



Boskwony (Suing as the Administrator of the Estate of Charles Boskwony) & another v Biwott & 5 others (Environment & Land Case 210 of 2012) [2023] KEELC 20100 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20100 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 210 OF 2012
A OMBWAYO, J
SEPTEMBER 22, 2023**

BETWEEN

MIRIAM SUSAN CHEROTICH BOSKWONY (SUING AS THE ADMINISTRATOR OF THE ESTATE OF CHARLES BOSKWONY). PLAINTIFF

AND

SUZIE CHEROTICH CHEBET (SUING AS THE ADMINISTRATOR OF THE ESTATE OF CHARLES BOSKWONY) APPLICANT

AND

PHILIP KIPKOECH BIWOTT 1ST DEFENDANT

MANGARE PHILIP MATOKE 2ND DEFENDANT

KENNEDY NYABUTI OGETO 3RD DEFENDANT

HON. ATTORNEY GENERAL 4TH DEFENDANT

COMMISSIONER OF LANDS 5TH DEFENDANT

DISTRICT LAND REGISTRAR, NAKURU 6TH DEFENDANT

(FORMERLY HCC CASE NO. 253 OF 2009)

RULING

1. The Applicants filed the instant application dated July 6, 2023 seeking orders that this Honourable Court be pleased to grant leave to the Applicant to further amend the amended plaint dated November 24, 2017 as per the draft amended plaint annexed herewith and it be pleased to make all such further orders and/or directions as it may deem fit. That the costs of this Application be in the cause. The



Application was based on grounds set out and supported by the Affidavit of Suzie Cherotich Chebet the Applicant herein.

She stated that she was appointed as an administratrix of the estate of Charles alongside Miriam Boskwony (deceased). That Miriam filed the suit herein in her capacity as an administratrix. She further stated that the matter came up for directions on November 14, 2022 since the judge that initially heard the Plaintiff's case was on transfer. She stated that the deceased died on November 11, 2022 and the court directed that the Plaintiff be substituted within 60 days.

2. That they applied and obtained the grant in respect of the said estate and that upon perusal of the file, counsel for the Applicant realized that the Plaintiff was suing in her capacity as the administratrix of the estate of her late husband. She added that given that a grant is issued in personam, the same could not transfer to her estate's legal representatives.

She stated that she was appointed alongside Miriam Susan Cherotich Boskwony (deceased) as an administrator and that in the circumstance it is imperative that she be enjoined in the proceedings so as to protect the interests of the estate. In conclusion, the Applicant stated that the suit may abate if the application is not allowed.

Response

3. The 2nd Defendant filed his Grounds of Opposition dated July 20, 2023 opposing the application on the following grounds:

1. The application is incompetent in so far as it principally seeks substitution of one administrator who has since passed on with the other administrator who was not a party to the proceedings which is not contemplated under Section 81 of the [Law of Succession Act](#).
2. That the provisions of Section 81 of the [Law of Succession Act](#) as read with Section 82 of the said [Act](#) do not permit one administrator to commence a suit alone on behalf of the estate of the deceased when the powers granted by the court was joint as joint administrators .
3. The instant application and the entire suit is an abuse of the due process of the court as they are null and void for want of capacity to institute proceedings on behalf the estate of Charles Boskwony

Submissions

4. Both parties did not file submissions.

Analysis and Determination

5. This court has considered the Application, and the main issue for determination is whether the Applicant should be granted leave to amend the plaint.

Order 8, Rule 3 (1) of the [Civil Procedure Rules](#) provides as follows:-

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”



6. Further, The Court of Appeal in case of *Coffee Board of Kenya V Thika Coffee Mills Limited & 2 Others*, CA No 94 of 2003 [2014] eKLR the court held as follows:
- i) All amendments should be allowed which are necessary for determination of the real issues in controversy in the suit;
 - ii) The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
 - iii) Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;
 - iv) Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;
 - v) Amendment of a claim or relief barred by time should not be allowed;
 - vi) No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
 - vii) No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;
 - viii) The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;
 - ix) Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”

7. This court has carefully perused the draft amended plaint and the same touches on the substitution of an administrator who died with a co-administrator. Section 81 of the *Law of Succession Act* states;

‘Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.’

Further Section 82 provides as follows:

Personal representatives shall, subject only to any limitation imposed by their grant, have powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

8. It is not in dispute that the Plaintiff is deceased. It is also not in dispute that the Applicant is a co-administrator to the estate of Charles Boskwony (deceased).

It is this court’s view that the said amendment is largely aimed at allowing the case to proceed since the Plaintiff passed on. The 2nd Defendant in his grounds of opposition contends that the Applicant being a co-administrator cannot substitute the Plaintiff since the court granted them powers to commence this suit jointly.



9. I am of the view that the Applicant despite not being a party to the suit initially, she remains the co-administrator and for the purposes of advancing this suit, she ought to be part of it by virtue of substitution.

It would be in the interest of justice that substitution of the Plaintiff is done to allow the case proceed. I also find that there would be no prejudice the 2nd Defendant might face since he has the option of filing an amended defence if need be.

I therefore find that the Application dated July 6, 2023 merited.

Consequently, I make the following orders:

- a. The Applicant is granted leave to file and serve their amended Plaintiff within 14 days from today.
- b. The Defendants will have leave within 14 days of service of the amended Plaintiff to file and serve any amended Defence, if need be.
- c. Each party shall bear its own costs.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER 2023.

A. O OMBWAYO

JUDGE

