



REPUBLIC OF KENYA



**In re Estate of Momanyi Oseko (Deceased) (Succession Cause E900 of 2020)
[2022] KEHC 14913 (KLR) (Family) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14913 (KLR)

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

SUCCESSION CAUSE E900 OF 2020

MA ODERO, J

OCTOBER 21, 2022

IN THE MATTER OF THE ESTATE OF MOMANYI OSEKO (DECEASED)

BETWEEN

**ROBERT GEBASO OSEKO 1ST APPLICANT
GEORGE MORARA OSEKO 2ND APPLICANT
DR GLADYS OSEKO 3RD APPLICANT
JOSEPH NGALA OSEKO 4TH APPLICANT
LILIAN NYAMOITA OSEKO 5TH APPLICANT
DAMARIS KEMUNTO OSEKO 6TH APPLICANT**

AND

**PATRICK ONDIEKI OSEKO 1ST RESPONDENT
ERICK AGWATA MOMANYI 2ND RESPONDENT
HON BEN ORORI MOMANYI 3RD RESPONDENT
ZACHARIAH MISARO MOMANYI 4TH RESPONDENT
BENSON NYASIMI MOMANYI 5TH RESPONDENT
UMASH FUNERAL HOME 6TH RESPONDENT**



RULING

1. Before this court for determination is the notice of motion application dated January 31, 2022 by which the applicants seek the following orders:-
 - “1. Spent.
 2. That the honourable court be pleased to grant leave to the applicants to amend the citations dated September 23, 2020 to read Momanyi Oseko Alias Momanyi Onchieku.
 3. That the said amended citation annexed herein be deemed as duly served on upon payment of requisite filing fees.
 4. That costs be provided
 5. Any other order or relief that this court will be pleased to grant in the circumstances.”
2. The application which was premised upon article 53, 159, (2) (d), orders 8 rule 1, order 8 rule 3, order 8 rule 5, order 51, rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law was supported by the affidavit of even date sworn by Robert Gebaso Oseko who is the 1st applicant.
3. The respondents opposed the application vide the grounds of opposition dated May 25, 2022 as well as the replying affidavit also dated May 25, 2022 sworn by Eric Agwata Momanyi who is the 2nd respondent.

Background

4. This cause relates to the estate of the late Momanyi Oseko (hereinafter ‘the deceased’) who died in May 2008. The applicants are the children of the late Josephat Oseko who was the eldest son to the deceased. Therefore, the applicants are the ‘grandchildren’ of the deceased.
5. The applicants filed a citation dated September 23, 2020 directing the respondents to accept or refuse to take out letters of administration in respect of the estate of the deceased. The respondents are the children of the deceased, whilst the 6th respondent is the funeral home.
6. The applicants now seek to amend the citation to include an alias to the name Momanyi Onchieku a name also used by the deceased.
7. The respondents oppose the application claiming that the deceased never used any other name during his lifetime. They claim that the name Momanyi Onchieku is not known to the respondents nor to any of the family members of the deceased. According to the respondents, the present application has been made in bad faith and will prejudice the respondents by delaying the hearing of the citation. They pray that the application be dismissed in its entirety.

Analysis and Determination

8. I have carefully considered the present application, the reply filed by the respondents as well as the written submissions filed in the matter.



9. Order 8 rule 3 of the [Civil Procedure Rules](#) provides for amendment of pleadings with leave of court as follows:-

“(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.”

10. In the case of [Bosire Ogero v Royal Media Services](#) [2015] the court held that:-

“Courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. The general power to amend the pleadings is donated by section 100 of the [Civil Procedure Act](#) which is the substantive law and its handmaiden order 8 rule of the [Civil Procedure Rules](#).”

11. In [Rubina Ahmed & 3 others v Guardian Bank \(sued in its capacity as a successor in title to First National Bank\)](#) [2019] eKLR the court cited [Halsbury Laws of England](#) 4th Edition 9 re-issue Vol 36 (1) at paragraph 76 where the author stated thus:-

“The person applying the amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis it is intended for the first time thereby to advance a new ground of defence, if the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness. Leave to amend may be granted if the amendment can be made without injustice to the other side.” (own emphasis)

12. Further in [Institute for Social Accountability & another v Parliament of Kenya & 3 others](#) [2014] eKLR the court held:-

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.....
The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.” (own emphasis)

13. Based on the above authorities, it is clear that so long as an amendment does not introduce new or inconsistent causes of action or issues, so long as the application for amendments is made in a timeous manner and does not prejudice the rights/case of the opposite party, then such applications ought to be freely permitted.

14. The respondents allege that this application will delay the hearing of the citation. In actual fact it is this unwanted opposition to the application, necessitating the hearing of the application which has delayed the proceedings.



15. In my view, the inclusion of an alias name used by the deceased will not in any way prejudice the respondents as the citation is yet to be heard. I therefore allow this application and grant prayers (ii) and (iii) of the notice of motion dated January 31, 2022. Each party to meet its own costs.

DATED IN NAIROBI THIS 21ST DAY OF OCTOBER 2022.

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MAUREEN A ODERO

JUDGE

