



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 218 OF 2004
ATHMAN JUMA MWAKUANDIKA.....PLAINTIFF
VERSUS
MARTHA WANGUI MURIITHI
ELIJAH WAICHANGURU MURIITHI.....DEFENDANTS

RULING

1. Martha Wangui Murithi (hereinafter called the Applicant) has moved the court under Order 8 rules 3, 5 & 7 of the Civil Procedure Rules and Section 1A, 1B, 63 (e) & 100 of the Civil Procedure Act. In the motion, the applicant seeks leave of the court to amend her defence. The motion is premised on the two grounds listed on the face of the application and the Supporting Affidavit sworn by Joseph K. Kanyi - Advocate for the applicant. The grounds listed state that the 2nd defendant is dead and the amendments sought will not prejudice the respondent.

2. The motion is opposed by the Plaintiff/Respondent vide the grounds of opposition filed. The Respondent states that the amendment seeks to introduce a cause of action which is statute barred. Secondly that seeking to strike out the 2nd defendant's name is superfluous as the suit against him already abated. Lastly that the grounds relied on by the applicant do not support the amendments sought in the motion.

3. The advocates filed written submissions and cited extensively case law in support of their submissions. From the pleadings and the submissions, I find two issues that are for my determination;

i. Whether the amendments sought are unmerited by virtue of introducing a new cause of action which is time barred and therefore should not be granted.

ii. In the alternative, whether the amendment sought is necessary.

4. On the first limb, the Respondent submits that the amendments seek to cancel the registration of the suit properties on account of fraud. This claim according to the Respondent is time barred by dint of Section 4 of the Limitation of Actions Act. He cited the case of Atieno vs. Omoro HCC No. 52 of 1976 where the court held that amendment of pleadings is subject to the law of limitations. The Respondent also cited the case of Kennedy Chege vs. Nehemiah Keengwe (2005) eKLR in his view the court did not allow the amendment where there was a cause of action that was statute barred.

5. The Applicant in response to this submission opposed the same by relying on the provisions of Order 2 rule 4 of the Civil Procedure Rules as regards matters which must be pleaded and which include pleading limitation of action. He relied on my decision in the case of Samuel Samita Namunyu vs. Philimon Machina Nduva & 3 others (2014) eK LR. The Applicant avers further that the respondent does not yet represent parties to be introduced therefore he cannot oppose their being joined to the suit at this stage and the rules of natural justice require that they should not be condemned without a hearing

6. There is no explanation given either in the Supporting Affidavit or the submissions why the counter-claim was not included when the defence was filed. This is a discretionary remedy and the Applicant had an obligation to justify why the amendment is being sought 10 years after this suit was filed. Further they have not denied that their claim sought to be introduced is based on fraud is statute - barred. They only challenge this submission by the fact that the plaintiff/Respondent has not pleaded it. If indeed the claim is statute barred, then it is superfluous to allow the same in the first instance. A claim based on fraud must be filed before the expiry of 3 years. The Applicant has been a party to these proceedings from the time it was initiated. On perusing the file, I found that on 23rd November 2007, the defendants through the law firm of Mogaka Omwenga & Mabeya Advocates filed an application seeking several orders amongst them leave to amend the defence. Leave was granted to amend the defence in terms of the draft amended defence that was annexed.

7. The record reveals therefore that the Applicant was aware of the need to amend their defence in 2007 and did move the court accordingly. The current application is therefore an abuse of the court process and in linking it to issue No.(ii) for determination, it is not necessary. The prayer seeking to strike out the name of the 2nd defendant was not necessary as put by the Respondent as the suit against him automatically abated upon the lapse of one year from the date of his death if no substitution was undertaken. The result is the notice of motion dated 14/8/2014 is dismissed for being an abuse of the court process and also it is unmerited. The costs of the motion is awarded to the Plaintiff/Respondent.

Dated and delivered at Mombasa in open court this 14th day of April, 2015.

A. OMOLLO

JUDGE

14.4.2015