



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KABARNET**  
**ELC CASE NO. E002 OF 2025**

**MARTIN**

**KIMENGICH**

**PLAINTIFF/RESPONDENT**

**= VERSUS =**

**JOHNSTONE**

**CHESANG**

**DEFENDANT/DEFENDANT**

**RULING**

1. The plaintiff/respondent herein instituted this suit seeking judgment against the defendant/applicant for an order of eviction, a permanent injunction to restrain the defendant by himself, his agents, servants or any other person claiming under him from trespassing, entering, remaining and/or dealing in whatever manner with his parcel of land known as Baringo/Kapkiamo/262 (hereinafter referred to as the suit property); general damages for trespass; costs and interest.

2. As can be discerned from the averments/contentions in the plaint, the plaintiff's claim against the defendant is premised on the grounds that the plaintiff is registered owner of the suit property; that sometime in the year 2022, the defendant trespassed into the suit property and started putting up structures therein; that the activities of the defendant complained of, curtailed the plaintiff's use and enjoyment of the suit property, thereby violating the plaintiff's right to property.
3. The defendant filed a statement of defence, undated, received in court on 21<sup>st</sup> June 2023 in which he contends that he has been living in the suit property together with his family for over 50 years, since 1974.
4. Desirous of amending his statement of defence to inter alia introduce a counterclaim to urge a case of adverse possession, the defendant filed the notice of motion dated 14<sup>th</sup> October 2025, in which he inter alia seeks leave of this court to amend his defence received in court on 27<sup>th</sup> June,

2023. The motion is premised on the grounds on its his face and supported by the affidavit of the applicant, sworn in support thereof in which the grounds on the face of the application are reiterated. The grounds taken up in support of the application are that the applicant filed an application dated 5<sup>th</sup> November, 2024 seeking leave to amend his statement of defence on record; that the application was dismissed by the court on the ground that it had no jurisdiction to entertain the claim sought to be introduced through the counterclaim, claim for adverse possession of the suit property; that the suit has since been transferred to this court which has jurisdiction to entertain his claim for adverse possession; that the intended amendment raises triable issues warranting this court to hear and determine them; that no prejudice will be occasioned on the plaintiff/respondent if the application is allowed and that it is in the interest of justice that the application be allowed.

5. The plaintiff/respondent filed a replying affidavit in response to the application sworn on 31<sup>st</sup> October 2025, in which he

depones/contends as follows: -

- i) That the proposed amendments and counterclaim are fatally defective and amount to abuse of the court process as they seek to change the character of the suit from a claim of possession and declaration of proprietary rights to one seeking cancellation of title over land;
- ii) That permitting the amendment will defeat the overriding objective of securing justice expeditiously and proportionate resolution of disputes and as such, occasion undue delay and hardship to the plaintiff;
- iii) That the defendant/applicant has been indolent and negligent in the manner he has conducted himself in this suit.
- iv) That the draft amended defence and counterclaim is a mere sham that does not raise any triable issues;
- v) That the claim by the defendant that he has acquired title to the suit property on account of

having been in adverse possession thereof is premature and unsustainable;

vi) That the defendant/applicant should file a separate suit to urge his claim for adverse possession; and

vii) That the amendments sought are unnecessary, unjust and would delay the plaintiff in attainment of justice.

6. Pursuant to directions given on 13<sup>th</sup> November 2025, the application was disposed of by way of written submissions.

7. The defendant/applicant filed submissions dated 1<sup>st</sup> December 2025 on 2<sup>nd</sup> December 2025 and the plaintiff/respondent filed his submissions dated 20<sup>th</sup> November 2025 on 4<sup>th</sup> December 2025 which I have read and considered.

### **Analysis and determination**

8. The sole issue arising from the application, the response

thereto and the submissions, is whether the defendant/applicant has made up a case for being granted the reliefs sought or any of them.

9. As pointed out herein above, the plaintiff instituted the instant suit seeking several orders, among them an order for eviction of the defendant from the suit property. Whereas the plaintiff/respondent claims that the defendant/applicant entered the suit property in 2022, the defendant/applicant claims that he entered the suit property in 1974 and has been in use and occupation of the suit property for over 50 years.
10. Based on his claim that he has been in use and possession of the suit property for a long period of time, through the intended counterclaim, the defendant/applicant wishes to advance a claim of advance possession against the plaintiff/respondent.
11. Asserting that the defendant/applicant entered the suit property, the plaintiff/respondent urges this court to dismiss

the application on among other grounds, the grounds that allowing the amendment may change the character of the suit which is a simple suit of eviction of the defendant from the suit property and unnecessarily delay the hearing and determination of his suit. According to the plaintiff/respondent, the defendant/applicant should, if need be, file another suit to urge his claim for adverse possession.

12. Upon considering of the cases urged by the parties and the law applicable to amendment of pleadings and considering that the suit herein is fresh (has not been admitted to hearing), I find and hold that granting the defendant/applicant leave to file the intended amended defence and counterclaim will give the court an opportunity to hear and determine all the issues of law and fact arising from the pleadings filed by the parties. Allowing the application will also lead in efficient use of judicial time as it will avoid multiplicity of suit. Moreover, it will also avoid the possibility of issuance of conflicting decisions over the subject matter of the suit.

13. That being my view of the notice of motion dated 14<sup>th</sup>

October 2025, I allow it in the following terms: -

- i) The defendant/applicant be and is hereby granted leave to amend his statement of defence received in court on 27<sup>th</sup> June, 2023.
- ii) The annexed draft amended statement of defence and counterclaim be and is hereby deemed to be properly on record subject to payment of the requisite court filing fees in respect thereof;
- iii) The cost of the application shall abide the outcome of the suit.

14. Orders accordingly.

**Dated, signed and delivered virtually at Busia this 25<sup>th</sup>  
day of March, 2026**

**L. N. WAITHAKA**

**JUDGE**

**In the presence of;**

Ms Mbugua for the Defendant/ Applicant

N/A for the Plaintiff/Respondent

Court Assistant; Tracy

ORIGINAL