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Case Action:	Ruling
Judge:	Antony Ombwayo
Citation:	William Kiprof Kimaiyo v Musa Kipchirchir Arusei [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Uasin Gishu
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Case Outcome:	-
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 111 OF 2015

WILLIAM KIPROP KIMAIYO.....APPLICANT

VERSUS

MUSA KIPCHIRCHIR ARUSEI.....RESPONDENT

RULING

The defendants in Originating Summons No. 111 of 2015 and Originating Summons No. 112 of 2015 and 113 of 2015 commenced suit by way of Plaintiff in Civil Case No. **E & L Case No. 361 Of 2013 (Formerly Eldoret Hccc No. 69** dated 20.6.2006 and amended on 23.3.2010 against the plaintiff' in the three Originating Summons thus **William Maiyo and one Pius Kimaiyo Kengo** claiming that the 1st plaintiff is the registered proprietor of all that parcel of land known as Uasin Gishu/Ilulula/108 which was allotted to him by the Ministry of Lands Settlements and Physical Planning as it then was through the department of settlement vide a letter of allotment dated 25.5.1983. Pursuant to the said allotment and acquisition, the 1st plaintiff took actual possession of the said parcel of land No. Uasin Gishu/Ilulula/108 in 1983 and commenced construction works which included digging of drenches to reclaim part of the said parcel of land which was marshland. The 1st plaintiff avers that pursuant to the foregoing Title No. Uasin Gishu Ilulula/108 was closed upon subdivision and consent to transfer new title deeds were issued in name of the new proprietors to wit: Uasin Gishu/Ilulul/470 in the name of the 1st plaintiff, Title No. Uasin Gishu/Ilulula/471 in the name of 3rd plaintiff and Title No. Uasin Gishu/Ilulula/472 in the name of the 2nd plaintiff. That in or about the month of March, 2006, the 1st defendant without any colour of right or lawful interest in the said parcel of land formerly known as Title No. Uasin Gishu/Ilulula/108 and now known as Title No. Uasin Gishu/Ilulula/470 after having been curved out and/or excised from Title No. Uasin Gishu/Ilulula/108 and without any authority or consent from the 1st plaintiff entered into the 1st plaintiff's said parcel of land and thereupon started farming activities.

The 1st plaintiff avers that the 2nd defendant has unlawfully removed the boundary marks between title No. Uasin Gishu/Ilulula/470 and Title No. Uasin Gishu/Ilulula/86 (which he is in possession by virtue of being the beneficiary and/or otherwise a trespasser thereon) extending the latter's acreage and thereby encroaching upon the former parcel of land. The 2nd defendant has not taken out letters of administration to the estate of his deceased father known as Cheron Kengo the registered owner of land parcel No. Uasin Gishu/Ilulula/86. The 1st plaintiff's claim against both the 1st and 2nd defendants is to restrain both of them from further trespassing and forcible occupation of the said land parcel No. Uasin Gishu/Ilulula/86. The 2nd and 3rd plaintiffs aver that the 1st defendant has also without any lawful right encroached upon land reference No. Uasin Gishu/Ilulula/471 on which he has forcibly ploughed and planted maize and he is using land reference No. Uasin Gishu/Ilulula/472 as his grazing field.

The 1st plaintiff's claim against the 1st defendant is for an order of eviction to issue and a permanent injunction to issue restraining him from further trespassing by entering, encroaching, ploughing and/or doing anything else to alienate an interest by way of sale, transfer and/or anything inconsistent with the rights of the 1st plaintiff over Title No. Uasin Gishu/Ilulula/470. The 1st plaintiff's claim against the 2nd

defendant is for an order of eviction and restoration of boundary marks between Uasin Gishu/Ilulula/470 and Uasin Gishu/Ilulula/86 and permanent injunction to restrain him from repeating the violation. The 2nd and 3rd plaintiff's claim against the 1st defendant is for an order of eviction and permanent injunction.

