



**Joseph v Kisau (Environment & Land Case 117 of 2018)  
[2024] KEELC 514 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 514 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 117 OF 2018  
TW MURIGI, J  
JANUARY 31, 2024**

**BETWEEN**

**RAEL MUMBUA JOSEPH ..... APPLICANT**

**AND**

**JEREMIAH NGUNZI KISAU ..... RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 9<sup>th</sup> March, 2023 brought under Order 37 Rule 19 of the [Civil Procedure Rules](#) in which the Applicant seeks the following orders: -
  - i. That this Court be pleased to order that the proceedings herein be continued as if the cause of action had been begun by filing a Plaint and the Applicant to the Originating Summons, Rael Mumbua Joseph be at liberty to amend the Originating Summons into a Plaint.
  - ii. That the Respondent to the Originating Summons, Jeremiah Ngunzi Kisau be at liberty to file a defence and counterclaim as may be necessary.
  - iii. That the costs if this application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit sworn by Jeremiah Ngunzi Kisau on even date.

**The Applicant's Case**

3. The Applicant averred that after the Originating Summons herein was filed, the Respondent filed a replying affidavit on 01/10/2019 which raises several issues and sought some prayers.
4. The deponent averred that the matter has been mentioned severally with a view to confirming whether a consent had been reached on the conversion of the Originating Summons to a Plaint pursuant to his wishes so that the Applicant herein could file a defence and counterclaim. That no consent had been



reached and that it is procedurally impossible for the Applicant to file a defence and counterclaim. He added that to proceed with the cause as is will effectively bar him from a fair hearing.

5. The deponent stated that no prejudice will be occasioned to either party because they will be at liberty to amend their respective pleadings in line with the orders issued by this Court. That it is in the interest of justice that the orders sought be issued so that all the issues are brought before the court for determination.

### **The Respondent's Case**

6. The Respondent filed a replying affidavit on 29<sup>th</sup> May, 2023 in opposition to the application. She averred that the application herein is incompetent as the Applicant has not indicated the issues which he intends to canvass outside the procedure which has been adopted in this suit. She urged the Court to dismiss the application herein for being devoid of merit.
7. The application was canvassed by way of written submissions.

### **The Applicant's Submissions**

8. The Respondent/Applicant's submissions were filed on 24<sup>th</sup> November, 2023. Counsel reiterated the contents of the Applicant's supporting affidavit. Counsel submitted that the only issue for determination is whether the Originating Summons herein should be converted into a Plaint.
9. Counsel submitted that Rael Mumbua Joseph, the Applicant in Originating Summons is seeking to be declared as having acquired the freehold interest in land Parcel No. Nzaui/Kikumini/786 by adverse possession and consequently be registered as proprietor thereof. Counsel argued that the Applicant vide his replying affidavit to the suit denied the Respondent's claim and made his own claims for eviction, injunction and demolition of the property.
10. Counsel argued that if the proceedings were to continue as they are, the Applicant will not have an opportunity to raise his counterclaim. That parties to a suit must bring their whole case before court for determination and the procedure adopted herein will restrict the Applicant from being fully heard. Counsel submitted that Order 37 Rule 19 of the [Civil Procedure Rules](#) permits the court to convert an Originating Summons into a Plaint.
11. Counsel argued that the pleadings filed herein by both parties raised multiple and complex issues requiring oral evidence to be called in proof thereof. Concluding his submissions, Counsel submitted that no prejudice would be suffered by either party since both would have an equal opportunity to be heard. Urging the Court to allow the application, Counsel relied on the case of [Emily Chepkor Chepkwony v Paul Arap Chandoek](#) [2021] eKLR.

### **The Respondent's Submissions**

12. The Applicant/Respondent's submissions were filed on 24<sup>th</sup> July, 2023. On her behalf, Counsel argued that the Applicant has not substantiated the specific issues which purportedly necessitate the conversion of the Originating Summons to a Plaint. In addition, Counsel averred that the Applicant had not annexed a copy of the relevant pleading she intended to file pursuant to the authority she had relied on in her submissions.
13. Counsel argued that the application herein is devoid of merit and urged the Court to dismiss it accordingly.



## Analysis and Determination

14. Having considered the application, the respective affidavits and the rival submissions, the only issue for determination is whether the Originating Summons herein ought to be converted into a Plaintiff.
15. Order 37 Rule 19 of the *Civil Procedure Rules*, 2010 empowers the court to convert an originating summons into a Plaintiff. The law explicitly outlines as follows: -
  - (1) Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaintiff, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.
  - (2) Where the court makes an order under subrule (1), Order 11 shall apply.’
16. In the case of *Mukesh Manchand Shah & another v Priyat Shah & another* [2015] eKLR, the Court of Appeal explained that the essence of conversion of an Originating Summons into a Plaintiff as being the need to accommodate complex matters or disputed facts so that the matter is fully determined and held as follows: -

“That is why in appropriate cases the judge may convert the cause or make the necessary amendments to the summons to accord with the existing facts in order to raise the matter in issue between the parties. See Order 37 rules 18 & 19. Where it is found that issues raised in the summons cannot be so raised, the High Court will nonetheless have jurisdiction to entertain these very same questions if brought properly in a plaintiff... There is no doubt that the mischief of this summary procedure is not intended for matters which involve serious and complex questions of law and fact. The procedure is intended to enable simple matters to be settled without the expense of bringing an action in the usual way.”
17. The nature of the Applicant’s allegations against the Respondent are clearly contested as can be seen from paragraph 14 of the replying affidavit annexed as Exhibit “JNK1”. The Applicant contends that the Respondent has not acquired any prescriptive rights to the suit property and that he has been in active dispute with the Respondent together with her relatives. He has also disputed the fact there are any buildings on the suit property.
18. Additionally, under paragraph 15, the Applicant made several distinct claims to wit; injunction, trespass, eviction and demolition of any developments in the suit property.
19. In view of the contentious nature of the allegations in the Originating Summons and the replying affidavit thereto, the circumstances dictate that oral evidence will undoubtedly be necessary in order to fully resolve the issues herein. The parties will need to fully present their claims vide a Plaintiff and a counterclaim as the case may be.
20. A conversion of the suit herein into a Plaintiff will therefore help the parties herein to effectively present their respective cases and also help the court to properly adjudicate the dispute. No prejudice will be suffered by either party if the application is allowed since no claim has been locked out of the seat of justice.
21. In the end, I find that the application dated 9<sup>th</sup> March 2023 is merited and the same is allowed as prayed.

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**HON. T. MURIGI**

**JUDGE**

**RULING DELIVERED DATED AND SIGNED VIA MICROSOFT TEAM THIS 31<sup>ST</sup> DAY OF  
JANUARY 2024.**

**In the presence of**

Mathuva for the Applicant.

Court assistant Kwemboi.

