



**Muchiri & another (Suing as representatives of the Estate of Benson  
Mugweru Muchiri) v Kageenu & another (Environment & Land  
Case 49 of 2019) [2024] KEELC 5513 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5513 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 49 OF 2019**

**MN GICHERU, J  
JULY 16, 2024**

**BETWEEN**

**KELVIN MUGWERU MUCHIRI ..... 1<sup>ST</sup> PLAINTIFF  
DAN MUNDIA MUCHIRI ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS REPRESENTATIVES OF THE ESTATE OF BENSON MUGWERU  
MUCHIRI**

**AND**

**LILIAN REGERIA KAGEENU ..... 1<sup>ST</sup> DEFENDANT  
CAROLINE NKATHA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is on the notice of motion dated 15/5/2023. The motion which is by the plaintiff is brought under Sections 80, 63(e) and 3A of the [Civil Procedure Act](#) and Orders 40 rule 1, 45 rule 1 of the [Civil Procedure Rules](#) and any other enabling provisions of the law. It seeks the following orders.
2. That this court be pleased to order temporary stay of execution of the ruling and orders made on 24/4/2022 in respect to the defendants' application dated 14/2/2022 pending the hearing and determination of this application.
3. That the ruling and orders made on 24/4/2023 in respect to the defendants application dated 14/9/2022 and all consequential orders be reviewed and/or set aside.
4. That such further and other relief be granted to the applicant as the court deems fit and expedient in the circumstances.



2. The motion is supported by an affidavit sworn by the applicant dated 15/5/2023 which is supported by several annexures which include the ruling dated 24/4/2023, the extract order dated 2/5/2023, the grounds of opposition dated 16/10/2022, email correspondences and a payment receipt dated 3/10/2022. There are also eleven (11) grounds on which the motion is based.
3. The gist of the above material is as follows. Firstly, there is an error apparent on the face of the record because even though the court ruling says that the motion dated 14/9/2022 was unopposed, this was not the case because the five (5) annexures to the supporting affidavit prove otherwise. Secondly, the omission is prejudicial to the applicant. Finally, it will be fair in the interest of justice to maintain the status quo pending the hearing and determination of the suit.
4. The motion is opposed by the respondents and the 1<sup>st</sup> defendant has sworn a replying affidavit dated 6/12/2023 in which she deposes as follows. Firstly, the court has inherent jurisdiction to issue summary orders to prevent the misuse of legal machinery and abuse of the court process. Secondly, it would be unfair to the defendants to deny them an opportunity to file their defence and counterclaim as this would be denying them an equality of arms.
5. I have considered the motion in its entirety and I find that it is true that there is an error apparent on the face of the record in that the counsel for the plaintiff had filed grounds of opposition on 31/10/2022 contrary to the findings made in the ruling dated 24/4/2023.
6. Be that as it may, I find that it would be unfair to the defendants if the suit proceeded in its current form. By law and practice originating summons is the way to commence a suit where the law so dictates and also where there is unlikely to be any substantial dispute of fact. In this suit the plaintiff's side claims to have bought the suit land from one Elijah Lengete in 1998. They have no title deed. They claim to occupy the entire land. On the other hand, the defendants claim to have bought the same land from the Lengete and have a title deed for the same dated 17/11/1999. They claim to have also occupied the same land. Since the material facts are in dispute, it is obvious that originating summons is not the appropriate method of commencing a suit such as this even though the law states claims for adverse possession be commenced by way of originating summons. This court has unfettered discretion under Order 37 rule 19(1) of the *Civil Procedure Rules* to order that the case continuous as if it had been begun by filing a plaint. The rule provides as follows.

19 (1)

" Where, on any originating summons under this order, it appears to the court that any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing of a plaint, it may order the proceedings to continue as if the cause had been so began and may, in particular order that any affidavit 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."

19 (2)

" Where the court makes an order under sub rule (1), Order 11 shall apply."

7. From the above, the discretion given to the court can be exercised at any stage of the proceedings and the court is not bound by its previous directions. When the plaintiff filed the suit, he may have been unaware of the kind of defence that the defendants would raise. There has been joining of a new party and many issues have arisen that may not have been envisaged at the commencement of the suit. This is why it is no longer tenable for the suit to continue in the original summary form. Finally, the plaintiff



will not suffer any prejudice if the suit proceeds in the new form because no evidence that he wishes to adduce will be locked out and if he proves adverse possession, he will be entitled to the orders sought even though the form of the suit will have changed.

8. For the above stated reasons, I dismiss the motion dated 15/5/2023. Costs in the cause.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 16<sup>TH</sup> DAY OF JULY 2024.**

**M.N. GICHERU**

**JUDGE**