In suit No. E & L Case No. 361 Of 2013 **(Formerly Eldoret Hccc No. 69 of 2006)** the plaintiff's sought a declaration that the defendants are trespassers on the suit parcels of land to wit Title Nos. Uasin Gishu/Ilulula/470, 471 and 472 and pray for an order of eviction directed at the 1st and the 2nd defendants, their servants, agents and/or their other persons to remove themselves or by the assistance of the OCPD, Kapsoya Police Post or any other Senior Police Officer from all that parcel of land known as title No. Uasin Gishu/Ilulula/470 and in addition, the 2nd defendant be ordered to restore the original boundary(ies) of the said parcel of land No. Uasin Gishu/Ilulula/470 and parcel of land known as No. Uasin Gishu/Ilulula/86. The 2nd and 3rd plaintiffs jointly and severally pray for an order of eviction directed at the 1st defendant to remove himself, his servants, agents and his other persons or by the assistance of the OCPD, Kapsoya Police Post or any other Senior Police Officer from all that parcels of land known as title No. Uasin Gishu/Ilulula/472 and No. Uasin Gishu/Ilulula/471. Furthermore they pray for a declaration that the 1st, 2nd and 3rd plaintiffs are the lawful owners of land parcels No. Uasin Gishu/Ilulula/470, 471 and 472 and the 1st and 2nd defendants are trespassers.

The plaintiffs further pray for an order of permanent injunction to restrain the 1st and 2nd defendants, their servants, agents and their other persons from entering into, re-entering into, fencing off, building any structures thereon or in any way or manner whatsoever, interfering with the boundaries and/or with the possession or enjoyment of the said parcels of land known as title Nos. Uasin Gishu/Ilulula/470, 471 and 472 by the 1st, 2nd and 3rd plaintiffs and from doing anything that will interfere with and/or violate the plaintiffs' proprietary rights over their said parcels of land.

The defendant's in the said suits who are now plaintiff's in the Originating Summons filed a statement of defence and counterclaim which was amended on 30.3.2010 denying that the 1st plaintiff is legally registered owner and or proprietor of land parcel known as Uasin Gishu/Ilulula/108 allegedly allocated to him by the Ministry of Lands and Settlement and state that if there was any transaction carried out between the plaintiffs herein the same was carried out fraudulently and it is forgery.

The 1st defendant denies that he has been occupying the land parcel Uasin Gishu/Ilulula/108 (now allegedly known as Uasin Gishu/Ilulula/470) illegally as alleged and states that he has a legal right to occupy the land parcel Number Uasin Gishu/Ilulula/108. The 1st defendant denies that he has encroached upon land parcel Number Uasin Gishu/Ilulula/471 and 472 as alleged and that the plaintiffs are entitled to relieves sought in paragraph 10A of the Amended Plaint.

That the 1st defendant avers that the Committee in Kapsamich Primary School approached his late mother Kimoi Kimaiyo to surrender her two acres of land (situated at Kapsamich area, Keiyo District) to the school and in exchange, she was allocated Plot No. 108 at Ilulula Settlement Scheme and the defendant will seek leave of court to issue 3rd party notice against school committee of Kipsamich Primary School. The late Kimoi Kimaiyo moved, occupied and settled in Plot No. 108 at Ilulula Settlement Scheme.

The 1st defendant further, states that one retired chief by name Ben Kattam was supposed to facilitate the allocation and transfer of the Plot No. 108 at Ilulula Scheme to Kimoi Kimaiyo but instead, he fraudulently allocated the same to his brother Enock Kattam (1st plaintiff in this matter). The 1st plaintiff has fraudulently purported to sell the Plot No. 108 to 2nd and 3rd plaintiffs. That it has now transpired that the director of settlement has fraudulently transferred the parcel No. 108 to 1st plaintiff herein and it is defence case that the said transfer and/or sale is fraudulent and for that reason be declared null and

void and the title be cancelled.

That by way of counterclaim, the 1st defendant states that the 1st defendant, his mother Kimoi Kimaiyo and the other family members of Kimoi Kimaiyo were allocated Plot No. 108 at Illula Settlement Scheme after surrendering their 2 acres to Kipsamich Primary School in 1983 and have been in occupation of Plot No. 108 since that time and that the 1st defendant's claim against the plaintiff is for cancellation of the titles Uasin Gishu/Illula/108, Uasin Gishu/Illula 470, 471 and 472. That the 1st defendant further claims for an order of permanent injunction do issue restraining the plaintiff, their agents and servants from trespassing upon land parcel No. Uasin Gishu/Illula/108 or any further subsequent subdivision. That the 1st defendant further prays for a declaration that the defendant is the sole and absolute owner and/or proprietor of land parcel No. Uasin Gishu/Illula/108. The defendant prayed for judgment against the plaintiffs jointly and severally as per the counterclaim.

