



REPUBLIC OF KENYA



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Muveu v Ndolo (Sued as the Beneficiary of the Estate of the Late General Joseph Musyimi Ndolo) (Environmental and Land Originating Summons 45 of 2022) [2024] KEELC 6155 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6155 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 45 OF 2022
TW MURIGI, J
SEPTEMBER 25, 2024

BETWEEN

GEORGE KYALO MUVEU PLAINTIFF

AND

KAMENE NDOLO DEFENDANT

SUED AS THE BENEFICIARY OF THE ESTATE OF THE LATE GENERAL JOSEPH MUSYIMI NDOLO

RULING

1. Before me for determination is the Notice of Motion dated 19th May 2023 brought under Article 159(2)(a) of *the Constitution* of Kenya 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act* and Order 2 Rule 12 and Order 37 Rule 7 of the Civil Procedure Rules in which the Applicant seeks the following orders:-
 1. Spent.
 2. The Honourable Court be pleased to strike out the Plaintiff's Originating Summons dated 18th November 2022.
 3. The costs of the application be borne by the Plaintiff/Respondent.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Andrew Ndolo Ndola sworn on even date.

The Defendant/applicant's Case

3. The deponent averred that he is the duly appointed agent of the Respondent and thus conversant with the facts of this case.



4. He averred that the Plaintiff claim as drawn is incapable of enforcement as the title for the suit property is non-existent. He further averred that the Defendant is the registered proprietor of L.R. No. 1757/19 and not L.R. No. 1757/6. He deposed that the Plaintiff did not file the title in respect of his claim as at the time of filing this suit. He argued that a claim for adverse possession can only be sustained on an existing title. He asserted that the suit herein is a waste of judicious time and amounts to an abuse of the court process. He urged the court to strike out the suit with costs to the Respondent.

The Plaintiff/respondent's Case

5. The Respondent filed a replying affidavit sworn on 16th February 2024 in opposition to the application.
6. He averred that the Applicant was out to frustrate his claim in which he has met the conditions to be satisfied in a claim for adverse possession. He admitted that his claim for adverse possession was founded on title No. L.R. No. 1757/6 as it was the original title number for the suit property before the Applicant maliciously subdivided the same in the year 2019 thereby giving rise to title No L.R. 1757/19.
7. He further averred that he became aware of the subdivision and new titles sometime in March 2024 after his Advocate applied to extract the decrees in ELC Nos. 233-241 of 2017 which are closely related to this suit.
8. He further averred that the Applicant explicitly admitted to having resurveyed the original title L.R. No. 1757/6 into nine titles leading to the creation of L.R No 1757/19 in the supporting affidavit sworn by Andrew Ndolo on 12th July 2022 and therefore she cannot claim that the suit offends Order 37 Rule 7 of the Civil Procedure Rules.
9. He contended that the act of creating new titles amounts to contempt of court orders issued on 19th March 2018.
10. He argued that the application herein stems from the Applicant's mischief that rendered the original title No. 1756/6 non-existent in order to defeat the course of justice in HCCC Nos. 233-241 of 2017. He further argued that his Advocate had filed an application dated 7th July 2022 seeking to amend the Originating Summons to substitute the title to 1757/19. He contended that the application is an abuse of the court process and urged the court to dismiss the same with costs.
11. The parties were directed to canvass the application by way of written submissions.

The Defendant/applicant's Submissions

12. The Defendant's submissions were filed on 23rd October 2023.
13. On her behalf, Counsel outlined the following issues for the court's determination:-
 - a. Whether the Plaintiff's Originating Summons dated 18th November 2022 should be struck out?
 - b. Who should be condemned to shoulder the costs of the application?
14. As regards the first issue, Counsel submitted that the orders sought in the Originating Summons are incapable of being granted as the title for the suit property is non-existent. Counsel contended that the Defendant/Applicant is the registered owner of L.R No. 1757/19 and not L.R No.1757/6. Counsel submitted that the Plaintiff's failure to retrieve title L.R No. 1757/19 as at the time when he was instituting this suit is inexcusable as the title was in existence.



15. Counsel further submitted that the present suit is defective as it offends the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules which stipulates that:-

The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. To buttress this point, Counsel relied on the case of *Stephen Mwandoro & 56 Others v Alhad Mohammed Hatimy* (2020) eKLR where it was held that:-

“One cannot seek adverse possession against a title that does not exist. It is upon any claimant seeking land by adverse possession to be very precise on what title he seeks to be registered as the proprietor”.

