



REPUBLIC OF KENYA



KENYA LAW
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**Wanyika & 4 others v Hunyu (Environmental and Land Originating Summons
45 of 2023) [2024] KEELC 13370 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13370 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 45 OF 2023
YM ANGIMA, J
NOVEMBER 14, 2024**

BETWEEN

**VERONICAH WANDIA WANYIKA 1ST APPLICANT
PATRICK KARIUKI WANYIKA 2ND APPLICANT
GREGORY NDIRANGU WANYIKA 3RD APPLICANT
FRANCIS NYOKABI WANYIKA 4TH APPLICANT
IRENE NYOKABI WANYIKA 5TH APPLICANT**

AND

ZAWERIA WANJIRU HUNYU RESPONDENT

RULING

A. Introduction

1. The material on record shows that the 5 Applicant s filed an originating summons dated 07.10.2019 against the Respondent seeking, inter alia, adverse possession of the suit property described as Title No. Nyandarua/Uruku Block 2/1434 (Uruku) measuring about 1.328 ha.
2. The Applicant s pleaded that suit property was allocated to their late mother Margaret Njeri Wanyika (the deceased) by a land buying company known as Othaya Mahiga Chinga Ex. Facco Company Ltd and that she settled thereon in 1978. It was further pleaded that when the deceased died in 2015 she was buried on the suit property without any objection from the Respondent.
3. The record further shows that the suit was heard on diverse dates between 18.05.2022 and 13.06.2023 when the Applicant s closed their case. The suit was thereafter fixed for defence hearing on several occasions but did not proceed for various reasons in the proceedings. Whilst the suit was pending



defence hearing, the 2nd Applicant filed an application dated 09.07.2024 seeking leave to be joined in the suit as the 6th Applicant in his capacity as the legal representative of the deceased.

B. 2nd Applicant's Application

4. Vide a notice of motion dated 09.07.2024 expressed to be filed pursuant to the provisions of Order 8 rule 3 & 5 and Order 51 rule 1 of the Civil Procedure Rule, and all other enabling provisions of the law the 2nd Applicant sought leave of court to be joined in the suit as the 6th Applicant in a representative capacity as the legal representative of the deceased. He also sought leave to amend the originating summons dated 07.10.2019 in terms of the draft originating summons annexed to the application. The application was based upon the grounds set out in the body of the motion and the contents of the supporting affidavit sworn by the 2nd Applicant on 09.07.2024 and the annexures thereto. He pleaded that he was the legal representative of the estate of the deceased by virtue of a limited grant ad litem issued to him on 03.04.2024 and that he wished to pursue the claim for adverse possession on behalf of the estate of her late mother.

C. Respondent's Response

5. The Respondent filed a replying affidavit sworn on 12.07.2024 in opposition to the said application. It was contended, inter alia, that the application was made in bad faith; that it was made belatedly; after the issue of the legal representative of the deceased had been raised at the hearing; and that there was no reasonable explanation for the undue delay in filing the application. The Respondent contended that the application lacked merit and was an abuse of the court process hence the court was urged to dismiss it with costs.

D. Directions on Submissions

6. When the application came up for directions, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the 2nd Applicant filed submissions on 09.11.2024 whereas the Respondent's submissions were dated 19.10.2024.

E. Issues for Determination

7. The court has perused the 2nd Applicant's notice of motion dated 09.07.2024, the Respondent's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following are the key issues for determination herein:
 - a. Whether the 2nd Applicant is entitled to leave to be joined in the suit as the 6th Applicant.
 - b. Whether the 2nd Applicant is entitled to consequential leave to amend the originating summons.
 - c. Who shall bear costs of the application.

F. Analysis and Determination

SUBDIVISION - a. Whether the 2nd Applicant is entitled to leave to be joined in the suit as the 6th Applicant

8. The court has considered the material and submissions on record. Whereas the 2nd Applicant contended that he had made out a case for joinder in the suit as the legal representative of the deceased, the Respondent contended otherwise. The court has noted that Applicant's closed their case way back in 2023. The court has further noted that the originating summons was filed in 2019 long after the



demise of the deceased but the 2nd Applicant did not choose to file any claim on behalf of her estate. It is evident from the record that during the 2nd Applicant's cross-examination on 18.05.2022 he stated that the estate of the deceased had no administrator.

9. The court has further noted that the 2nd Applicant has not offered any plausible explanation for the lengthy delay in seeking a limited grant ad litem to represent the estate of the deceased in the instant suit. It would further appear from the proceedings that the Applicant is seeking to fill up some gaps which may have been identified during cross-examination by the Respondent's advocate. The court is persuaded that the Applicant's are simply trying to re-open their case for the purpose of mending it as a result of what transpired during the hearing of their case. The court is thus not satisfied that the application was filed in good faith for the purpose of determining the real issues in controversy as framed in the originating summons. Consequently, the court is not inclined to allow the application for joinder of the 2nd Applicant as the 6th Applicant in the instant suit.

b. Whether the 2nd Applicant is entitled to the consequential leave to amend the originating summons

10. The court has already found and held that the 2nd Applicant has failed to make out a case for the grant of leave to be joined in the suit as the 6th Applicant on behalf of the estate of the deceased. In the event, granting him leave to amend the originating summons as intended would not serve any useful purpose. As a result, the court finds and holds that the 2nd Applicant is not entitled to the leave sought to amend the originating summons dated 07.10.2019.

c. Who shall bear costs of the application

11. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Respondent shall be awarded costs of the application to be borne solely by the 2nd Applicant.

G. Conclusion and Disposal Order

12. The upshot of the foregoing is that the court finds no merit in the 2nd Applicant's application for leave to be joined the 6th Applicant in the suit and for leave to amend the originating summons. As a consequence, the notice of motion dated 09.07.2024 is hereby dismissed in its entirety with costs to the Respondent.

Orders accordingly.

1. The suit is hereby fixed for defence hearing on 13.03.2025.
2. The Deputy Registrar shall cause the proceedings to be typed before the next hearing date.

It is so ordered.

RULING DATED AND SIGNED AT NYANDARUA THIS 14TH DAY OF NOVEMBER, 2024 AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Nderitu Komu for the Applicants

Mr. Gakenia Gicheru for the Respondent



C/A - Carol

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Y. M. ANGIMA

JUDGE