In reply, to defence and counterclaim the plaintiffs deny the allegation of fraud and the particulars at paragraph 12 and reiterate the contents of the amended plaint. In defence to counterclaim, the plaintiffs deny the assertion that the 1st defendant's mother, Kimoi Kimaiyo and family were lawfully allocated Plot No. Uasin Gishu/Illula/108 in 1983 and took possession of the same as alleged. The plaintiffs deny that the 1st defendant is the sole and absolute owner of Uasin Gishu/Illula/108 as the title was first issued to the 1st plaintiff who became the absolute owner and has lawfully subdivided the same and closed it and in its place three new titles have been issued. The plaintiffs prayed that the counterclaim be dismissed with costs.

The 1st defendant was given leave to amend the amended statement of defence and filed a further amended statement of defence and counterclaim whose gist was that the 1st defendant strictly denies the contents of paragraph 3A of the Amended plaint and more particularly that the 1st plaintiff is legally registered owner and or proprietor of land parcel known as Uasin Gishu/Illula/108 allegedly allocated to him by the Ministry of Lands and Settlement and puts the 1st plaintiff into strict proof thereof.

That in alternative, the 1st defendant avers that he and his family members of the Estate of Kimoi Kimaiyo also known as Tapkurgoi w/o Kimaiyo have acquired title of land Uasin Gishu/Illula/108 subdivided into land parcel Uasin Gishu/Illula/470, Uasin Gishu/Illula/471 and Uasin Gishu/Illula/472 by virtue of adverse possession. (Emphasis is mine)

That the 1st defendant being the administrator of the Estate of Kimoi Kimaiyo be declared the owner through adverse possession of land Uasin Gishu/Illula/108 currently subdivided into land parcels Uasin Gishu/Illula/470, Uasin Gishu/Illula/471 and Uasin Gishu/Illula/472 which he and his late mother Kimoi Kimaiyo has occupied since 1983. The 1st defendant prayed for the plaintiff's suit to be dismissed with costs and that judgment be entered for 1st defendant against the plaintiffs jointly and severally.

This amendment re-ignited the further amendment of the plaint which was filed on the 28.1.2012. The 2nd defendant also filed a statement of defence stating that property No. Uasin Gishu/Illula/108 has encroached onto No. Uasin Gishu/Illula/86 and that the suit against him and that the land in dispute belongs to a deceased person *inter-alia*. This matter is part-heard and 2 witnesses have testified.

On the 17.4.2015, the 1st defendant simultaneously filed Originating Summons Eldoret H.C.C.C No.111, 112 and 113 of 2015 against the defendants respectively. The respondent in 111 of 2014, **thus Musa K. Arusei** has moved to court in the application dated 22.11.2016 for orders that this suit be stayed in view of the previously instituted and part heard suit to wit Eldoret E & L Case No. 361 of 2013 (Formerly Eldoret Hccc No. 69 of 2006). An or in the alternative and without prejudice to the foregoing prayers, the said suit be struck out for being an abuse of court process. The respondent in this application, Mr.

William Kiprop Kimaiyo, be condemned to pay costs.

The application is based on grounds that the current suit clearly offends the provisions of Section 6 of the Civil Procedure Act, and the Supreme Law of the land. The matter in issue in this suit is also directly and substantially in issue Eldoret E & L Case No. 361 of 2013 (Formerly Eldoret Hccc No. 69 of 2006) between the parties herein. That Mr. William Kiprop Kimaiyo alias William Maiyo has his own case within Eldoret E & L Case No. 361 of 2013 between the same parties and subject matter(s) herein. That the said Eldoret E & L Case No. 361 of 2013 is part, it is ongoing and the respondent in this application is fully participating in its proceedings. That the said respondent has acted in bad faith by not disclosing the existence of the said old matter. That the acts of the said respondent amount to an abuse of court process. That in order to protect the integrity of the proceedings in the said old matter and further in order to protect the integrity of this Honourable court, the actions of the said respondent need to be nipped in the bud. That this application is *bonafide*, is merited, well founded in law and will save court's precious judicial time and will result in the doing of justice.