16. Counsel further submitted that the Plaintiff’s claim can only be sustained on an existing title. To buttress this point, Counsel relied on the case of *Safari Chengo Nyambu & Others v Alpesh Kanakihn Khimji* (2022) eKLR where the court held that:-

“It follows that the Plaintiffs have filed suit for adverse possession to a title that does not exist. You can claim adverse possession to a title that exists since the result will be that the said title be registered in your name if you are successful in the litigation. In this case, even assuming that the Plaintiffs succeed in proving that they have been in possession of the land for over 123 years they cannot get title to what they claim because the title no longer exist. This litigation is therefore misplaced....”

17. Finally, on who should bear the costs of the application, Counsel submitted that it is trite law that costs follow the event. He urged the court to award the Defendant costs in line with Section 27 of the *Civil Procedure Act*. To buttress this point, Counsel relied on the case of *Party of Independent Candidate of Kenya v Mutula Kilonzo & 2 others* (2013) eKLR

The Plaintiff’s/respondent’s Submissions

18. The Plaintiff’s submissions were filed on 2nd February 2024.

19. On his behalf, Counsel identified the following issues for the court’s determination:-

- i. Whether the application before the court is an abuse of the court process by invoking the striking out jurisdiction of the court?
- ii. Whether the Applicant ought to subdivide the suit property after entry of judgment against her on 18th March 2018?
- iii. Whether the application before this court is an abuse of court process?
- iv. Whether the omission identified by the Applicant is curable by way of amendment of pleadings?

20. Counsel submitted that it was common ground that:-

- i. The Plaintiff is similarly situated within another litigant with the same parcel of land as the Defendant/Applicant herein in ELC Nos. 233-241 of 2017 i.e namely 1757/19.
- ii. The Plaintiffs in ELC Nos. 233-241 of 2017 successfully sued the Defendant and obtained a judgment dated 18th March 2018.



- iii. After the delivery of the judgment, the Defendants initiated the subdivision of L.R. 1757/6 and among the created subplots was L.R 1757/19 in order to defeat the Plaintiff in ELC Nos. 233-241 of 2017 and others would follow suit.
 - iv. The Plaintiffs in ELC Nos. 233-241 of 2017 have launched a contempt of court application against the Defendant for the very same reason, namely subdividing L.R. No 1757/6 after entry of the judgment spoken to herein, which is due for ruling on 31st January 2024.
 - v. The mischief highlighted by the Defendant in the Notice of Motion dated 19th May 2023, is one which was created by the Defendant herself. It is curable by way of amendment of pleadings to introduce the correct Land Reference Number.
21. Counsel submitted that on 19th October 2019, the Applicant subdivided the suit property into 9 subplots in breach of the court orders. According to Counsel, the application herein is made in bad faith and a blatant attempt by the Applicant to subvert the course of justice. To buttress this point, Counsel relied on the case of *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (2014) eKLR where the Court of Appeal stated as follows:-
- “This court is a court of equity; equity shall suffer no wrong without remedy. No man shall benefit from his own wrong doing, and equity detests unjust enrichments. This court is bound to deliver substantive rather than technical and procedural justice”.
22. Counsel further submitted that striking out the application herein will amount to unjust enrichment of the Defendant/Respondent.
23. On whether the application is an abuse of the court process, Counsel relied on the case of *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others* (2022) eKLR where court defined abuse of the court’s process as follows:-
- “An abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two court process. In other words a party by the two court process is involved in some gamble, a game of chance to get the best in the judicial process..”
24. Counsel submitted that the application is an abuse of the court process and an attempt to subvert justice the course of justice.
25. Counsel further submitted that the court has discretion to grant a party leave to amend his pleadings in order to determine the real issues in controversy. To buttress this point, Counsel relied on the case of *John Nyagaka Osoro v Reynold Karisa Charo & 5 others* (2021) eKLR where the court stated as follows:-
- “The court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment as per *Bullen and Leake & Jacob Precedents of Pleadings* 12th Edition”.
26. Counsel urged the court to allow the Applicant to amend the Originating Summons to reflect the correct title number.



27. Concluding his submissions, Counsel urged the court to dismiss the application in line with the provisions of Section 27 of the *Civil Procedure Act*. To buttress this point, Counsel relied on the of Rufus Njuguna Miringu & another v Martha Murithi & 2 others (2012) eKLR where it was held that:-

“The interpretation of the proviso to the cited Section 27 of the *Civil Procedure Act* is that the material event referred to is the result of the proceedings and it is the successful party in this result who is normally awarded costs”.

