



**Mwendia (Suing as the Personal Representative of the Estate of Mwendia Gichinga Maara)
v Njuguna (Personal Representative of the Estate of Njuguna Wambuthi) (Environment
& Land Case 16 of 2018) [2024] KEELC 7262 (KLR) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7262 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 16 OF 2018
BM EBOSO, J
OCTOBER 28, 2024**

BETWEEN

**GODFREY GICHINGA MWENDIA PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
MWENDIA GICHINGA MAARA**

AND

**JOHN MUIGAI NJUGUNA DEFENDANT
PERSONAL REPRESENTATIVE OF THE ESTATE OF NJUGUNA WAMBUTHI**

RULING

1. Falling for determination in this ruling is the notice of motion dated 14/7/2021, brought by Godfrey Gichinga Mwendia [the applicant]. Through the motion, the applicant seeks: (i) leave to amend the plaint to include the District Land Registrar - Kiambu as a party to this suit; (ii) an order that the draft amended plaint be deemed as duly filed and served upon the defendant upon grant of the leave and upon payment of the requisite court fees; (iii) an order that the pleadings/proceedings be deemed to have been initiated by way of originating summons; and (iv) that the costs of the application be provided for. The application was premised on the grounds outlined in the motion and in the applicant's supporting affidavit sworn on 14/7/2021. It was canvassed through written submissions dated 13/3/2024, filed by M/s J. K Gachie & Company Advocates. Before I dispose the application, I will briefly outline the parties' respective substantive cases.
2. The plaintiff, Geoffrey Gichinga Mwendia, instituted this suit on behalf of the estate of the late Mwendia Gichinga Maara on 22/1/2018. He sought the following reliefs against the estate of the late Njuguna Wambuthi: (i) a declaration that the plaintiff is entitled to one (1) acre of land parcel number Karai/ Renguti/95 by adverse possession; (ii) an order directing the Land Registrar-Kiambu to curve out one (1) acre out of land parcel number Karai/ Renguti/95 and register the same in the name of



- the plaintiff as a trustee of the beneficiaries of the estate of Mwendia Gichinga Maara; and (iii) costs of the suit.
3. The plaintiff's case was that in 1966, the late Mwendia Gichinga Maara purchased one acre out of land parcel number Karai/Renguti/95 from the late Njuguna Wambuthi at Kshs 1,200. Upon buying the land, the late Maara took possession and remained in possession of the land up to the time he died in 2014. Upon his death, he was buried on the land.
 4. The plaintiff further contended that upon the death of Njuguna Wambuthi, his son, John Muigai Njuguna, obtained a grant of letters of administration relating to his estate but declined to excise and transfer to the estate of the late Maara the one acre that they occupy. Consequently, he initiated this suit seeking the above reliefs.
 5. The estate of the late Njuguna Wambuthi filed a defence dated 6/3/2018 in which it denied the allegation that the late Maara bought one acre from the late Wambuthi out of parcel number Karai/Renguti/95. The estate added that if there was a sale agreement, the same became void and voidable for want of a consent of the Land Control Board and could not be enforced by a court of law as the limitation period of 12 years had already lapsed. The estate of Wambuthi further denied the allegation that the late Maara took possession of the land and developed a permanent home on it. The estate denied the contention that the late Maara was buried on the land. It was the case of the estate of the late Wambuthi that this court lacked jurisdiction to entertain this suit. The estate added that the suit was statute-barred.
 6. Subsequently, the plaintiff brought a notice of motion dated 14/7/2021 seeking, among other orders, an order that the suit be deemed to have been initiated by way of an originating summons. The application was disposed by the Deputy Registrar of the court who directed the plaintiff to file an originating summons in this (existing) suit within 21 days. The plaintiff complied. This subsequently attracted a preliminary objection dated 17/10/2022 from the 1st defendant. The preliminary objection culminated in a ruling by this court [Eboso J] dated 23/10/2023 in which the court issued the following disposal orders:
 - a. The preliminary objection dated 17/10/2022 is rejected.
 - b. The direction/order issued by the Deputy Registrar of this court on 22/9/2021, including the direction/order requiring the plaintiff to file and serve an originating summons within this suit is vacated and the originating summons filed within this suit is expunged.
 - c. The application dated 14/7/2021 shall be canvassed afresh before a judge of this court.
 - d. Costs of the preliminary objection shall be in the cause.
 7. The application dated 14/7/2021 was heard by this court and now falls for determination in this ruling. I will briefly outline the parties' respective positions on the application before I dispose the key issues that fall for determination.
 8. The case of the applicant is that the amendments sought to be made are necessary to bring out the real issues in dispute between the parties. The applicant contends that there is need to include the District Land Registrar as a party to the suit given that the reliefs sought in the plaint are directed at him. The applicant further contends that the pleadings have closed, hence there is need to seek and obtain leave from this Court before he can make further amendments to the pleadings. The applicant adds that John Muigai Njuguna [the respondent] will not suffer any prejudice if the leave sought is granted.
 9. The respondent opposes the application through grounds of opposition dated 15/11/2023 and written submissions dated 7/5/2024, filed by M/s Nyoro Njogu & Company Advocates. The said