The application is supported by the affidavit of **Musa Kipchirchir Arusei** who states that he is the registered as the absolute proprietor of that parcel of land comprised in Title No. Uasin Gishu/Illula/471, and which is the subject of this as well as a subject of Eldoret E&L Case No. 361 of 2013 (Formerly Eldoret Hccc No. 69 of 2006). The parties in the said Eldoret E&L Case No. 361 of 2013 are: Enock Chirchir Katam Mark Kibiego Katam, Musa K. Arusei (himself) (the plaintiffs) and William Maiyo (alias William Kiprop Kimaiyo), the defendant and that it is very clear that the matter in issue in this suit is also directly and substantially in issue Eldoret E & L Case No. 361 of 2013 (Formerly Eldoret Hccc No. 69 of 2006) between the parties herein. That Mr. William Kiprop Kimaiyo alias William Maiyo has his own case within Eldoret E & L Case No. 361 of 2013 between the same parties and subject matter(s) herein. That the said Eldoret E & L Case No. 361 of 2013 is part, it is ongoing and the respondent in this application is fully participating in its proceedings. That the said respondent has acted in bad faith by not disclosing the existence of the said old matter. That the acts of the said respondent amount to an abuse of court process. That he is advised by his advocate on record, which advice he verily believe to be legally sound that in order to protect the integrity of the proceedings in the said old matter and further in order to protect the integrity of this Honourable, the actions of the said respondent need to be nipped in the bud.

That he is further advised by his advocate on record, which advice he verily believe to be legally sound that this application is bona fide, is merited, well founded in law and will save court's precious judicial time and will result in the doing of justice. That he is advised by his advocate on record, which advice he verily believes to be legally sound that it is only fair and just and in the interest of justice that his application now before this Honourable court be allowed.

The application is opposed vide a replying affidavit of **William Kiprop Kimaiyo** who states that there is no need to stay this case as the matter in issue is the same as the other case 361 of 2013 and that the four cases ought to be consolidated and heard together. The success or otherwise of either party's case will determine the other case. That there is no prejudice that the plaintiffs in Eldoret E & L Case No. 361 of 2013 stands to suffer if the cases are consolidated for purposes of hearing as the same will save valuable Judicial time. That the instant originating summons cannot be struck out as it is not an abuse of the court process. That it is more convenient and it will constitute prudent use of Judicial time if the cases are consolidated for purposes of hearing. That there is no prejudice the respondent in this matter stands to suffer if the matters are consolidated with the other case to save on judicial resources as the witnesses will testify in one case. That the court will also save judicial time as it will hear and write only one judgment in the four cases. That the respondent has not demonstrated what prejudice if any he stands to suffer if the cases are consolidated. That he has been advised by Mr. Momanyi Advocate that the appropriate way to proceed with a claim under adverse possession is through an originating

summons. That should the court deem it appropriate, the counterclaim may be withdrawn. That the respondent will still have an opportunity to present his case in court and tender appropriate defences. That there is no bad faith on his part nor has he abused the court process. That the respondent should not be allowed to determine which case proceeds and which does not. That the respondent is keen to delay the expeditious determination of the case as can be demonstrated by the fact that he refused to file a replying affidavit to the originating summons for about 5 months. Parties filed written submissions.

The gravamen of the applicants' submissions is that the respondent in the application herein is seeking adverse possession in the parcel in dispute in Suit No. 361 of 2006. According to the applicant, the main issue is whether the suits brought by way of Originating Summons thus, 111, 112 and 113 of 2015 ought to be stayed. The applicant argues that they ought to be stayed on the basis of the constitution of Kenya, 2010, section 3A, sections 5 and 6 of the Civil Procedure Act as the issues are the same and the subject matter is the same. On consolidation of the suits, the applicant argues that the respondent/applicant in the Originating Summons has counterclaimed in Eldoret Hccc No. 361 of 2006 whereby he is seeking orders sought herein. He cannot be allowed to litigate by counterclaim and by way of originating summons.

The respondent in the application dated 22.10.2016 submits that he seeks an order of declaration that he has acquired an interest on the suit land by virtue of the Limitation of Actions Act, thus adverse possession when claim can only be commenced by way of originating summons. He attacks his own counterclaim in 361 of 2006 as not verified with an affidavit and therefore, faulty and defective. Moreover, that the originating summons Nos. 111, 112 and 113 are directed against 3 different persons. The respondent further submits that the filing of the originating summons is not due to bad faith and abuse of court process but he wants the case determined on merit. He argues that the integrity of proceedings have not been compromised and that it is more convenience to consolidate the matters.