Analysis And Determination

28. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the instant suit should be struck out with costs.

29. Order 2 Rule 15 of the Civil Procedure Rules deals with striking out of pleadings and provides as follows:-

15(1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that-

- (a) It discloses no reasonable cause of action or defence in law; or
- (b) It is scandalous, frivolous or vexatious; or
- (c) It may prejudice, embarrass or delay the fair trial of the action; or
- (d) It is otherwise an abuse of the court process, and may order the suit to be stayed or dismissed or judgment be entered accordingly, as the case may be”.

30. Striking out of pleadings is a drastic step that should be exercised sparingly and only in the clearest cases.

31. In the case of Crescent Construction Co Ltd v Delphis Bank Limited (2007) eKLR the Court held as follows:-

“...the power to strike out pleadings is a discretionary one. It is to be exercised with the greatest of care and caution. This comes from the rules of natural justice that the court must not drive away the litigant however weak his case may be from the seat of justice. This is a time honoured principle. At the same time it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

32. In the matter at hand, the Plaintiff commenced this suit by way of an Originating Summons dated 21st November 2022 against the Defendant seeking the following orders:-

- a. That this Honourable court do direct that the Plaintiff be registered as the proprietor of all that portion of 2.1 acres or thereabouts within L.R. No. 1757/6 (formerly L.R No. 1757 hereinafter the suit property) occupied by himself by reason of adverse possession.
- b. That a permanent injunction do issue to restrain the Defendant whether by herself, her agents and/or servants from trespassing, entering, alienating, and/or in any manner interfering with the Plaintiff's use and enjoyment of the suit property.
- c. That in the likely event of the Defendant's refusal to surrender the original file, an order do issue directing the Registrar of Titles and/or the Director of Surveys and/or the National Land Commission to excise 2.1 acres comprising the suit property No. 1757/6 registered in the name



of the Defendant after dispensing with the requirement to produce the original title and to transfer and vest the same in the Plaintiff herein.

- d. That the Defendant be condemned to pay general damages under the tort of trespass.
 - e. Costs of the suit.
33. The Applicant annexed a certified extract of the title (GKM5) to his affidavit in support of his claim. The Applicant insisted that the instant suit offends the provisions of Order 37 Rule 2 of the Civil Procedure Rules as the title for the suit property is non-existent.
 34. The Respondent on the other hand averred that the Applicant maliciously subdivided L.R. No.1757/6 thereby giving rise to L.R No. 1757/19 to subvert the course of justice.
 35. Order 37 Rule 7(2) of the Civil procedure Rules provides as follows:-

The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
 36. The net effect of the above provision is that a claim for adverse possession can only be founded against an existing title.
 37. It is not in dispute that the judgment in ELC Nos. 233-241 dated 18th March, 2018 was in favour of the Applicants therein. The Defendant/Applicant annexed a copy of the certificate of title for L.R No.1757/19 to his affidavit in support of the application. The certificate of title clearly shows that it was registered on 22nd October 2019. The Applicant averred that his Advocate discovered that the Respondent had subdivided the suit property when he went to extract the decrees in ELC Nos. 233-241 of 2017 which are closely related to this suit. The Respondent urged the court to amend the pleadings so as to determine the real issue in controversy. As correctly submitted by Counsel for the Respondent, the court has inherent discretion to allow amendment of pleadings at any stage of the proceedings before judgment. The purpose of amendment of pleadings is to enable the court to determine the real issues in controversy between the parties.
 38. However, pleadings belong to the parties and can only be amended by the parties. The Respondent ought to have sought to amend his suit the minute he discovered that the title was extinguished upon subdivision. The Respondent did not adduce any evidence to show that he has made any application to amend the originating summons to reflect the correct title number for the suit property.
 39. A claim for adverse possession can only be founded on a title that exists. In the absence of any amendment, it follows that the Plaintiff filed this suit claiming for adverse possession on a title that does not exist.
 40. In the absence of an existing title, this court has no option but to find that this suit offends the provisions of Order 37 Rule 2 of the Civil Procedure Rules.
 41. In the end, I find that the application dated 19th May 2023 is merited and the same is hereby allowed with costs to the Applicant.

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER, 2024.

In The Presence Of:



Steve Court Assistant

Linnet Chania for the Plaintiff

Jematia holding brief for Ndalaila for the Defendant

