



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 85 OF 2009**

**JOHN NGUGI GACHAU.....PLAINTIFF/APPLICANT**

**VERSUS**

**STEPHEN WAGOI NGUNYI.....DEFENDANT/RESPONDENT**

**RULING**

The plaintiff, John Ngugi Gachau brought this action against the defendant, Stephen Wagogi Ngunyi for a declaration that the latter's use of an access road through the plaintiff's parcels of land NYANDARUA/WANJOHI/ 1274 and NYANDARUA/WANJOHI/1026 is illegal and amounts to trespass. He also seeks an order of permanent injunction to restrain the defendant from trespassing upon the two parcels of land above, among other reliefs.

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with the suit, the plaintiff also instituted an application for temporary injunction in the terms sought in the suit pending the determination of the suit. This application was withdrawn when it was disclosed that the defendant died on 18<sup>th</sup> February, 2010. The plaintiff has now brought the present application dated 6<sup>th</sup> July, 2010 for orders:

**“(b) That the court do grant leave to the plaintiff to amend his pleadings to remove the names of Stephen Wagogi Ngunyi as a defendant and substituting the same with the names of TIMOTHY NDUNGU NGUNYI and ALEXANDER NGOTHO NGUNYI.”**

This order is sought on the grounds that the defendant having died on 18<sup>th</sup> February, 2010 and members of his family including his two brothers proposed to be substituted in this suit having continued to trespass on the suit property, it was just and fair to amend the pleadings as prayed in (b) above.

The proposed substitutes have opposed the application and have filed both grounds of opposition and a replying affidavit, the combined effect of which is that’ the application does not lie, bad in law, is an abuse of this court process and is without merit.

I have considered these arguments. The application is expressed to be brought under the provisions of **Order 6A rules 3(3) and (5)** of the revoked **Civil Procedure Rules**. It is undisputed fact that Stephen Wagogi Ngunyi who was the sole defendant in this claim is now deceased. It is alleged that his family members including his two brothers, now proposed to substitute him have continued committing trespass for which he had been sued. The law regarding amendment for purposes of joining or substituting a party may be summarized as follows:

- i) The court may at any time and on such terms as to costs amend any defect or error in any proceedings in a suit for the purpose of determining the real question or issue raised by the proceeding **(Section 100 of the Civil Procedure Act)**
- ii) No suit shall be defeated by reason of the misjoinder or non-joinder of parties **(order 1 rule 9 – Civil Procedure Rules)**
- iii) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff and the court is satisfied that it was so instituted through a *bona fide* mistake, it may order any other person to be substituted or added as plaintiff **(order 1 rule 10(1))**.
- iv) Similarly, the name of a party improperly joined whether as plaintiff or defendant may be struck out and the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary may be added **(Rule 10(2))**

v) An amendment will be ordered for the purpose of determining the real question in controversy between the parties, or for the purpose of correcting any defect. or error in any proceedings.

The application before me seeks to do none of the above. As a matter of fact and from the manner in which it is framed, it is difficult to understand whether the application is seeking an amendment of the plaint or a substitution of the deceased defendant with his brothers. If the latter be the case, then the two brothers can only be substituted as the deceased defendant's personal representatives. It has not been demonstrated that they are his personal representatives. Secondly, in the circumstances of this case and in view of the nature of the claim, the suit clearly did not survive the defendant. He was accused of trespassing on the plaintiff's parcels of land. He is incapable of doing so upon his death. If other people have continued to trespass, they must be sued individually,

The application for these reasons fails and is dismissed with costs.

**Dated, Delivered and Signed at Nakuru this 21<sup>st</sup> day of September, 2011.**

**W. OUKO  
JUDGE**