



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 281 OF 2017

NICHOLAS OKOTH OKOYO.....PLAINTIFF/RESPONDENT

VERSUS

PRISKA ONDIEK OKETCH.....1ST DEFENDANT/APPLICANT

ROSE ANYANGO OCHIENG.....2ND DEFENDANT/APPLICANT

BENSON OLILI OKETCH.....3RD DEFENDANT/APPLICANT

MICHAEL ODHIAMBO OKETCH.....4TH DEFENDANT/APPLICANT

JARED OOKO OKETCH.....5TH DEFENDANTS/APPLICANT

RULING

1. This ruling is in respect of an application by way of a Notice of Motion dated 17th April 2018 and filed in court on 8th April 2018 brought under Order 1 Rule 9 and 10 ,Order 24 Rule 3,4, 5 and 6 and Order 8 Rule 3 of the Civil Procedure Rules and Section 3A Civil Procedure Act. The defendants (applicants) have sought against the plaintiff (respondent), the following orders:-

a. Spent

b. THAT this Honourable court hereby grants leave to the defendants amend their defence and to comply with Order 11 of the Civil Procedure Rules.

c. THAT upon the granting of leave by the court the amended defence attached hereto be deemed as duly filed and served upon the plaintiff come respondent.

d. THAT costs be in the cause.

2. The application is supported by the 4th applicant's supporting affidavit sworn on 17th April 2018 and his statement filed on 4th April 2017 as well as the proposed amended statement of defence. The grounds of the application include that K'owino and Co. Advocates previously on record for the applicants ignored to include some very important and crucial information in the defence and that the mistake of counsel should not be visited on the applicant who deserve to have the suit heard and determined on its merits.

3. The respondent opposed the application by his statement of grounds of opposition dated 26th April 2018 and filed on 3rd April 2018 pursuant to Order 51 Rules 15 and 16 of the Civil Procedure Rules 2010. The grounds are inter alia, that the purported originating summons is a nullity ab initio hence it cannot be brought on board by way of amendments either in the manner sought or at all and that the application has been mounted with inordinate delay.

4. On 23rd July, 2018, the court directed that the parties argue the application by way of written submission, see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction No. 33 (a) of the Courts Practice Directions, 2014**. The applicants represented by Mauwa and Company Advocates and the respondents represented by M/s Oguttu, Ochwangi,Ochwal and Company Advocates, filed submissions dated 25th July, 2017 and 19th September,2018 respectively.

5. I consider the entire application, the statement of grounds of opposition and submissions which include authorities cited therein. Is the application suited and merited for the grant the orders sought? The answer follows the analysis hereunder:-

6. By a plaint dated 11th March 2017 and filed in court on 17th March 2017, the respondent is seeking an order of eviction, permanent injunction, general damages for trespass, among other reliefs, against the applicants in respect of the suit land, **LR NO. TRANSMARA/OLENTARE/214**. The applicants filed their undated statement of defence on 4th April 2017 whereby they denied the respondents claim. Their reply to statement of defence dated 24th April 2017 was filed in court on 27th April, 2017.

7. The instant application has been brought approximately a year after the close of pleadings. It seeks to amend the applicant's statement of defence to include a counterclaim by way of originating summons as provided under **Order 37 Rule 7 of the Civil Procedure Rules, 2010**.

8. Notably, a claim for adverse possession in the form of a defence cannot be faulted by court, see **Wabala –v- Okumu (1997) LLR 609 (CAK)**.

9. The decision in **Wabala case** (Ibid) was recognised later in the case of **Gulam Noordin –v- Julius Charo Karisa (2015) eKLR** where it was further held, inter alia:-

a. An applicant can mount an adverse possession claim for registration as the proprietor of land by way of an originating summons.

b. Where the respondent elected to raise the defence of adverse possession without a counterclaim, denied himself or herself an opportunity to be registered as the proprietor of the suit property.

c. Irrespective of the procedure adopted the onus is on the claimant to prove adverse possession claim dictated by the need to do substantive justice.

d. The power of the court to do substantive justice is today wider than before.

10. In **Mariba –v- Mariba Civil Appeal No.188 of 2002**, the Court of Appeal held that a party can articulate his or her claim under **Order 37 Rule 7** by way of a plaint. Therefore, adverse possession claim by way of an originating summons is not cast in stone.

11. It is also trite law that where a plaint had made no specific plea for adverse possession, the plea can be granted in the interest of substantive justice; see **Bayete Co. Ltd –v- Kosgei (1998) LLR 813**.

12. I note the undated statement of defence filed on 4th April 2017 by K'owino and Co. Advocates formerly on record for the applicants, and a notice of change of advocates dated 23rd May, 2017 by Marwa & Co. Associates Advocates who are currently on record for the applicants. In view of the grounds of the application, it can hardly be concluded that the application has been mounted with inordinate delay. Furthermore, the applicants' counterclaim is loaded with triable issues and the jurisdiction of this court cannot be restricted thereby; see **Peter –v- East Africa Cargo Handling Ltd (1974) EA 75**.

13. The parties to this suit have a right to a fair trial which shall not be limited as provided for under **Articles 25 (c) and 50 (1) of the Constitution of Kenya,2010**. Moreover, and as already noted, this court is enjoined to do substantive justice rather than procedural or technical justice as provided for in **Article 159 (2) (d) of the Constitution of Kenya, 2010** as well as **Sections 3 and 19 (1) of the Environment and Land Court Act, 2015 (2011)**; see also **Macharia Maina-v- Mwangi Kagiri (2014) eKLR**.

14. In light of the foregoing analysis, I am of the considered view that the applicants have made a sufficient case for the grant of the orders sought in the application. I find merit in the application.

15. Accordingly, I grant orders 2, 3 and 4 sought in the applicants' Notice of Motion dated 17th April 2018.

DELIVERED, SIGNED and DATED in open court at MIGORI this 22nd day of **October 2018**.

G. M. A. ONGONDO

JUDGE

In the presence of:

Mr. Oguttu Mboya learned counsel for the plaintiff/respondent

Tom Maurice Court Assistant