



**Mukuha v Mukuha & another (Civil Case 475 of 2013)  
[2022] KEHC 12565 (KLR) (Civ) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12565 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL CASE 475 OF 2013  
DO CHEPKWONY, J**

**JULY 29, 2022**

**BETWEEN**

**NEWTON KAGIRA MUKUHA ..... APPLICANT**

**AND**

**SIMON GASHWE MUKUHA ..... 1<sup>ST</sup> DEFENDANT**

**DAVID KIMANI MUKUHA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Application for determination is dated 5<sup>th</sup> October, 2021 and is seeking for orders that;
  - a. This Honorable Court be pleased to grant leave to the plaintiff/applicant to amend its pleadings as per the annexed draft Plaintiff;
  - b. The annexed Amended Plaintiff herein be deemed duly filed subject to payment of requisite court fees;
  - c. Costs of the Application be in the cause.
2. The application is premised on the grounds on the face of it which are replicated in the Supporting Affidavit of the plaintiff/ applicant sworn on 5<sup>th</sup> October, 2021. The plaintiff's/ Applicant's case is that he inadvertently failed to include Naivas Limited as a party in the suit as necessary party that will help this court render a fair determination of the suit. Also, the plaintiff states that the omitted to set out some fundamental particulars in the suit that are relevant for fair determination of this suit. He states that the intended amendments will not in any way alter or change the cause of action between the parties but will crystalize the issues in dispute for this court to conclusively render a decision in the matter. Further, according to the plaintiff, since the 1<sup>st</sup> defendant, Simon Gashwe Mukuha has since passed on, there is a need to substitute him with his Personal Administrator to the deceased's estate.



Finally, he contends that the intended amendments will not prejudice the defendants/respondents in anyway and that it is in the interest of justice that the leave sought is granted.

3. The 2<sup>nd</sup> defendant, David Kimani Mukuha is opposed to the application vide the Replying and a further replying affidavits he swore on 26<sup>th</sup> April, 2022 and 16<sup>th</sup> May, 2022 respectively. His case is that the issue on joining Naivas Limited was substantially in issue in the Ruling delivered by Honorable Lady Justice Nzioka on 14<sup>th</sup> November, 2016 and the Court of Appeals Civil Application No. 39 of 2017 where Judgment was delivered on 17<sup>th</sup> December, 2021 hence the issue is res judicata. He avers that the said issue was raised in a Preliminary Objection dated 27<sup>th</sup> July, 2015 together with the issue of the entire suit being re judicata. Further that the question of equitable rights to ownership of Naivas Limited was decided in High Court Succession Cause No.92 of 2011(In the matter of the Estate of Peter Kago) by Honorable Mr. Justice Emukule in his Ruling of 31<sup>st</sup> October, 2014. He added that the instant Application was filed on 20<sup>th</sup> January, 2022 whereas the Court of Appeal's Judgment was delivered on 17<sup>th</sup> December, 2021 and therefore the instant Application is not only res judicata but also an abuse of the court process and urges the court to dismiss the application.
4. By consent, the application was canvassed by way of written submissions and as the record reflects, both parties complied with the plaintiff/applicant filing his written submissions dated 16<sup>th</sup> February, 2022 whilst those of the 2<sup>nd</sup> defendant together with their list of authorities dated 16<sup>th</sup> May, 2022.
5. I have read through the said written submissions and since they reiterate the summary of the parties' case as laid above, and thus do not see the need to replicate the same.
6. Having read through each party's perspective position in relation to the application at hand, in my view, only two issues crystalizes for determination:-
  - a. Whether the issue of joinder of Naivas Limited is res judicata;
  - b. Whether the amendment should be allowed.
  - a) Whether the issue of joinder of Naivas Limited is res judicata.
7. Section 7 of the [Civil Procedure Act](#) on matters res judicata stipulates as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
8. The Court of Appeal in the case of [The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), Nairobi CA Civil Appeal No 105 of 2017 ([2017] eKLR) held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

  - a) The suit or issue was directly and substantially in issue in the former suit.
  - b) That former suit was between the same parties or parties under whom they or any of them claim.
  - c) Those parties were litigating under the same title.



- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
9. I have perused Emukule, J.’s judgment, Lady Justice Nzioka’s Ruling and the Court of Appeal’s judgment to establish the claim by the 2<sup>nd</sup> defendant that the present application is res judicata is founded in view of the underlying principles in the above cited cases. Having done so, I am persuaded that the issue on joinder of Naivas Limited as was previously determined was not on its substance but on the procedure that had been adopted in joining Naivas Limited as a party.
10. The Court of Appeal after considering the two decisions by the High Court, upheld that Naivas Limited had improperly been joined as a party to this suit without leave of court having been sought. The courts never addressed the issue of whether or not Naivas Limited is a necessary party, to this suit. I therefore find the issue of whether or not Naivas Limited is a necessary party was not a substantive issue in the decisions cited by the 2<sup>nd</sup> defendant and neither did the courts determine the same. Consequently, the issue of res-judicata cannot arise here.
11. Turning to the question of the proposed/intended amendment on the issue of joinder of Naivas Limited and the substitution of the 1<sup>st</sup> defendant, Order 8 Rule 3 of the [Civil Procedure Rules](#) provides;
- “(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4,5 and 6 and 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.”
- “3(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”
12. On the other hand, Order 5 Rule 1 of the [Civil Procedure Rules](#) provides as follows;
- “5(1) 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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”
- “5(1) 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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”
13. The Court of Appeal while citing with approval the unreported case of [Ochieng & others v First National Bank of Chicago](#) Civil Appeal No. 147 of 1991 in [St Patrick’s Hill School Ltd v Bank of Africa Kenya Ltd](#) [2018] eKLR set out the principles governing the amendment of pleadings as follows: -
- a. The power of the court to allow amendments is intended to determine the true substantive merits of the case.
  - b. The amendments should be timeously applied for;
  - c. Power to amend can be exercised by the court at any stage of the proceedings.



- d. 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.
  - e. The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation
14. Applying those principles as articulated by the Court of Appeal to the circumstances of the instant case, and while considering the issue on joinder of Naivas Limited, I associate myself with and reiterate the decision in High Court Succession Cause No. 92 of 2011 (In the matter of the Estate of Peter Kago) by Honorable Mr. Justice Emukule (as he then was) in his Ruling of 31<sup>st</sup> October, 2014, where, in addressing whether the applicant had interest in Naivas Limited, he stated as follows at Paragraph 52 of the said
- Judgment;-
- “clearly therefore, the objector has no interest, legal or equitable in Naivas Limited. His interest in the 10,000 shares held by their father in Naivas limited is co-equal with that of the petitioner and other children of the late Peter Mukuha Kago, and even then, only upon intestacy. In this case, the objector does not in any of his affidavits dispute the validity of his father’s will, and the distribution of the 10,000 shares or 20% of their father’s interest in Naivas limited. These shares will as already stated be transmitted in accordance with the terms of the will. He will therefore have no interest at all in Naivas Limited. In the upshot therefore the objector’s applications dated 2nd November 2012 and 9th July 2013 are dismissed with costs to the petitioner and the estate of the late Peter Mukuha Kago.”(emphasis added)
15. As noted by the Court of Appeal, the applicant not having appealed the Ruling of Emukule, J above, cannot claim interests in Naivas Limited and neither has any evidence been placed before court to demonstrate change of circumstances. Therefore, for that reason, I do not find Naivas Limited as a necessary party and reiterate the position that the Applicant has no legal or equitable interest in Naivas Limited. Allowing the joinder of Naivas Limited as a party at this stage for purposes of determining the applicant’s interest whatsoever in that company is akin to sitting on appeal against Emukule, J’s Ruling. Consequently, the leave sought for joinder of Naivas Limited is denied.
16. The plaintiff has sought to also include important and fundamental particulars in the plaint which he believes were inadvertently omitted. Given that pleadings in this case are yet to be closed, the request is allowed only to the extent that the amendments shall be limited to issues touching on the parties herein without changing the cause of action.
17. Lastly, on the question of whether to substitute the 1<sup>st</sup> defendant, I do note that the same is not opposed and I wish not to belabor on it. I therefore proceed to allow substitution of the 1<sup>st</sup> defendant with his administrators pursuant to Order 24 Rule 3 of the *Civil Procedure Rules, 2010*.
18. For avoidance of doubt, this court makes the following orders in respect of Notice of Motion application dated 5th October, 2021 which I have found to be partly merited:-
- a. The leave sought for joinder of Naivas Limited as a necessary party to this suit be and is hereby denied.



- b. The applicant is granted leave to amend its pleadings as per the annexed draft plaint in so far as the said amendments do not alter the cause of action. The applicant to file and serve the amended Plaint within seven(7) days from today.
- c. The defendant is equally granted leave to file and serve an amended defence within twenty one (21) days from the date of being served by the plaintiff.
- d. Leave be and is hereby granted for substitution of the 1<sup>st</sup> defendant with his legal administrators.
- e. Each party shall bear its own costs on the application.
- f. Mention on 19<sup>th</sup> September, 2022 before the Deputy Registrar to confirm compliance and fix a date for Case Management.

It is hereby ordered.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI THIS 29<sup>TH</sup> DAY OF JULY 2022.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Kiiru counsel for Defendant/Respondent

Court Assistant - Sakina

