REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 5348 OF 1990

1. **DANIEL MUCHIRU JOEL**
2. **DANSON NJOROGE KINYANJUI**
3. **GRISHON KINUTHIA**
4. **ROBERT MUGU**
5. **A K KINYANJUI**
6. **JOSEPH NGURE JOEL**
7. **DANSON N WAKABA……………………….……….PLAINTIFFS**

VERSUS

1. **STRABAG-AG**
2. **LIMA LIMITED……..…..…..…………………..……DEFENDANTS**

R U L I N G

1. The Plaintiffs applied by chamber summons dated 24th June 2004 for leave to amend the plaint. The application was heard *inter partes* by a deputy registrar on 20th January 2006. By a considered ruling dated and delivered on 10th February 2006 the application was dismissed with costs. The main reasons for dismissal of the application were that it lacked merit and was belatedly brought.

2. There was no appeal to a judge in chambers against that ruling under **Order XLVIII, rule 5(2)** of the old **Civil Procedure Rules** (the **Rules**).

3. The Plaintiffs (through a different firm of advocates) subsequently applied by chamber summons dated 23rd September 2008, again seeking leave to amend the plaint. The application was placed before the same deputy registrar who had dealt with the first application for amendment. The learned deputy registrar, in a ruling dated and delivered on 14th November 2008, pointed out the earlier application and the ruling of 10th February 2006. He then ruled that the new application for leave to amend the plaint was *res judicata* and struck it out. Again there was no appeal to a judge in chambers against this order.

4. The Plaintiffs then filed **notice of motion dated 11th February 2009**. This application is the subject of this ruling. It seeks a review of the order of the deputy registrar of 14th November 2008. It also seeks an order that the chamber summons dated 23rd September 2008 be allowed and the Plaintiffs be granted leave to amend the plaint.

5. The effect of this application is that the Plaintiffs are seeking for the third time leave to amend the plaint after being refused the previous two times.

6. The grounds for the application given on the face thereof are-

(i) That some Plaintiffs are dead and that it is thus necessary for the plaint to be amended in order to reflect the names of the persons substituted in their places.

(ii) That it is in interests of justice that the application be allowed.

7. Both the 1st and 2nd Defendants opposed the application. The 1st Defendant filed a replying affidavit on 2nd of March 2009. The 2nd Defendant filed grounds of opposition dated 17th February 2009.

8. As the deputy registrar did not have power to hear an application for review under Order XLVIII, rule 5 of the Rules (or under **Order 49, rule 7(1)** of the new Rules), the application was placed before me on 15th March 2012. I have considered the submissions of the respective counsels appearing.

9. A person substituted in place of a deceased party takes the place of the deceased party in the proceedings. In that event it is not necessary to amend the pleadings to include the name of the substituted party, and I know of no procedural requirement for such amendment, and none was brought to the attention of the court.

10. It seems to me, upon a reading of the supporting affidavit and the submissions of the learned counsel for the Plaintiffs that what is sought in the present application is an opportunity to plead by amendment what was refused in the first application for amendment dated 25th June 2004. At any rate, no new or important matter has been placed before the court, and which could not have been within the knowledge or possession of the Plaintiffs upon exercise of due diligence, that alters the position as obtained on 10th February 2006 when the first application for amendment was dismissed. I also do not find any other sufficient cause to review the decision of the deputy registrar of 14th November 2008.

11. It is also to be noted that the proper way to challenge the decision of a deputy registrar in exercise of powers granted under Order XLVIII, rule 5 of the old Rules (or Order 49, rule 7 of the new Rules) is by way of appeal to a judge in chambers, and not by way of review. This is not a mere procedural technicality. The court's jurisdiction in appeal is different from that in review.

12. In conclusion, the application at hand not only lacks merit, it is also misconceived and an abuse of the process of the court. It is hereby dismissed with costs to the Defendants. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF MAY 2012.

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2012.