



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2359 OF 2010

IN THE MATTER OF THE ESTATE OF FRANCIS KAHENYA (DECEASED)

HARRISON THUKU KAHENYA.....APPLICANT

VERSUS

PETER MBUGUA KAHENYA.....1ST RESPONDENT

MONICA NYIHA KAHENYA.....2ND RESPONDENT

MR. WARANI T/A CASTLELAND PROPERTY CONSULTANT.....3RD RESPONDENT

RULING

(1) Before this Court for determination is the chamber summons dated 22nd September 2020, by which the Applicant **HARRISON THUKU KAHENYA** seeks the following orders:-

“1. This honourable court be pleased to grant leave for the applicant herein to amend his notice of motion application dated 15th December 2016.

2. This honourable court be pleased to order that the amended notice of motion annexed herewith is duly on record and the same to be served upon the respondents.

3. The costs of this application to be in the cause.”

2. The Application was premised upon **Rule 49** of the **Probate and Administration Rules, Sections 1A, 1B, 3A and 100 of the Civil Procedure Act** and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondents opposed the application through the Replying Affidavit dated **30th June 2021** sworn by the 1st Respondent **PETER MBUGUA KAHENYA**. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated **9th July 2021**. The Respondent opted to rely entirely on their Replying Affidavit and did not file any written submissions.

4. In the summons dated **22nd September 2021**, the Applicant seeks leave of court to amend his Notice of Motion dated **15th December 2016**. **Order 8 Rules 3 and 5(1)** of the **Civil Procedure Rules 2010** provide as follows: -

“(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.

3(5) An amendment may be allowed under sub rule (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 part applying for leave to make the amendment.

General power to amend

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. The Applicant seeks leave to amend the application dated **15th December 2016** on the grounds that a critical prayer was inadvertently omitted from the said application. That the proposed/amendments is aimed at saving the courts time and resources by having all pertinent issues dealt with comprehensively.

6. In the case of **ST PATRICK’S HILL SCHOOL LTD – VS – BANK OF AFRICA LTD [2018] eKLR** the Court of Appeal set out the principles upon which a court may grant leave to amend 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.

7. Therefore as a general rule amendments to pleadings ought to be freely allowed. The only exceptions would be cases where the amendments is found to be inconsistent with the original pleadings and entirely alters the nature of the pleading. In **DANIEL NGETICH & ANOTHER – VS – KREP BANK LIMITED [2013] KLR** it was held as follows: -

“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 amendments would cause injustice or irreparable loss to the other side or if it is a devise to abuse the process of the court”.

8. I have perused the Draft Amended Notice of Motion which is annexed to the supporting Affidavit dated **22nd September 2020**. I find that no prejudice will be suffered by the Respondent if the Amendment is allowed. Accordingly I do allow prayers (2) and (3) of the summons dated **22nd September 2021**. Costs to be met the Applicant.

Dated in **Nairobi** this **15th** day of **October, 2021**.

.....

MAUREEN A. ODERO

JUDGE