Muiga & 2 others (Suing as the Administrators of the estate of the late Susan Wateru Muriithi) v Kagia & 3 others (Civil Case 284 of 2018) [2022] KEHC 9840 (KLR) (Civ) (22 July 2022) (Ruling)

Neutral citation: [2022] KEHC 9840 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 284 OF 2018

JN NJAGI, J

JULY 22, 2022

BETWEEN

ROSALID NJOKI MUIGA ..... 1ST PLAINTIFF

JOSIAH MURIITHI MUIGA ..... 2ND PLAINTIFF

CHRISTOPHER MUCORA MUIGA ..... 3RD PLAINTIFF

SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE SUSAN WATERU MURIITHI

AND

JEAN WAMAITHA KAGIA ..... 1ST DEFENDANT

KENYA HOSPITAL ASSOCIATION T/A NAIROBI HOSPITAL .... 2ND DEFENDANT

MUNDIA WACHIRA ..... 3RD DEFENDANT

AGA KHAN HEALTH SERVICES T/A THE AGAKHAN UNIVERSITY HOSPITAL, NAIROBI ..... 4TH DEFENDANT

RULING

1. The 3rd and 4th defendants/Applicants have filed an application dated 21st January 2022 seeking for orders that they be struck out as parties to the suit on the ground that they were wrongly enjoined in the suit. In the alternative they are seeking that the suit against them be dismissed for being statute barred.

2. The application is made pursuant to an earlier application by the plaintiffs/Respondents dated 8th June 2021 wherein the plaintiffs had sought and were granted leave to enjoin the 3rd and 4th defendants to the suit. The application by the 3rd and 4th defendants is based on the grounds that the plaintiffs

in their application failed to disclose to the court that the application was made after the limitation period of suing the 3rd and 4th defendants had lapsed. That Order 8 Rule 3(2) (2) and (3) prohibits joinder of parties after lapse of limitation period except for amendments relating to correction of names or capacity of the party. That the plaintiffs did not bother to seek leave to file the suit against the defendants out of time. Further that the 3rd and 4th defendants are entitled in law to benefit from the defence of limitation. That their surreptitious joinder to the suit is prejudicial to them for reasons of their inability to mount a formidable defence for reasons of lack of documentation from the hospital.

3. The application was supported by the affidavit of counsel appearing for the 4th defendant, Valentine Situma Achungo, in which he deposes that the plaintiffs had vide an application dated 8th June 2021 sought an order for amendment of the plaint and joinder of the 3rd and 4th defendants to the suit. That on 30th September 2021 the plaintiffs and the advocates for the 1st and 2nd defendants recorded a consent allowing the application dated 8th June 2021. That the plaintiffs proceeded to amend their plaint and enjoined the 3rd and 4th defendants to the suit. That the said application was made under Order 8 Rule 3 and 5(1) of the *Civil Procedure Rules* instead of Order 1 rule 10 that permits the addition or substitution of parties. That the joinder of the 3rd and 4th defendants was made after the relevant period of limitation had lapsed on 12th December 2018 and the amendment thereof did not seek to correct the name of the parties or their capacity. That the joinder was improper as it was in breach of section 4(2) of the *Limitation of Actions Act*.

4. The application was opposed by the plaintiffs/Respondents through the replying affidavit of the 1st Respondent, Rosalid Njoki Muiga, wherein she deposes that the joinder of the 3rd and 4th defendants to the suit was done procedurally and thus the suit is not statute barred and is competently before the court. That the applicants are challenging the application dated 8/6/2021 which has already been granted and are as such attempting to appeal against it by filing the instant application instead of following the proper channels. That the provisions of Order 8 rule 3 and 5(1) were properly applied in the case.

Submissions

5. The application was canvassed by way of written submissions. The advocates for the Applicants, Chenge Busiku & Co. Advocates, submitted that the application to enjoin the 3rd and 4th defendants was premised under the wrong rules which denied the court a chance to interrogate the same prior to recording the consent of the parties. That there is a distinction between substitution or addition of a party and an amendment of pleadings and a party cannot be seen to add or substitute a party to the suit under the guise of amending their pleadings. To support this position counsel relied on the case of *Peres Atieno v Moses Angura Omoro & Another* (1985)eKLR where the court held that:

   The *Civil Procedure Rules* make a clear distinction between the substitution or addition of a party to proceedings and the amendment of the pleadings, and the position in the instant case is governed by order 1 rule 10.

6. It was submitted that it is misleading for the plaintiffs to argue that the applicants should have filed an appeal for the reason that before joinder to the proceedings the applicants were not participants in the proceedings.

7. Counsel submitted that the matter arose out of a tort of a perceived medical negligence whose cause of action arose on 10th December 2015 and the limitation period lapsed on 10th December 2018. That it is a general principle in amendments that the same should not be allowed if it causes injustice or prejudice to the other side. Further that an amendment that would have the effect of depriving the other party the right to rely on statute of Limitation ought not to be allowed. That Order 1 rule 10(2)

of the *Civil Procedure Rules*, 2010 gives the court power to strike out any party improperly joined and the applicants ought to be struck out as parties to this suit.

8. On the alternative prayer for the suit be dismissed for being time barred, it was submitted that the plaintiffs did not adequately explain the delay of 7 years after the cause of action accrued. Counsel relied on the holding in the case of *Lochab Brothers Limited v Peter A. Mulama* (2014)eKLR where the court stated that:

> Since the grant of leave (to enjoin another party) is a discretionary power, a party who abuses the process of court or seeks to cause further delay of the suit will be denied the remedy.....The delay here of nearly three years is inordinate and inexcusable. That in turn militates against the grant of a discretionary relief.

9. It was further submitted that the plaintiffs are guilty of laches and should not be allowed to prosecute the claim against the 3rd and 4th defendants as it would be prejudicial to them on the reason that the 4th defendant does not have medical records relating to the claim as the 4th defendant`s retention of medical records procedure provides that inpatient record should be retained for 7 years from the date of contract. That 7 years have lapsed since the 4th defendant had contact with the deceased patient.

10. The advocates for the plaintiffs, E. Muigai & Co. Advocates, on the other hand submitted that if the application dated 8th June 2021 was premised on the wrong rules or if it was time barred the applicant should have challenged it through an appeal and not through the instant application. It was submitted that the deceased died on the 10th December 2015 and the suit was filed on 6th December 2018. That thereafter the plaintiffs sought amendment of the plaint and the same was granted on 30th September 2021. That though the limitation period had lapsed the court had the unfettered discretion to allow the application as provided under section 1A of the *Civil Prosecution Act* and Order 8 rule 3. That the consent order entered on 30th September 2021 was regular. That if the orders sought are granted it will amount to the applicants obtaining a reversal of the orders granted on 30th September 2021 through the back door.

11. It was submitted that the court has discretion to grant joinder of parties even after the limitation period of the cause of action has lapsed. The case of *Consolidated Bank of Kenya Limited v Monica Wangari & Another*, ELC Appeal Case No.113 of 2019 was cited in that respect.

12. The respondents submitted that the applicants have already filed their statement of defence and list of documents that they intend to rely on in the case and as such it is not true that they will be prejudiced for lack of records.

13. It was submitted that the general rule in pleadings is that courts should aim to do substantive justice after hearing the merits of a suit and ought to be slow in dismissing a suit summarily unless in the clearest of the cases. Therefore, that it would be fair and just if the matter herein was heard on merits. The respondent relied on the case of *Dreameast Limited v Fernando Vischi & 7 Others* where the court upheld the finding in *D.T. Dobie v Muchina* that:

> "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption."

14. It was also submitted that the limitation period in suing the Applicants was broken after the plaintiffs filed the suit against the 1st and 2nd defendants. Therefore, that it was proper to enjoin the applicants into the suit. The Case of *Capital Fish Kenya Limited v Kenya Power & Lighting Company Ltd*, HCCC 369 of 1998, was cited in support of this proposition.

Analysis and Determination.

15. I have considered the application and grounds in opposition there to. The issues for determination are:

    1) Whether the application to join the applicants to the suit was incompetent.

    2) Whether the application was time barred.

16. The Plaintiffs/Respondents were seeking to join the 3rd and 4th defendants to the suit and made the application under Order 8 rule 3 and 5(1) of the *Civil Procedure Rules* and under sections, 1A, 1B and 3A of the *Civil Procedure Act*. The stated rule provides as follows:

> " [Order8, rule 3.0.] Amendment of pleading with leave
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> 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.
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> 2. Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it thinks just so to do.
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> 3. An amendment to correct the name of a party may be allowed under sub rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
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> 4. An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub rule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
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> 5. An amendment may be allowed under sub rule (2) notwithstanding that its effect will he 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."

17. In my considered view, this rule deals with amendment of pleadings as between parties in a suit and does not deal with substitution or addition of parties to suits. Section 3A of the *Civil Procedure Act* was not applicable in this case as there is a specific rule that caters for substitution/addition of parties to proceedings. This position was demonstrated by Kneller Ag. JA (as he then was) in the case of *Wanjau v Muraya* (1982] KLR 276 where it was held inter alia that Section 3A of the *Civil Procedure* (Cap.21) although saving the inherent powers of the Court to make such orders as may be necessary for the ends of justice, or to prevent the abuse of the power of court, should not be cited where there is an appropriate section or order and rule to cover the relief sought.

18. The rule that deals with substitution and addition of parties to suits is Order 1 rule 10 (2) of the *CPR* which provides that:

> (2) 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."

19. It is then clear that the application was made under the wrong rule of the *Civil Procedure Rules*. In the case of *Atieno v Omoro* (*supra*) the court made it clear that the *Civil Procedure Rules* makes a clear distinction between substitution or addition of parties to proceedings and amendment of pleadings.

20. However, even though the plaintiffs made the application under the wrong rule, it is clear from prayer 2 of their notice of motion dated 8/6/2021 that they were seeking to enjoin the 3rd and 4th defendants/ Respondents in the suit. Article 159 (2) of *the constitution* requires courts of law to be guided by doing substantive justice when dispensing justice as opposed to being guided by technicalities. The fact that the application was brought under the wrong rule does not invite an automatic dismissal. The court is obligated to determine the application on its merits as if it was made under Order 1 rule 10 of the *Civil Procedure Rules*.

21. The respondent submitted that the Applicant should have filed an appeal against the orders instead of filing the instant application. This, in my view, cannot be the case as rule 10(2) is explicit that the trial court has power "at any stage of the proceedings" to strike out any party improperly enjoined to the suit. The application is therefore properly before this court. In any case the applicants were not parties to the suit when the application was made. It is therefore not plausible to argue that the applicants should have appealed against the orders of the court.

22. There is no dispute that the cause of action arose on 10th December 2015 which is the day when the deceased died. The suit was filed on 6th December 2015. The same was based on the tort of medical negligence on the part of 1st and 2nd defendants. Section 4(2) of the *Limitation of Actions Act* (cap 22) provides that:

> " An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued."

23. The three-year limitation period in this case ended on 9th December 2018. The application to enjoin the Applicants to the suit was made on 8th June 2021 by which time the case for the plaintiffs against the applicants was time barred by virtue of the provisions of the *Limitation of Actions Act*. The only way that the plaintiffs could file suit against the 3rd and 4th respondents was to first seek leave of the court to file the suit out of time which they never did. Though the court (Meoli J.) did on the 30th September 2021 record a consent by the advocates for the plaintiffs and those of the 1st and 2nd defendants allowing for the applicants herein to be enjoined in the suit, it is clear that it was not disclosed to the court that the suit against the 3rd and 4th defendants/applicants was time barred by virtue of the *Limitation of Actions Act*. There was no order in the consent giving leave to file the suit out of time. The order to enjoin the applicants in the suit was in the circumstances obtained by non-disclosure of material facts.

24. The advocates for the plaintiffs argued that the court has discretion to grant joinder of parties even after the limitation period of the cause of action. However, the application dated 8/6/2021 did not contain any prayer to enjoin the applicants outside the limitation period and no such orders were granted. The argument is therefore out of place.

25. The plaintiffs' counsel also argued that the period of limitation was broken when the suit was filed against the 1st and 2nd defendants. I do not agree with that submission. In my considered view the period of limitation against the applicants continued to run until when the application to enjoin them to the suit was filed. At the time when the application dated 8/6/2021 was filed the suit against the applicants was time barred. I am fortified in this by the holding in the case of *Atieno v Omoro* (*supra*) where Trainor J. had the occasion to consider such an issue and held that:

> "The number of cases that have been reported dealing with applications to amend proceedings by adding a new party are many. The position now seems to be well established. Where the application is granted the new party will not be prejudiced. Any defence that is open to him at the time the application is granted is available to him as if proceedings were first instituted against him at that time. To put it another way, the Act may be relied on as a defence if the period has expired. It would appear from the cases that I have found, and there are many, that time is calculated up to when the proceedings are instituted; in the case of an added party time continues to run until the amendment adding him as a defendant is ordered.

26. It is trite law that amendments allowed in a case should not have the effect of causing injustice to the other side nor should it amount to an abuse of the process of the court. In *Daniel Ngetich & Another Vs KRep Bank Limited* 2013 KLR it was held that:

> "Normally the Court should be liberal in granting leave to amend pleadings. But it must never grant leave if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a devise to abuse the process of the court."

27. Moreso, amendments should not be allowed where the defendant would be deprived of his right to rely on *Limitations Acts* – see the Court of Appeal decision in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* (2013)eKLR. The amendment in the instant case deprived the applicants of that right. It was an abuse of the process of the court for the advocates for the parties to apply for the court to adopt a consent to enjoin the applicants to the suit while knowing that the suit was time barred as against the applicants. I am convinced that had the information been brought to the attention of the court it is unlikely that the court would have allowed the consent. The enjoining of the applicants to the suit was done in error and was improper.

28. In view of the foregoing, I find that the suit against the 3rd and 4th defendants/Applicants was time barred by virtue of the provisions of the *Limitation of Actions Act* and that they were improperly enjoined in the suit. The application is therefore merited. The suit against the Applicants is accordingly struck out with costs to them.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JULY 2022.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Chenge for Applicants

Miss Muigai for Respondents

Court Assistant- Sarah

30 Days Right of Appeal.