



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 55 OF 2011

**PETER MUNYUA MBUGUA (Suing as the administrator ad litem of the estate of
PATRICK NDAI MUNYUA-Deceased)PLAINTIFF/APPLICANT**

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT/RESPONDENT

COMMISSIONER OF POLICE.....2ND DEFENDANT/RESPONDENT

RULING

1. The Motion is dated 26th October, 2018 and is supported by the grounds set out on the body thereof and the affidavit of *James Kironji*. The plaintiff/applicant herein seeks the following orders:

i) *Spent.*

ii) *THAT this Honourable Court be pleased to reinstate the suit which stood dismissed on 7th September, 2018.*

iii) *THAT this Honourable Court be pleased to grant the applicant leave to withdraw the application dated 28th September, 2018.*

iv) *THAT this Honourable Court be pleased to grant the applicant leave to amend his plaint as shown in the draft amended plaint annexed to the application.*

v) *THAT leave be granted to substitute the 2nd defendant/respondent with the Inspector General of Police.*

vi) *THAT upon substitution of the proposed party, the amended plaint be deemed as duly filed and served upon the respondents subject to payment of the relevant court fees.*

vii) *THAT costs be in the cause.*

2. *James Kironji*, the deponent and advocate for the applicant herein, stated that the suit was initially dismissed on 10th March, 2017 under Order 17, Rule 2 of the Civil Procedure Rules but that the same was reinstated vide a ruling delivered by this court on 10th May, 2018 on condition that, the applicant ensures the prosecution of the suit within 120 days from the date of the aforesaid ruling. That the applicant took the necessary steps to prosecute the suit and invited the respondents to fix a convenient date for hearing of

the same.

3. The deponent also asserted that the applicant took an ex parte hearing date and that the same was scheduled for 2nd October, 2018 which falls outside the 120 days ordered by this court. Consequently, the suit stood dismissed as at 7th September, 2018. That when the matter came up for hearing on 2nd October, 2018 as scheduled, the applicant's advocate sought to have the suit reinstated but was directed by the court to file a formal application. The deponent clarified that previously, the applicant had filed an application dated 28th September, 2018 seeking leave to amend his plaint and which amendments are necessary in enabling the court determine the real issues in controversy.

4. In response thereto, the respondents filed Grounds of Opposition on 23rd November, 2018 in essence stating that the application is an abuse of the court process; the applicant has been indolent in prosecuting his case; the intended amendments give rise to new issues and will only drag the suit further. The Grounds also stated that the respondents will suffer prejudice.

5. The parties presented oral arguments. *Mr. Ngugi* advocate for the applicant reiterated the averments in the supporting affidavit to the Motion, adding that in issuing the aforementioned ex parte hearing date, the registry did not appreciate that a date was to be given on priority basis and that the applicant had no control over the diary. As concerns the application for amendment, the counsel argued that the purpose of the same is to expound on the circumstances of negligence on the part of the respondents in the criminal case from which the suit is derived. That the applicant also wishes to substitute the 2nd respondent with the correct party in addition to including a prayer for damages which the applicant has subsequently incurred.

6. On her part, *Mrs. Murugi* counsel for the respondents contended that the applicant did not prosecute the suit despite being given the opportunity of doing so. That the applicant ought to have filed an application urgently with the aim of requesting for an early date but did not do so. The advocate maintained that the application for amendment is being sought late in the day and raises new issues contrary to Order 2, Rule 6(1) of the Civil Procedure Rules. That on this point, the applicant seeks to introduce a judgment in the criminal case whose existence was well within his knowledge all along. It was *Mrs. Murugi's* overall submission that if the prayer for amendment is allowed, the respondents will not only be forced to amend their statement of defence but will experience difficulties in obtaining instructions and tracing relevant witnesses; that the amendments will delay the matter.

7. *Mr. Ngugi* in his counter arguments, stood his ground that the respondents have not shown that they will be prejudiced and since their intended witnesses are all police officers, there is no indication that they cannot be found. The counsel in closing submitted that the intended amendments will only introduce the judgment and no new issues.

8. I have taken into consideration the averments raised in the Motion, the Grounds of Opposition hand in hand with the rival oral arguments by the respective counsels. In the premises, the prayers sought are two-fold: that is, the reinstatement of the suit and the intended amendments to the plaint.

9. I wish to first address the prayer on reinstatement. It is true that the applicant's suit was dismissed on 10th March, 2017 and that subsequently, the said applicant applied to have the same reinstated on the basis that the notice to show cause had not been served upon him. Vide my ruling of 10th May, 2018, I granted the applicant's request for reinstatement conditionally.

