was then completely fenced off and the deceased and his family utilized the same for cultivation and other related activities. It is thus argued that there is an informal merger of the land parcel No. 161 and the portion adjacent to it. It is claimed that in the year 1999, this adjacent portion was used to carve out titles to the respondents and I believe that it is these titles that are in issue in this case.

3. The respondents in their reply contend that their parcels of land are distinct from the applicants' land parcel No. 161 and aver that there existed a clear boundary and beacons between their land and that of the plaintiffs until the year 2001 when the beacons were uprooted by the applicants. They generally contest the claim of the applicants.

4. The suit for one reason or another did not take off for hearing and at some point, the court file disappeared, so that what is before me is a

reconstructed file. The suit was originally filed in the High Court at Nairobi, then later transferred to the High Court at Nakuru, before being moved to the Environment and Land Court (ELC) in Narok. Hearing commenced before Kullow J, in the ELC at Narok, and the Judge heard some witnesses and visited the locality before he recused himself following an application by the applicants. The matter was then transferred to this court for determination and it is after its movement to this court that this application was filed.

5. The supporting affidavit to the application is sworn by Eric Tipis Lengesenii the 2nd applicant. He has deposed that after the hearing (in Narok) on 26 July 2018, he was approached by someone who revealed to him that contrary to his earlier position that the plot No. 1870 was earmarked as a school, there was a purported title in the name of David Kimutai Kenduiwo. He then applied for an extract of the title and obtained it in early November 2018. It is his view that this title is fraudulent. In the draft amended O.S, the applicants wish to include this land parcel No. 1870 in the suit, and also claim to be entitled to it by way of adverse possession. They also wish to add a prayer that all the titles of the respondents and the intended new party were acquired fraudulently and illegally and thus null and void.

6. The respondents have opposed the application through filing of Grounds of Opposition. It is their view that this application has been instituted too late in the day and as an afterthought with the sole intention of derailing the hearing of this case. They point out that this application has been filed 19 years after the case was first filed and that it was always within the knowledge of the applicants that the parcel No. 1870 existed. They ask the court to take consideration of what they claim to be the conduct of the applicants in frustrating the hearing of this suit. They argue that there is no prejudice that the applicants will suffer if they bring a separate suit against the intended new defendant. They further aver that to accommodate the new defendant would bring delay to the suit and render what has happened for the last 19 years an academic exercise. They further complain that the applicants wish to add a new prayer based on fraud.

7. I took in the submissions of both Mr. Njagi for the applicants and Mr. Maina Ngaruiya for the respondents and I have taken these into consideration before arriving at my decision. Mr. Njagi in his address urged this court to dispel the notion that his clients have been delaying this matter deliberately. He submitted that his clients believed that the land parcel No. 1870 was a school only to discover later that it actually was not. He submitted that the right to amend is unfettered and that litigants should be allowed to plead their case in the best way that they wish. He thought that the amendments are necessary to his client to enable his clients present their case much more clearly. He also pointed out that the power to amend can be exercised at any stage of the proceedings.

8. On his part, Mr. Ngaruiya pressed the point that this is another delay tactic by the applicants. He submitted that introducing the new party will simply lead to further delays in the conclusion of this suit as the new defendant will need to be allowed time to respond. He also thought that the applicants want to re-engineer their case by adding a claim for fraud. He wondered why this application was not filed in November 2018 when the applicants allege to have obtained the register of the new title.

9. What is before me is principally an application to amend pleadings. The general rule on amendments was well articulated by O'Connor J, in the case of *Eastern Bakery vs Castelino (1958) EA 461*, where the judge stated as follows at p462 :-

“It will be sufficient for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: Tildesley v. Harper (10 (1878), 10 Ch. D. 393; Clarapede v. Commercial Union Association (2) (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: Budding v. Murdoch (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: Ma Shwe Mya vs. Maung Po Hnaung (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: Raleigh v. Goschen (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: Weldon v. Neal (6) (1887), 19 Q.B.D. 394; Hilton v. Sutton Steam Laundry (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.

10. I am in full agreement with the above dictum which has been cited with approval in several authorities including the case of *St. Patrick's Hill School Limited vs Bank of Africa Kenya Limited (2018) eKLR* referred to me by Mr. Ngaruiya. In essence, amendments need to be freely allowed if no serious prejudice is caused to the other party. In arriving at the decision whether serious prejudice will be caused to the other party, the court needs to look at all surrounding and material circumstances including the stage in which the proceedings have reached, the nature of amendment particularly whether it is introducing a new cause of action, and any prejudice that either of the party may suffer. Different circumstances will be material depending on the specific circumstances of each case and the nature of amendments sought.

11. In our case, it is not in contest that this suit was originated in the year 2001. It is now more than 18 years ago. The claim of the applicants is one of adverse possession for the properties identified as belonging to the 1st-4th respondents and now the applicants wish to add a claim for adverse possession for the new parcel No. 1870. It is a fact that once the new defendant is introduced, there will be further delay in this matter, and indeed, since the validity of summons is generally for one year, following the provisions of Order 5 Rule 2, service upon the new defendant can be delayed for up to one year. Even if the new defendant is served immediately, he will still need to be accommodated so that he can reply to the suit and prepare himself for trial. I think this element of delay given the circumstances of this case is material. I would probably have not given this element so much prominence if I felt that it is, critical for the applicants to have the new defendant in this suit, but I do hold the view that the applicants stand to suffer no prejudice, if they continue this suit as it is, without the new intended party being in this case. I say so because the applicants can as well file a separate suit for adverse possession for the new land parcel that they wish to introduce, without compromising in any way their existing claim in this suit, or the claim in the second suit (if filed). It is thus not entirely necessary for the applicants to have the proposed new defendant in this suit for their right to claim adverse possession of the land parcel No. 1870 will not be affected at all. In essence the applicants stand to suffer no prejudice if their application for joinder of the new defendant is not allowed. They can as well sue him in a separate suit.

12. The second limb of the amendment seeks to plead fraud in the body of the O.S. Mr. Ngaruiya's argument was that this is a new cause of action whereas Mr. Njagi thought that it is not, as it is mentioned in the body of the supporting affidavit. He submitted that the aim is to make more clear the pleadings of his client. Again, if as mentioned by Mr. Njagi, the claim of fraud already exists in the pleadings then no

prejudice is suffered by not allowing the amendment. It thus follows that there is no necessity in this amendment. There is no need of delaying the parties further and burdening them with the extra costs of filing new pleadings when the amendment is not necessary.

13. I think I have said enough to demonstrate that I am not persuaded that this application is merited and I hereby dismiss it with costs to the respondents.

14. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 26th day of June 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Njagi Wanjeru for the applicants.

Ms. Kinuthia holding brief for Mr. Maina Ngaruiya for the respondents.

Court Assistants :Nelima Janepher/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU