



**M'Mukaria v Equity Bank Kenya Limited & another (Civil Suit
4A of 2020) [2022] KEHC 15935 (KLR) (29 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL SUIT 4A OF 2020
EM MURIITHI, J
NOVEMBER 29, 2022**

BETWEEN

JUDAH K. MBIJIWE M'MUKARIA PLAINTIFF

AND

EQUITY BANK KENYA LIMITED DEFENDANT

AND

KIMAITA MBIJIWE APPLICANT

RULING

1. The applicant, Kimaita Mbijiwe, by application dated November 17, 2021 made pursuant to Order 24 Rules 1, 2 and 3 (2) of the *Civil Procedure Rules*, seeks an order 'that this Honorable Court be pleased to substitute the name of the deceased Plaintiff with the Applicant Kimaita Mbijiwe, who is the appointed legal representative of the deceased's estate.'
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Kimaita Mbijiwe, the applicant herein, sworn on even date. He avers that after the death of his father, the plaintiff herein, on April 14, 2021 as a result of Covid 19 Pneumonia Respiratory failure, he petitioned for letters of administration ad litem which were issued on August 27, 2021. It is in the interest of justice to have him substituted for the just and fair determination of this matter.
3. The defendant/respondent opposed the application by its replying affidavit sworn by Francis Gakuu Macharia, its credit manager, on January 25, 2022. He accuses the plaintiff of intending to introduce fraud as a new cause of action, on the basis that Mr Judah Mbijiwe (now deceased) did not acquire his wife, Lucy Mbijiwe's consent before acquiring charges over the properties. He views the application as a ploy to delay the hearing of the suit and deny the defendant/respondent the right to realize their security. He notes that the plaintiff/applicant seeks an order declaring the charges invalid, null and void



all together for want of spousal consent. He believes that the application is unmerited, a waste of the court's time and brought in bad faith as it is designed to mislead the court on the real issue in the case, to wit, that the deceased did not perform his obligation under the charges, precisely, failing to repay the loan, and as a result the defendant/respondent is entitled to its right of sale of the suit properties as securities to the loan.

4. The Respondent avers that the intended amendments do not assist the court in determining the matter justly but rather seek to cause confusion and digress from the main issue for determination. He asserts that the deceased's wife, Lucy Kirumba, was well aware of the charges over the suit properties as she appended her signature consenting to the same. He feels that the defendant/respondent will be greatly prejudiced in terms of finances and time as it will be forced to defend the suit all over again yet before the deceased died, there were discussions on settling the matter. He contends that the applicant has not provided any real evidence of the alleged forgery to persuade this court that a strong case exists against the defendant/respondent over the same, and that the certificate of marriage only confirms that Lucy Kirumba was married to the deceased.

Submissions

5. The applicant urges that the respondent will not suffer any prejudice which cannot be compensated by an award of costs, as the matter has not been set down for hearing and it will in any case be accorded an opportunity to respond to the amendment sought and even cross examine the applicant during hearing, and relies on the Court of Appeal cases of *St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd (2018) eKLR* and *Harrison C Kariuki v Blueshield Insurance Company Ltd (2006) eKLR*. He prays that the application be allowed in order to avoid multiplicity of suits and enable the court to effectively determine the issues raised on merits.
6. The respondent acknowledges that the amendment sought arises out of the same facts as established by the parties, and even though the law allows parties to freely amend their pleadings at any stage of the proceedings before judgment is delivered, such freedom is fettered by judicial discretion as was captured in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited (2013) eKLR*, *John Mulwa Kang'atu v Pan African Insurance Co Ltd (2015) eKLR* and *Silvester K Kaitany v Nyayo Tea Zone Development Corporation & Another; National Land Commission & Another (Interested Parties) (2021) eKLR*. It submits that the amendments sought will greatly prejudice its accrued rights over the suit properties as the chargee and force it to litigate the matter afresh, and relies on *Nyangenya Isaboke Maniga (Suing through his attorney fact Joel Maniga) v Andrew MI Ochoki (2018) eKLR*. It urges the court not to aid the applicant who has been indolent by bringing the litigation herein to an end, and relies on *William Koross (Legal personal Representative of Elijah CA Koross) v Hezekiah Kiptoo Komen & 4 others (2015) eKLR*. It beseeches the court to look at the draft amended plaint in order to determine the feasibility of the amendment sought, and proceed to dismiss the application with costs.

Determination

7. This court notes that the net effect of the substitution sought by the applicant is to ultimately amend the plaint. The issues for determination are whether the orders of substitution and amendment of the plaint should be granted.

Substitution

8. Substitution of a deceased plaintiff is provided under Order 24 Rule 3 of the Civil Procedure Rules as follows:



- (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
 - (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff: Provided the court may, for good reason on application, extend the time.'
9. There is no doubt that the applicant is the legal representative of the deceased plaintiff by virtue of limited Grant of Letters of Administration ad litem issued on August 27, 2021. It is equally evident that the plaintiff (now deceased) died on April 5, 2021 at Nanyuki Cottage Hospital as shown by the Death Certificate on record. This court thus allows the substitution of the deceased plaintiff with the applicant as sought in prayer 1 of the application dated November 17, 2021.

Amendment of the Plaintiff

10. The principles under which courts may grant leave to amend the pleadings were clearly set out by the Court of Appeal judgment of *AB Shah JA in Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago [1995] eKLR* as follows:

' [P]owers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) 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; that exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that 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 Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation: that the court has powers even in special circumstances to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment.'

11. In *Barclays Bank DCO v Shamsudin (1973) EA 451*, it was held that, 'In special circumstances, amendment of a plaint will be allowed, notwithstanding that the effect will be to defeat a defence of limitation.'



12. *Halsbury's Laws of England, 4th Edition (re-issue) Vol 36*(1) at Paragraph 76 provides as follows:

' The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion on such terms as to costs or otherwise as may be just and in such manner, if an, as the court may direct. The person applying for 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, and there is no injustice if the other side can be compensated by an order as to costs. Even an open admission of liability may be withdrawn by amendment if the plaintiff cannot show prejudice. When a plaintiff obtains leave to amend a statement of claim, leave will be assumed to have been given to the defendant to make consequential amendments to the defence.'

13. Moreover, Order 8 Rule 3 of the Civil Procedure Rules provides for amendment of pleading with leave as follows:

'3. Amendment of pleading with leave [Order 8, rule 3.]

- (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.
- (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 subrule if it thinks just so to do.
- (3) An amendment to correct the name of a party may be allowed under subrule (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.
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (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.
- (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.'



14. The amendment sought by the applicant is in its nature an addition of a new cause of action, which is permissible under Order 8 Rule 3 (5) of the Civil Procedure Rules. Notably, the new cause of action does not substantively change the character of the case as to make it suitably a subject of a fresh action. As I understand it, the amendment is merely a limb of the Plaintiff's challenge on the validity of the defendant's charge and the right to exercise the chargee's power of sale.
15. The said new cause of action, having arisen out of the same facts and same parties, this Court deems it fit to allow the amendment, in order to avoid multiplicity of suits and effectively resolve the issues in controversy.
16. It was reasonably expected that after the substitution of the deceased plaintiff with the applicant, the cause of action would entirely and/or substantially change.
17. On the issue of prejudice, while the applicant claims that the respondent will not be prejudiced by the proposed amendment, the respondent claims that its accrued rights over the suit properties as the chargee will be greatly prejudiced and it will be forced to litigate the matter afresh. I consider that the amendment allows the court to finally and fully determine all the issues arising from the civil dispute between the parties before the court. As set out in section 100 of the Civil Procedure Act, the amendment is sought to ensure determination of the real question or issue between the parties.
18. The amendment has been sought timeously before the matter could be set down for hearing, and in view of the fact that the respondent will be accorded an opportunity to make consequential amendments to its statement of defence, this court is inclined to allow the amendment of the plaint.

Orders

19. Consequently, for the reasons set out above, the court allows the application dated November 17, 2021 as follows:
 1. The name of the deceased plaintiff is substituted with the applicant Kimaita Mbijiwe, the Legal Representative of the Deceased's Estate.
 2. Leave to amend the Plaint is granted.
 3. The Amended Plaint shall be filed within fourteen (14) days in terms of Order 8 Rule 6 of the Civil Procedure Rules.
 4. The Defendant/ Respondent is granted corresponding leave to amend its statement of Defence with fourteen (14) days after service of the Amended Plaint in terms of Order 8 Rule 1 (3) of the Civil Procedure Rules.
 5. Costs are awarded to the respondent.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF NOVEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Sandi for the Plaintiff.

Mr. C. Mwangela for the Defendant.

