



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 98 OF 2018

CHARLES MWANGI KIIRU.....APPLICANT/PLAINTIFF

VS

BONIFACE MAINA GICHOMO.....1ST RESPONDENT/ DEFENDANT

JOSEPH MWANGI THUO.....INTENDED 2ND DEFENDANT

RULING

1. The Applicant moved the Court by way of Notice of Motion dated the 10/6/19 seeking interalia the following orders;

1. Joinder of Joseph Mwangi Thuo as the 2nd Defendant.
2. Leave to amend the Originating Summons as per the draft annexed to the application.
3. An inhibition order be issued against any dealings in the suit land pending the hearing and determination of the suit.
4. An order of injunction be issued against the 1st and 2nd Defendants jointly and severally and any and all their servants agents and persons claiming through or under them from entering into parcel No LOC 14/GAKURWE/314 until the suit is heard and determined.
5. Costs of the application.

2. The application is based on the grounds annexed to the application which are interalia; the Applicant is claiming a right under adverse possession over the suit land; on the 9/4/19 the Defendant transferred the suit land to the intended 2nd Defendant ; the Applicant is in possession of the suit land wherein he has planted cash and subsistence crops; on 4/5/19 the 2nd intended Defendant entered the land and uprooted and destroyed crops and trees on the land; it is necessary to enjoin the 2nd intended Defendant to enable the Court determine the matter substantially.

3. In his supporting affidavit the Applicant reiterated the grounds of the application as set out above.

4. The Defendant did not contest the application.

5. The 2nd intended Defendant opposed the application through a Replying Affidavit dated the 9/7/19. In it he opposed his joinder in the suit because he is the registered owner of the suit land having become registered as such on the 9/4/19. Further that he acquired the suit land in compliance with the right procedure including obtaining land control board consent. In addition, that the Applicant has not met the threshold of granting an injunction as no prima facie case has been shown.

6. Parties elected to canvass the application by way of oral arguments which I have considered and in a large extent are reiterated in the application and the response.

7. In respect to the joinder of the 2nd Defendant, Order 1 Rule 10 (2) of the Civil Procedure Rules provides that: -

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out. And that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved

in the suit, be added.”

8. From the above procedural rule, it is clear that the Court has unfettered discretion to admit or strike out from proceedings a party with or without an application being made. In the former case, it is trite law that the Court can, upon satisfying itself that the person whose presence before the Court may be necessary in order to enable or assist it effectually and completely determine all questions involved in a dispute, add such person as a party.

9. The guiding principles for joinder of parties are as follows; the party must be a necessary party, must be a proper party, there must be relief expected to flow from one party to the other and the ultimate order or decree of the Court cannot be enforced without his presence in the matter and his presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

10. It is not in dispute that the 2nd intended Defendant is the registered owner of the suit land and therefore any orders that are likely to be issued shall affect him and in accordance to Art 50 of the Constitution, his right to be heard on the issue in controversy is paramount so that the Court can effectively and effectually adjudicate upon and settle the question of adverse possession as claimed by the Applicant.

11. The Court finds that it is proper to enjoin Joseph Mwangi Thuo as the 2nd Defendant herein.

12. In respect to the issue of amending the Originating Summons, and having allowed joinder in the preceding para, Order 8 Rule 5(1) empowers the Court follows;

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just”.

13. In the case of **Mccooy Vs Allibhai (1939) 5 EACA, 70** the Court stated that, as a general rule, leave to amend pleadings ought not to be refused unless the Court is satisfied the party applying is acting *malafides* or that his blunder has caused some injury to the other side which cannot be compensated by the payment of costs or otherwise. In the instant case, it is meet to allow the amendment. The 2nd Defendant has challenged the amendment on the grounds that the claim for material damages is irreconcilably inconsistent with the cause of action for adverse possession. I have looked at the Original Summons and it does not bear such a claim.

14. It is the view of the Court that the application for amendment is for allowing. It is allowed. It would be absurd to allow the joinder of the intended 2nd Defendant and decline to allow amendment of the Plaintiff.

15. The third issue for determination as I can glean from the application is whether the Applicant is entitled to an order of injunction and or inhibition until the hearing and the determination of the suit. Going by the celebrated case of **Giella Vs Cassman Brown** the Applicant has averred that he is in possession of the suit land cultivating cash and subsistence crops. That upon becoming registered owner of the suit land the 2nd intended Defendant brought some 20 armed persons who destroyed the crops and trees and the Applicant annexed photographs to evidence the same. This evidence was not controverted by the 2nd Defendant. The Court is of the view that the Applicant has successfully established a prima facie case.

16. Going by Order 40 Rule 1 and Section 63 of the Civil Procedure Act which empowers the Court to issue orders preserving the subject matter of the suit, I hereby order an inhibition to be registered on the suit land pending the hearing and determination of the suit.

17. Final orders

1. The Court grants prayers Nos. a, b, and c.
2. In view of prayer No. c above prayer No.(d) is declined as it will serve no additional purpose.
3. The costs of the application shall be in the cause.

18. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 9TH DAY OF OCTOBER 2019

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Waiganjo Gichuki for the Plaintiff/Applicant

Ndegwa HB for Mrs Kimani for the Defendant/Respondent

Mr Ndegwa HB for Kimani for the Intended 2nd Defendant/Respondent

Irene and Njeri, Court Assistants