



Musega & another (Suing as personal representative of the Estate as Joash Adamba) v Musya & 4 others (Environment & Land Case 137 of 2020) [2024] KEELC 7264 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7264 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 137 OF 2020
SM KIBUNJA, J
OCTOBER 30, 2024**

BETWEEN

GEORGE ADAMBA MUSEGA & JUDITH LIVEHA (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE AS JOASH ADAMBA) PLAINTIFF

AND

JOEL TITUS MUSYA 1ST DEFENDANT

PAMELA AURA OGOLA 2ND DEFENDANT

PAUL ONGIDI AMOLO 3RD DEFENDANT

OCEAN BAY GROUP OF SCHOOLS 4TH DEFENDANT

AND

ALFRED NYADIMO AGUNGA PROPOSED DEFENDANT

RULING

1. The application before the court for determination is the Chamber Summons dated 8th November 2023, by the plaintiffs. It has been brought under Order 1 Rule 10 (4), Order 8 Rule 3, 5 & 7 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*, and seeks for;
 1. “Spent.
 2. Spent.
 3. Leave be granted to the plaintiff herein to add Alfred Nyadimo Agunga as the 5th defendant.
 4. Leave be granted to the plaintiff to amend the plaint to reflect the addition of Alfred Nyadimo Agunga as the 5th defendant to this suit.



5. An order to be given to allow the plaintiff and his appointed valuer to have supervised access to the suit property for purpose of carrying out a valuation of the suit property.
6. Costs of this application be in the course.”

The application is based on four (4) grounds on its face and supported by the affidavit of George Adamba Musiega, legal representative of the estate of Joash Adamba, deceased, in which he inter alia deposed that the proposed 5th defendant occupies the suit property, erected a structure valued at KShs.100 million with rental income of KShs.250,000, carries out business there, and his wife the 2nd defendant, had lodge a claim of adverse possession over the said land; that the proposed 5th defendant came onto the suit property in 2017 pursuant to some arrangement with 1st defendant and one William Munywoki Maundu, which has been subject matter in Mombasa CMCC No. 1895 of 2015 Joel Titus Muasya versus Alfred Nyadimo Agunga T/A Aganga & Co, where the 1st Defendant sought and obtained orders on 27th September 2018 to stop the proposed 5th Defendant from constructing on the said construction; that the proposed 5th defendant is a necessary party as he needs to be liable for trespass, and as such the plaintiffs will be seeking judgment against him and other defendants jointly and severally liable to pay mesne profits, general damages, aggravated damages and exemplary damages for the trespass and the brazen and audacious attempt to grab the suit property; that the proposed 5th defendant, should be joined in the suit as proposed in the attached draft amended plaint, to enable the court to effectually and completely adjudicate upon and settle all matters involved in this suit; that their valuers should be granted supervised access to the suit property to carry out a valuation of the suit property to determine the damages to be sought by the plaintiff against the defendants.

2. Pamela Auma Ogola, the 2nd defendant, and the proposed 5th defendant opposed the application through their replying affidavits sworn on 14th May 2024, inter alia deposing that application is frivolous, vexatious and an abuse of the court process; that the 2nd defendant is in physical occupation of the suit property, and there is no usefulness of joining the proposed 5th defendant in the suit; that the proposed 5th defendant has recorded a statement as a witness for the 2nd defendant, and as such his role should remain that of a witness, and not litigant; that the 2nd defendant has a counterclaim against the plaintiffs, and has documentary evidence of her occupation; that the application should be dismissed with costs.
3. On 13th February 2024, Ms. Mukoya informed the court that the 4th defendant does not intend to oppose the application, and on 18th July 2024, Mr. Maithya, informed the court that the 1st defendant would not participate in the application.
4. The learned counsel for the plaintiffs filed their submissions dated 11th April 2024, while that for the 2nd defendant and proposed 5th defendant filed theirs both dated 17th July 2024 respectively, which the court has considered.
5. The issues for determination by the court are as follows:
 - a. Whether the plaintiffs have met the threshold for joinder of the proposed 5th defendant, in the suit.
 - b. Whether the plaintiffs have made a reasonable case for leave to visit the suit property with their appointed valuer to conduct a valuation report thereof.
 - c. Who pays the costs?
6. The court has considered the grounds on the application, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following determinations:



- a. The plaintiffs commenced this suit vide the plaint dated 21st September 2020, as the legal representatives of the estate of Joash Adamba, the registered owner of Plot No. MN/1/3190, suit property. It is the plaintiffs' case that the defendants are trespassers and are illegally occupying the suit property. The plaintiffs in particular claim that the 2nd defendant has filed Mombasa ELC No. 19 of 2019 Pamela Aura Ogola versus Joash Adamba, where she claims the suit property by way of adverse possession. In this application, the plaintiffs are seeking the leave of court to join Alfred Nyadimo Agunga, who is the husband to the 2nd defendant, as the 5th defendant.
- b. The court has wide discretion to grant applications to amend pleadings at any stage of the proceedings under Order 8 Rule 3 of the Civil Procedure Rules. In this case, the plaintiffs are seeking leave of court to amend their plaint by joining Alfred Nyadimo Agunga, to become the 5th defendant. Order 1 Rule 10 (2) Civil Procedure Rules provides for the joinder of parties. It provides:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

Order 8 Rule 5 provides for the amendment of pleadings:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

I have perused the file and I have come across the 2nd defendant's list of witnesses dated 14th September 2023. I have seen a witness statement signed by Alfred Nyadimo Agunga. He states that Pamela Auma Ogola is known to him as he is her husband and that he frequently visits her in the suit property where she resides since he paid her dowry sometime in 2002. The plaintiffs have argued in their draft amended plaint that Alfred Nyadimo is in occupation of the suit property together with the 2nd defendant who is his wife. That they both generate an income of Kshs 250,000/= a month from the house and that it is paramount for Alfred Nyadimo to be enjoined as a defendant as there are specific orders they will be seeking against him. The 2nd defendant as well as Alfred Nyadimo have not denied their marital relationship, but have claimed that Alfred Nyadimo is simply a witness to the 2nd defendant and should not be made as a litigant herein.



- c. The court allows amendments of pleadings for the sole purpose of determining the real question in controversy between the parties. The Court of Appeal stated in the case of *Central Kenya Ltd versus Trust Bank Ltd & 5 others* [2000] eKLR that:

“The settled rule with regards to amendment of pleadings has been concisely stated in Vol 2 6th Ed. at P. 2245 of the AIR Commentaries on the Indian Civil Procedure Code of Chittaley and Rao in which the learned authors state:

‘that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

...hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be will not result into prejudice or injustice to the other party which cannot properly be compensated for in costs.”

Considering that the plaintiffs claim against defendants is based inter alia on trespass, their proposed amendments will in my considered view, clarify the issue of who is (are) in real occupation of the suit property, which the 2nd defendant claims to be in adverse possession of.

- d. The court in the case of *Joseph Njau Kingori versus Robert Maina Chege & 3 Others* [2002] eKLR was of the view that for a defendant to be enjoined, two conditions must be established, that is there must be a right to some relief against him, and that his presence should be necessary for the court to effectively and completely adjudicate and settle the questions in issue. The court further held that;

“When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party;
2. He must be a proper party;
3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff;
4. The ultimate order or decree cannot be enforced, without his presence in the matter, and
5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.”

The joinder of the proposed 5th defendant will clarify the issue of physical occupation of the suit property which is a key question of facts in both principles of law, that is trespass and adverse possession.



- e. I have perused the draft amended plaintiff and I do note that there are specific prayers that are addressed to the 2nd and proposed 5th defendants on mesne profits, which are said to be the profits made from the rent collected from the suit property. Further, neither the 2nd defendant nor the proposed 5th defendant has established that the joinder of the proposed 5th defendant would be prejudicial to them in their defence and or counterclaim, or in any other way that is beyond monetary compensation of costs. The averments by the proposed 5th defendant that his joinder as a defendant would cost him legal fees cannot be said to be incapable of being compensated with an award of costs if he emerges as the winning litigant. The 2nd and proposed 5th Defendants have therefore not established that the proposed amendment of the plaintiff will in any way lead to undue delay in determining the matters in controversy between the parties herein. I find that the proposed amendments are necessary for the effectual and complete adjudication of all the questions involved in the suit, and to avoid multiplicity of suit by like the plaintiffs filing a separate suit against the proposed 5th defendant.
- f. The next issue for determination is whether the court should allow the plaintiffs and their appointed valuer to have access to the suit property to carry out a valuation of the same. The reason advanced is that they approximate the building erected on the suit property is worth Kshs.100,000,000/= and that the rental income is Kshs.250,000/= per month. The plaintiffs are seeking mesne profits from the 2nd and 5th defendants for the rental income earned, hence the need for a valuation report to ascertain the value of the suit property. The plaintiffs have argued that the valuation report will guide the court in determining the special damages that must not only be pleaded but also proved. The plaintiffs submitted to the court that since they have sought for Kshs.250,000/= as mesne profits, they require a valuation report which will give an accurate value of the property and income generated therefrom. The 2nd defendant and 5th defendant have not made any serious rebuttal on this prayer.
- g. In my view, the plaintiffs have given a compelling reason behind their request, and since the 2nd defendant has admitted to being in physical possession of the suit property, it is only fair and just for the plaintiff to access the said premises for a valuation exercise to be conducted. The 2nd and 5th defendants have not demonstrated any prejudice that they stand to suffer if they grant the plaintiffs temporary access to the suit property to enable them to inspect and carry out valuation of the property for whatever purpose they wish to use the same for. The valuation report may be of use in determining the amount to be paid in terms of damages to whichever party emerges the victor.
- h. Section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, provides that costs should follow the event unless where for good reason, the court orders otherwise. Due to the nature of the application, being primarily for joinder of the 5th defendant, I am of the view that the costs should abide the outcome of the suit herein.
1. In conclusion, the court finds the Chamber summons dated 8th November 2023 to be with merit and orders as follows:
 - a. Leave is hereby granted to the plaintiffs to join Alfred Nyadimo Agunga as the 5th defendant.
 - b. The plaintiffs will therefore file and serve an amended plaintiff to reflect the joinder within fourteen (14) days.



- c. The defendants are to file and serve their responses to the amended plaint within 14 days from after service.
- d. The plaintiffs be at liberty to file and serve their defence to any counterclaim filed within 14 days from the date of service.
- e. The 2nd and 5th defendants are directed to allow the plaintiffs and their valuer to access the suit property to conduct a valuation exercise within the next thirty (30) days on a date and time to be agreed upon between their counsel.
- f. The costs of the application shall be in the cause.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 30TH DAY OF OCTOBER 2024.

S. M. Kibunja, J

ELC MOMBASA

In the presence of:

Plaintiffs : M/S Gitau for Wandabwa

Defendants : Mr Kenga for 2nd Defendant and holding brief for Chengo for 5th Defendant.

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

