



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 454 OF 1996

BENJAMIN WAMUGI WAWERUPLAINTIFF

VERSUS

JACINTA NJOKI MUREITHI DEFENDANT

RULING

Before me is a Notice of Motion dated the 15/4/11. The plaintiff/applicant has brought it Order Rule 3 and 4 order, order 8 Rule 3, 5, and 7 and order 51 rule 3, 10 (4) of the Civil Procedure Rules and section 1 A, 13 and 3 A of the Civil Procedure Act Cap 21 laws of Kenya. The plaintiff/applicant is seeking the following orders that:

- 1) Leave be granted to the applicant herein to enjoin Peter Wambugu Mureithi and Charles Kingori Mureithi as 2nd and 3rd defendants respectively.
- 2) The pursuant to prayer 1 being granted the applicants be granted leave to amend the plaint dated 27/2/96 as per the annexed draft hereto.
- 3) That upon leave being granted, the draft amended plaint annexed here to be filed within a period of 14 days.
- 4) That Costs be in the cause.

The application is based on the grounds stated on the face of the application.

The application is supported by the supporting affidavits of Benjamin Wamugi Waweru dated the 15/04/2011.

The application was opposed. The defendant filed a notice of preliminary objection dated the 13/7/11

The issues raised are

1. That the intended suit against the intended 2nd & 3rd Defendants namely PETER WAMBUGU MUREITHI & CHARLES KINGORI MUREITHI is statute barred under the provisions of S. 7 & 17 of the limitation of Action Act Cap 22 Laws of Kenya and accordingly the application does not lie in Law & orders sought cannot therefore be granted.
2. In any event the plaintiff has not applied for the extension of limitation period.

3. The matters alleged the intended 2nd & 3rd defendants are also administrators of the estate of the deceased were at all material times within the knowledge of the plaintiff in any event he deposes in paragraph 4 of his supporting affidavit that he became aware of the same in year 2005 well over 5 years to date yet the Application was filed the other day.

The applicant states as follows in brief. That he learnt on the 16th December 2005 that the proposed 2nd and 3rd defendant were co-administrators to the estate of the late John Mureithi Wambugu. That it is necessary to enjoin the 2as defendants for the court to determine the suit on merit; that the proposed amendments shall not occasion any prejudice to the defendants.

Mrs Ngari for the respondent opposed the application and stated that the intended suit against the 2 proposed defendants Peter Wambugu Mureithi and Charles Kingori Mureithi is statute barred under the provisions of 7 and 17 of the limitation of Actions Act CAP 22, that the application does not lie in law and the orders should not be granted; that the amendments brings in 2 new parties and no leave was sought to file the new suit.

In the grounds the respondent states that the applicant knew of these fact in 2005 and it is over 5 years when the present application was filed.

In reply Mr. Nyaaga stated that it is not a new suit that all administrators are deemed to be agents of the estate and that adding someone to the suit does not change the matter into a new cause of action nor is it time barred.

I have considered the submission made by counsel in this matter and I find as follows:

The guiding principles in respect of application to amend pleadings is that they should be allowed if it is necessary for the purposes of determining the real questions in dispute between the parties. Order 8(5) (1) expressly states so order 8(3) (2) states that where an application for leave to make an amendment such as mentioned in sub-rule (3) (4) and (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 sub-rule if it thinks just so to do.

The plaintiff/applicant seeks to enjoin the 2 proposed defendants. He argues that the proposed amendments are necessitated by information relevant for the fair and just determination of the real question in controversy in the suit which came to the plaintiff's knowledge subsequent to filing the plaint herein. I have looked at the proposed amended plaint and noted the prayers. The defendant in her application to set aside the Judgment did state that the 2 proposed defendants are co-administrators of the estate of the deceased John Mureithi Wambugu. Any order that will be made by the court that will hear this suit, since the exparte judgment was set aside, will indeed affect the 2nd proposed defendants.

I do agree with the plaintiffs counsel submissions that the respondent cannot challenge the issue of the enjoining the 2 proposed defendants now and that if the application is allowed they can hereafter file an application to challenge the same.

I have noted the provisions of sections 7 and 17 of Cap 22 but I find that the 2 proposed defendants are at liberty to bring an application on the same once they are enjoined. I also note that it is not clear from the preliminary objection if Mrs. Ngari will be acting for the 2proposed defendants.

I therefore find that the application before me has merit. The plaintiff has shown that to help in determining the real issues the 2 co-administrators need to be enjoined in the suit. I note that they had knowledge of these facts in 2005, but in the interest of justice I will allow the application.

I therefore grant leave to the applicant to enjoin Peter Wambugu Mureithi and Charles Kingori Mureithi as 2nd and 3rd defendant respectively. The applicant is granted leave to amend to his plaint dated 27/2/96 as per the annexed draft. The said amended plaint shall be filed within 14 days from the date of this ruling

and served to the defendants. The defendant is at liberty to file an amended defence if need be within 15 days from the date of service. Costs shall be in the cause.

Dated, Signed and delivered at Nairobi this 2nd day of February 2012.

R. OUGO

JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk