

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 648 of 2004

PAUL NDICHU.....APPELLANT

VERSUS

WAMBUI KINYANJUI.....1ST RESPONDENT

NGANGA NJOROGE.....2ND RESPONDENT

R U L I N G

By a chamber summons brought under Order VIA Rule 3(1) and 5 of the Civil Procedure Rules, Margaret Nyathira Gakuna and Samuel Gakuna Muchina seek leave “*to amend the notice of motion in a manner indicated in draft amended chamber summons*”. It is contended that the application was meant to be a chamber summons but was erroneously put down as a notice of motion. Mr. Kamonde who appeared for the applicants maintained that under Order VIA Rule 3 of the Civil Procedure Rules, the court can grant leave for amendment of pleadings at any stage. He contended that the amendment was necessary to enable the court deal with the real issue in controversy, and that the respondent will not be prejudiced.

The respondents, Wambui Kinyanjui and Nganga Njoroge (hereinafter referred to as the 1st and 2nd respondents), have filed grounds of opposition in which they maintain that the application is frivolous, vexatious and an abuse of the process of the court and further that it is brought in bad faith and should be dismissed.

Mr. Oluoch who appeared for the respondents, submitted that the prayer for an amendment contemplates a situation in which there is a suit and proceedings before the court, with appropriate parties. He maintained that in the instant case, there is no suit as the suit abated the plaintiff having died on 24th October, 2005 and no application having been made for substitution of the legal representative within one year. Mr. Oluoch maintained that the application for amendment was brought two years after the death of the appellant. The court therefore had no jurisdiction to entertain the application. In support of his submissions counsel relied on the case of *Owners of the Motor Vessel “Lillian S” vs Caltex Oil Kenya Ltd (1989) KLR 1*.

In a rejoinder to the submissions made by Mr. Oluoch, Mr. Kamunde maintained that the application was filed on 12th October, 2006 which was before the expiry of one year from the date the appellant died which was 25th October, 2005.

The prayers sought by the appellant in the chamber summons filed on, 13th November, 2007, is not very clear as to the amendments sought. However, looking at the annexures it becomes clear that the applicants seek leave to amend the form of the notice of motion which was filed on 12th October, 2006 to change it to a chamber summons. The respondent maintained that the application cannot be entertained as the suit in respect of which the applicants seek to be substituted has already abated. That is a misconception of the facts, as the application filed on 12th October, 2006, which was for substitution of the deceased appellant was made within one year. That is the application now sought to be amended and the court has jurisdiction to entertain the application.

Although Order VIA Rule 3 of the Civil Procedure Rules, deals with amendment of pleadings only, Rule 5 of the same order gives the court a general power to amend any document for the purposes of determining the real question in controversy between the parties or of correcting any defect or error in any proceedings. In this case, the application for substitution brought under Order XXIII Rule 3(3) of the Civil Procedure Rules was wrongly brought by way of notice of motion as Order XXIII Rule 12 of the Civil Procedure Rules provides that an application under Order XXIII shall be by summons. Therefore, it is necessary to correct that defect to enable the court consider the application for substitution, to pave the way for determining the real controversy between the parties. The application for amendment of the notice of motion falls squarely within the ambit of Order VIA Rule 5 of the Civil Procedure Rules. Moreover, the mistake in adopting the wrong form was that of counsel. There is no reason why the parties should be denied their day in court because of a simple mistake made by their counsel.

For the above reasons I do allow the application and grant leave to the applicants to amend their notice of motion as per the annexed draft within 14 days from the date hereof. The respondent shall have costs of the application.

Those shall be the orders of this court.

Dated and delivered this 4th day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Kubai for the applicant

Advocate for the respondent absent