Having heard the parties herein, I do find the following issues ripe for determination:

- 1. Whether the defendants' counterclaim in 361 of 2006 is a claim based on adverse possession**
- 2. Whether the originating summons are an abuse of the process of court and therefore, should be struck out or stayed.**
- 3. Whether the 4 suits should be consolidated, stayed or struck out**

1. WHETHER THE DEFENDANTS' COUNTERCLAIM IN 361 OF 2006 IS A CLAIM BASED ON ADVERSE POSSESSION

In the counterclaim above said amended on 14.9.2012 pursuant to a court order made on 05.9.2012, the 1st defendant is the plaintiff in the originating summons and a respondent in the application dated 22.11.2016. The defendant in the counterclaim prays for a declaration that being the administrator of the Estate of Kinoi Kimaiyo, he is the owner through adverse possession of parcel of land known as Uasin Gishu/Ilulula/108 subdivided into parcel Uasin Gishu 470, 471 and 472. The counterclaim is not supported by any affidavit as required by law. A counterclaim is suit recognized by the Civil Procedure Rules and therefore, should be accompanied by a verifying affidavit, failure to do so makes the claim defective however whether the same is fatally defective can only be determined after hearing both parties This issue is not before me.

Though the proper manner to commence a suit based on adverse possession is to file an originating summons and not a counterclaim this court is not bound by the strict rules of procedures. I am guided by

article 159 of the constitution of Kenya, 2010 that provides for judicial authority and legal systems.

159. (1) *Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.*

(2) *In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

(a) *justice shall be done to all, irrespective of status;*

(b) *justice shall not be delayed;*

(c) *alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause*

(3):

(d) *justice shall be administered without undue regard to procedural technicalities; and*

(e) *the purpose and principles of this Constitution shall be protected and promoted.*

(3) *Traditional dispute resolution mechanisms shall not be used in a way that—*

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.

(Decided cases)

I do find that since the proceedings in respect of adverse possession can be simplified through directions that the originating summons becomes plaint whilst the replying affidavit becomes defence, then commencing a claim on adverse possession by way of counterclaim is not fatal in view of the provision of Article 159 of the Constitution. Moreover, the Environment And Land Court Act Chapter 12A Laws Of Kenya section 19 thereof provides for Procedure and powers of the Court, thus In any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure. And that the Court shall be bound by the procedure laid down by the Civil Procedure Act. The meaning of the above is that the court ought to consider the overriding objective thus to do justice expeditiously.

2. WHETHER THE ORIGINATING SUMMONS IS AN ABUSE OF THE PROCESS OF THE COURT AND SHOULD BE STRUCK OUT OR STAYED.

Striking out pleadings is a very draconian and should be the last step the court should on proof that the party has filed pleadings that are scandalous ,frivolous, vexatious inter-alia. Order 2, Rule 15 of the Civil procedure rules provides:-

(1) *At any stage of the proceedings the court may order to be struck out or amended any*

pleading 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 process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

Situations of abuse of court procedures are many and include filing multiple suits and it is an interference with administration of justice. Abuse of Judicial process include instituting a multiplication of actions on the same subject matter against the same opponent on the same issues or multiplication of actions on the same parties even where there exists a right to begin the action. In the matter before court though there exist the right to begin the action, there is a pending suit that is part-heard and has not been determined. However, this order provides for the discretion of the court to stay the suit.

Section 6 of the Civil Procedure Act provides for stay of suit, thus; ***“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”***

It is not in dispute that the matter in dispute in the subsequent suits is the matter in dispute in Eldoret Hccc No. 361 of 2013. I do find that the subsequent matters should be stayed unless the defendant withdraws the counterclaim.

On consolidation of the suits, the court finds that directions have not been taken in the Eldoret Hccc (Originating Summons) 111, 112 and 113 of 2015 and therefore, consolidation can only be done after directions have been undertaken and after withdrawal of the counterclaim.

This court cannot allow consolidation to cure the defects in the counterclaim if any. The only option for the respondent is to withdraw the counterclaim if he believes that it is defective. This court declines to exercise its discretion to the favour of the respondent and orders the subsequent suits filed and the claim for adverse possession stayed until the suit herein is heard and determined. Orders accordingly.

DATED AND DELIVERED AT ELDORET ON 23RD DAY OF NOVEMBER, 2016.

ANTONY OMBWAYO

JUDGE



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