



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 225 OF 2017 (OS)

IN THE MATTER OF LAND PARCEL NUMBER THARAKA/TUNYAI "A"/390

AND

IN THE MATTER OF SECTIONS 7, 37 AND 38 OF THE LIMITATION OF ACTIONS ACT AND ORDER 37 RULE 8 OF THE REGISTERED LAND ACT

BETWEEN

JAMES MUTUGI MWITHI.....PLAINTIFF

VERSUS

DANIEL MUGO MWANGI.....DEFENDANT

RULING

1. This ruling concerns an application dated **29th October, 2018** which states that it has been brought to court under Order 8 Rule 1(i) and Rule 3(i) AND under Order 5 Rule 17(i) of the Civil Procedure Rules. It seeks orders that:

- i) The annexed amended originating summons be deemed to have been properly filed upon payment of the prescribed filing fee.
- ii) Alternatively the plaintiff be given leave to amend his originating summons and the same be deemed to have been properly filed upon payment of the prescribed fee.
- iii) The plaintiff be given leave to serve the amended originating summons on the defendant Dedan Mugo Mwangi by advertising it once in the Daily Nation Newspaper.
- iv) The cost of this application be costs in the cause.

2. The application is supported by the affidavit of JAMES MUTUGI MWITI, the plaintiff and has the following grounds:

- a) When drawing the pleading in this case either our advocate on record erroneously wrote the name of the defendant as Daniel instead of Dedan or the secretary typed the name Dedan wrongly.
- b) Without noticing the error our advocate filed the papers and did not notice the mistake until the day of the hearing of this case when he perused the abstract of title of the parcel of land in question and also noticed the name South was missing in the title.
- c) The proposed amendment or correction of the name will not prejudice anybody.
- d) The suit was filed on 5th April, 2017 by my advocates on my instructions.
- e) I do not know the defendant and all my efforts to trace him and have him served with the Originating Summons have proved fruitless.
- f) I was all along looking for Dedan Mugo Mwangi and I did not know the suit documents had the name Daniel Mugo Mwangi.
- g) It is imperative that the Originating Summons be served before this suit is heard, hence the necessity for the order.

3. The application is supported by the affidavit of the plaintiff which states:

I, JAMES MUTUGI MWITHI of care of Post Office Box Number 68, Marimu, Tharaka Nithi make oath and state as follows:-

1. That my name is James Mutugi Mwithi and I am the deponent herein.
2. That I am the plaintiff herein and therefore competent to make this affidavit.
3. That I am informed by Mr. Kaai, our advocate on record, that when drawing the pleadings in this case he either erroneously wrote the name of the defendant as Daniel instead of Dedan or the secretary typed the name Dedan wrongly.
4. That without noticing the error our advocate filed the pleadings and did not discover the mistake until the day the matter came up for hearing.
5. That he noticed the mistake when I handed him the abstract of title.
6. That he also noticed the name South was omitted in the description of the suit land.
7. That I verily believe that the correction of the names will not prejudice anybody.
8. That the suit was filed on 5th April, 2017 by my advocates on my instructions.
9. That I do not know the defendant and all my efforts to trace him and have him served with the originating summons have proved fruitless.
10. That I was all along looking for Dedan Mugo Mwangi and I did not know the suit papers bore the name Daniel Mugo Mwangi.
11. That it is imperative that the Originating Summons be served before the suit is heard. Hence, the necessity for the order sought.
12. That I make this affidavit in support of my application the facts deponed herein being true to the best of my knowledge, information and belief.

4. The plaintiff's Originating Summons dated **13th March, 2017** takes the following form:

LET DANIEL MUGO MWANGI of Tunyai Tharaka Nithi District within 15 days after service on him enter appearance to this summons which is issued on the application of **JAMES MUTUGI MWITHI** who claims to have acquired title by way of adverse possession of Land Parcel Number THARAKA/TUNYAI 'A'/390 currently registered in the name of Daniel Mugo Mwangi, the defendant for the determination of the following question:-

- a) Whether the defendant is the registered proprietor of land parcel number Tharaka/Tunyal 'A'/390.
- b) Whether the plaintiff has been in occupation of the said parcel of land adversely for a period in excess of 12 years.
- c) Whether the defendant's title to the said parcel of land has been extinguished by virtue of the plaintiff's adverse possession.
- d) And if so whether the plaintiff has acquired title to the said parcel of land and whether he should be registered as the proprietor thereto in place of the defendant.
- e) What orders should be made as regards costs.

Dated this 13th day of March, 2017

KAAI, MUGAMBI & CO.

ADVOCATES FOR THE PLAINTIFF

5. It is clear that from the outset, the plaintiff was claiming a declaration that he was entitled to ownership of the defendants Land Parcel No. THARAKA/TUNYAI 'A'/390 by way of adverse possession. The defendant's name was given as DANIEL MUGO MWAGI. This was the name under which this suit was filed.

6. A claim for ownership of land by adverse possession is a claim that must be crafted meticulously. If it succeeds, it deprives a registered owner of land his property. It bestows upon an applicant ownership of property which initially did not belong to him. Therefore, the process leading to the determination of ownership of another person's land by any applicant by way of adverse possession must be handled very carefully.

7. Daniel Mugo Mwangi cannot all of a sudden become Dedan Mugo Mwangi. These are two different names of different persons. A person can only be known by one name. Introduction of another name after a suit has been filed suggests introduction of a different suit. I opine that amendments subsumed by order 8 of the Civil Procedure Rules cannot be allowed to change the original name of the defendant. This is a backdoor way of filing a different suit. Any orders granted in the original suit are automatically vacated when a new defendant is introduced. This renders the original suit veritably inchoate. For that reason an order for substituted service cannot issue.

8. I note that the advertisement dated **31st May, 2018**, purporting to effect substituted service names the defendant as Daniel Mugo Mwangi. The plaintiff wants to substitute that name with Dedan Mugo Mwangi. As I have already said these are names of two different persons, whether or not both exist being immaterial.

9. In the circumstances, I dismiss this application.

10. I also dismiss this suit in its entirety.

11. It is also so ordered.

Delivered in open court at Chuka this 13th day of November, 2018 in the presence of:

CA: Ndegwa

Mark Muriithi h/b Kaai Mugambi for plaintiff

P.M. NJOROGI,

JUDGE.