10. That said, I have perused the court record and confirmed the applicant's averments that an invitation was made to the respondents on 10th May, 2018 for purposes of fixing a hearing date and which invitation was received by the 1st respondent. The record further reveals that the hearing date of 2nd October, 2018 was taken ex parte and the respondents were served with a hearing notice to that effect.

11. It is therefore clear from the above that the applicant took reasonable steps to comply with my order requiring him to prosecute his suit within the set timelines. The applicant cannot be faulted for the mere

fact that the hearing date given fell outside of such timelines as this was likely a result of congestion in the court diary. I find the explanation given by the applicant to be reasonable.

12. This leads me to the second issue for determination. In doing so, I make reference to *Section 100* of the *Civil Procedure Act* which stipulates as follows:

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

13. The above provision is echoed under *Order 8, Rule 5* of the *Civil Procedure Rules*. To add on, *Order 8, Rule 3 (1)* of the said Rules grants the court power to allow an amendment of pleadings at any stage of the proceedings as and when it deems fit. *Order 8, Rule 3 (3)* on its part stipulates that a party can seek an amendment to correct the name of a party even where such amendment will entail the substitution of parties as long as the mistake is found to have been genuine. I also consider it necessary to mention *Order 8, Rule 3 (5)* which provides as follows:

“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. *Order 1, Rule 10 (2)* of the *Civil Procedure Rules* under which the application is brought provides for the substitution of parties where necessary.

15. In relation thereto, it is noteworthy that a number of judicial authorities have addressed the subject of amendment of pleadings. For now, I shall cite the Court of Appeal case of *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others*, CA No. 94 of 2003 [2014] eKLR, wherein the principles stated in *Mulla, The Code of Civil Procedure, 18th Ed, Vol. 2* at pages 1751-1752 were adopted 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.”

16. Having established the above, I now turn to the draft amended plaintiff annexed to the Motion. I have perused the same and observed that the intended amendments concern inter alia, the substitution of the 2nd respondent with the Inspector General of Police by virtue of the relevant statute and constitutional provisions. It is as well noted that the other amendments are largely aimed at either clarifying or correcting the facts or description of parties. To my mind, it would appear the causes of action incorporated into the amended plaintiff arise out of the same facts as those pleaded in the original plaintiff. Contrary to the averments made by the respondents, there is no indication that new issues have been raised in the aforesaid amended plaintiff.

17. The respondent also contended that the applicant sought to introduce the judgment in the already concluded criminal case (namely Republic v Wilfred Mwititi-High Court Criminal Case No. 61 of 2011) to the present civil case. I have perused the judgment and come to the finding that the same is substantially intertwined with the facts raised in the civil suit. As such, there do not appear to be any new issues arising out of the facts relating to the said judgment.

18. Furthermore, I would be required to address my mind to the prejudice, if any, which would befall the respondents. I recall the respondents’ argument that they will be forced to file an amended defence and may face challenges in tracing their witnesses. My response thereto is that this argument is untenable since the respondents will have the opportunity of responding to the allegations raised in the amended plaintiff. In any case, the respondents will still be required to avail their witnesses for purposes of their testimony one way or another, should the suit be reinstated and proceed for hearing. I therefore find no indication of prejudice that cannot be compensated by costs. On the flip side, it is fair to state that the by stands to suffer prejudice if the prayer for amendment is denied since this will likely impede his right to a fair trial, considering this is a fatal accidents claim.

19. It is noteworthy for me to reiterate that this court has the power to allow an amendment where necessary at any point in the proceedings. It matters not that the parties will return to the pre-trial stage: the essence is to ensure that all issues in controversy are properly laid before the court for ease of deliberation and determination. That notwithstanding, I am alive to the fact that this is a fairly old matter which ought to be prosecuted and determined expeditiously.

20. In view of the foregoing, I find the Motion to have merit and will allow prayers ii), iii), iv) and v) of the same. Consequently, I make the following orders:

- a) The applicant shall file and serve the amended plaintiff within seven (7) days from the date hereof, following which the respondents shall file and serve their amended statement of defence if need be, within fourteen (14) days from the date of service.
- b) Thereafter, parties are at liberty to file any additional pre-trial documents and take a date for pre-trial directions on priority basis.
- c) Costs shall abide the outcome of the suit. S

Dated, signed and delivered at **NAIROBI** this **21st** day of **February, 2019**.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendants/Respondents