submissions, however, erroneously refer to an application dated 16/7/2020 while the application which is the subject of this ruling is dated 14/7/2021.

10. The respondent's case is that the application does not meet the mandatory requirements of the law. The respondent adds that there is no legal provision providing for conversion of a plaint into an originating summons. The respondent contends that the plaintiff lacks the locus standi to file and prosecute the application. The respondent further contends that the application is not properly before this Court, adding that it was filed contrary to statute. The respondent further contends that this Court lacks jurisdiction to hear and determine the application. The respondent argues that the application is calculated to stifle the defendant's defence in the matter hence it is an abuse of the process of the court. The respondent states that the suit is fatally defective as it offends the provisions of Section 6 of the *Civil Procedure Act*. The respondent adds that the application will serve no purpose, adding that it is an abuse of the process of court.
11. The Court has considered the application, the response to the application and the parties' rival submissions. The two questions that fall for determination are: (i) Whether the criteria for leave to amend pleadings has been satisfied; and (ii) Whether this court has discretion to deem the plaint in this suit as an originating summons. I will analyse the two issues and dispose them sequentially in the above order.
12. Order 8 rule 3 (1) of the Civil Procedure Rules contain the relevant legislative framework on amendments of pleadings with leave. It provides that:

“Subject to Order 1, rules 9 and 10, Order 24, rules 3,4, 5 and 6and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”
13. The relevant guiding principle on the question of amendment of pleadings was outlined by the Court of Appeal in the case of *Central Kenya Ltd. v Trust Bank Ltd & 5 Others* [2000] eKLR as follows:

“The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”
14. *Bullen & Leake & Jacob's Precedents of Pleading*, 12th Edition, provides as follows concerning amendment of pleadings:

“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”
15. A perusal of the draft amended plaint that the applicant seeks to file reveals that the cause of action will not change. The only substantial change which the applicant seeks to introduce is the joinder of the Land Registrar as a party to the case. Trial has not commenced in this suit. There is therefore no



proper reasons why the plea for leave to join the Land Registrar should be denied. Consequently, it is my finding that the criteria for grant of leave to amend pleadings has been satisfied.

16. Does this court have discretionary jurisdiction to deem the plaint in this suit as an originating summons? The plaintiff's claim is essentially a plea for orders of adverse possession. The claim was initiated by way of plaint.
17. Section 38 of the [Limitation of Actions Act](#) and Order 37 rule 7 contemplates that the vehicle to be used by a party seeking to be registered as a proprietor of land under the doctrine of adverse possession is an originating summons. Departure from the above procedure has been a source of numerous objections in our superior courts. The objections have culminated in defining pronouncements by the superior courts.
18. The question as to whether orders of adverse possession can be sought on the platform of a counterclaim in a suit initiated by way of plaint was answered by the Court of Appeal in [Gulam Mariam Noordin v Julius Charo Karisa, Civil Appeal No 26 of 2015](#) in the following words:

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala v Okumu* [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd v Kosgey* [1998] LLR 813 where the plaint made no specific plea of adverse possession, the plea was nonetheless granted.”

19. In *Stephen Kaguku Mariba v Kibe Mariba*, Civil Appeal No 188 of 2002, the question before the Court of Appeal was whether a plea for orders of adverse possession, initiated by way of plaint instead of an originating summons, was sustainable. The Court of Appeal examined the framework in Order XXXVI rule 3D and 10 of the then Civil Procedure Rules. The said framework was re-enacted as Order 37 rule 7 and 19(1) of the current Civil Procedure Rules. The Court of Appeal made the following defining pronouncements:

“However, this Court in *Mucheru V. Mucheru* [2000]2 EA 455 said that the procedure by originating summons is intended to enable simple matters to be dealt with in a quick and summary manner. In saying so, it relied on the decisions in *Bhari V Khan* [1965] EA 94, *Kibutiri V Kibutiri* [1982-88] 1 KAR 60 and *Kenya Commercial Bank V James Osebe* [1982-88] 1 KAR 48. The Court also referred to the judgment of Sir Ralph Windham C.J. in *Salehmohamed Mohamed Vph Saldanha 3*, Kenya Supreme Court (mombasa) Civil case Number 243 of 1953 (UR), where the scope and general purpose of procedure by way of originating summons were being considered. His Lordship said:-

“Such procedure is primarily designed for the summary and “ad hoc” determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions of the court,

such as trustees, administrators, or (as here) the court's own execution officers. That dispatch is an



object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as

possible and be heard in chambers unless adjourned by a judge into court.’

While it is true that the suit was commenced by plaint instead of by the procedure of Originating Summons, we do not consider the error to be fatal in view of the provisions of Order XXXVI r 10 of the Civil Procedure Rules. That provision requires the trial court in an appropriate case, to continue proceedings commenced by Originating Summons as though the same had been begun by Plaint.”

20. In *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR, the Court of Appeal addressed the question as to whether a plea of adverse possession could be ventilated on the platform of a plaint, counterclaim or defence. The Court of Appeal rendered itself on the question as follows:

“The courts, have since this decision [the decision in *Njuguna Ndatho v Masai Itumu & 2 others, Civil Appeal No 231 of 1999*], held that a claim by adverse possession can be brought by a plaint [See *Maria v Mariba, Civil Appeal No 188 of 2002*], counterclaim or defence as was the case here. [See *Wabala v Okumu* [1997] LLR 609 (CAK).”

21. It is clear from the above analysis of the prevailing jurisprudence that although Section 38 of the *Limitation of Actions Act* and Order 37 rule 7 of the Civil Rules contemplate an originating summons as the ideal instrument to use in initiating a plea for orders of adverse possession, the plea can properly be pleaded through a plaint, counterclaim or defence. Secondly, by dint of the provisions of Order 37 rule 10 of the Civil Procedure Rules, an originating summons brought under Section 38 of the Limitation of Action Act and Order 37 rule 7 of the Civil Procedure Rules can properly be converted into a plaint and vice versa.
22. It is clear from paragraph 5 of the supporting affidavit dated 14/7/2021 that, the only reason why the plaintiff seeks an order deeming this suit to have been instituted by way of an originating summons is to align the suit with the requirements of Section 38 of the *Limitation of Actions Act* and Order 37 rule 7 of the Civil Procedure Rules. Our superior courts having held that a plea for adverse possession can be properly initiated by way of plaint or counterclaim, the court is satisfied that it has discretionary jurisdiction to grant the second limb of the application dated 14/7/2021.
23. The result is that the application dated 14/7/2021 is found merited and is granted in terms of prayers 1 and 3. The amended plaint shall be filed and served within 10 days. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 28TH DAY OF OCTOBER 2024

B M EBOSO

JUDGE

In the Presence of: -

Mr Gachie Advocate for Plaintiff

Court Assistant: Hinga

