



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 494 OF 2016

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CO-OPERATIONPLAINTIFF

VERSUS

REUBEN ARAP SIMOTWO & 20 OTHERS.....1ST DEFENDANT

JOSEPH CHEROGONY CHESEREM.....2ND DEFENDANT

WILSON KIPRONO CHESEREM.....3RD DEFENDANT

ZIPPORAH RUNGO AMDANYI.....4TH DEFENDANT

KIPKOECH BENJAMIN TALAM.....5TH DEFENDANT

JOHN LEMRKOGO.....6TH DEFENDANT

WILSON RUTO CHERONO.....7TH DEFENDANT

SOLOMON CHELAGAT.....8TH DEFENDANT

MARK BUNE.....9TH DEFENDANT

AMOS TANUI.....10TH DEFENDANT

JAMES KIPSANG RONO.....11TH DEFENDANT

MEOS MATOKE MUSA.....12TH DEFENDANT

GRACE CHEROTICH MWANGI.....13TH DEFENDANT

JOHN K. SOLIT.....14TH DEFENDANT

PST. FRANCIS KIBOR.....15TH DEFENDANT

SAMUEL SITIENEI.....16TH DEFENDANT

FORENCE LIVWEKE.....	17 TH DEFENDANT
AARON KULEI.....	18 TH DEFENDANT
HENRY KOECH.....	19 TH DEFENDANT
HOSEA KOECH.....	20 TH DEFENDANT
JOB KELONG.....	21 ST DEFENDANT

RULING

(Application for leave to amend defence; application allowed)

1. By Notice of Motion dated 18th February 2017, the defendants sought the following orders:

1. That the defendants/applicants be granted leave to amend their defence and file and serve the same within fourteen (14) days from the date of giving the orders or within such time as this honourable court may deem expedient.

2. That if leave is granted, the draft defence annexed hereto be deemed to be the amended defence duly filed and served upon the payment of the appropriate court fees.

3. That the costs of this application be provided for.

2. The application is supported by an affidavit sworn jointly by the 12th, 7th, 15th and 1st defendants. They depose that their advocates overlooked to specifically plead the defence of limitation. They thus pray that they be allowed to amend their defence so as to include the defence of limitation, for the purpose of determining the real question in controversy between the parties.

3. The application is opposed through a replying affidavit sworn by Joseph Chege Mwaura, the Special Projects Manager of the plaintiff. He deposed that the plaintiff is a state corporation established under Cap 445 Laws of Kenya and therefore Limitation of Actions Act does not apply to it and that proceedings by the government to recover possession of government land are excluded in the Limitation of Action's Act and the definition of government according to the Act includes Corporation. He also denied that the defendants have been in open and continuous occupation of the land in a manner hostile to the plaintiff's proprietary right.

4. The court ordered pursuant to parties' agreement, that the application be heard by way of written submissions. The defendants filed submissions on 14th September 2017. When the matter came up on 19th September 2017 for mention to take date of ruling, counsel for the plaintiff sought and was granted 14 days within which to file and serve submissions. The matter was then scheduled for mention on 13th October 2017 to take date of ruling. Come the new mention date, there was no appearance for the plaintiff and the plaintiff's submissions were neither in the court file nor had any such submissions been served on the defendants'/applicants' counsel. Counsel for the defendants/applicants successfully urged the court to give date of ruling on the basis of the submissions on record.

5. I have considered the application, the affidavits and the submissions on record. This suit has not yet proceeded to hearing. Upon perusing the record, I note that directions under Order 11 of the Civil Procedure Rules are yet to be taken. In other words, the suit herein is still in its very early stages on its journey towards hearing. Generally, amendments sought before judgment should be freely given provided that no injustice is occasioned to the respondent.

6. The respondent herein has raised arguments to the effect that the respondent is a state corporation and

that proceedings by government to recover land are not excluded by Limitation of Actions Act. In other words, the respondent is contending that the proposed amendments will not avail the defendants any case or defence against the plaintiff. That to my mind is an issue to be determined at the hearing of the suit and is not a bar to the amendments being allowed. Indeed, the plaintiff has not suggested that it will suffer any prejudice if the amendment is allowed. I see no prejudice to the plaintiff. The plaintiff will have a chance to respond to the defendants' amended defence.

7. In the end, I make the following orders:

(a) The defendants are hereby granted leave to amend their defence. The amended defence to be as per the draft annexed to the Notice of Motion dated 18th February 2017.

(b) The amended defence to be filed and served within 7 days from the date of this ruling.

(c) The plaintiff to file and serve a reply to amended defence, if any, within 7 days of service of the amended defence.

(d) Parties to comply with Order 11 of the Civil Procedure Rules within 45 days from today.

(e) Costs of the application shall be in the cause.

8. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 13th day of December 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Matiri for the plaintiff/respondent

No appearance for the defendants/applicants

Court Assistant: Gichaba