



**Kamau & another v Mbuthi (Sued as the Administratrix and Personal Representative of the Estate of Mbuthi Muru - Deceased) (Environment & Land Case 359 of 2019) [2022] KEELC 15123 (KLR) (14 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15123 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 359 OF 2019  
JA MOGENI, J  
NOVEMBER 14, 2022**

**BETWEEN**

**BETH WANJIRU KAMAU ..... 1<sup>ST</sup> PLAINTIFF**

**NYOKABI KIMANI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**EUNICE MUTHONI MBUTHI (SUED AS THE ADMINISTRATRIX AND PERSONAL REPRESENTATIVE OF THE ESTATE OF MBUTHI MURU - DECEASED) ..... DEFENDANT**

**RULING**

1. Before this Court for determination is a Chamber Summons Application dated 24/02/2022 filed under section 1A & 2A of the [Civil Procedure Act](#), order 1 rule 10 (2) & (14), order 8 rule 5 of the [Civil Procedure Rules](#) 2010. The Applicant is seeking for the following orders: -
  - a. That leave be granted to add the names of Naomi Wambui Kinuthia and John Njoroge Murima as the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs to represent the late Gathoni Muru's interest in this matter.
  - b. That leave be granted to substitute the 1<sup>st</sup> Plaintiff with her daughter annexed hereto.
  - c. That costs of this application be in the cause.
2. The Application is supported by the Affidavit sworn by Naomi Wambui Kinuthia on 24/02/2022. I do not need to reproduce them.
3. The Application is opposed. There is an objection dated 5/08/2022 on the following grounds: -
  - i. The Application is fatally defective in form and in substance.



- ii. The Application seeks to enjoin parties to the suit who have no legal right or locus on the issues in court.
  - iii. The Applicants have not demonstrated that they have obtained any grant of administration to justify substitution.
4. When the Application came up before this Court for determination, I gave directions for its disposal by way of written submissions. The Plaintiffs/Applicants filed their submissions dated 17/10/2022 on 18/10/2022. The Defendant filed their submissions dated 24/10/2022 on the even date.
  5. The Court has considered the Applicants' chamber summons dated 24/02/2022, the Defendant's ground of objection thereto as well as the Plaintiff's submissions on record. The Court is of the opinion that the following issues arise for determination herein:
    - a. Whether the Applicants have made out a case for joinder as 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs in the suit.
    - b. Whether the 1<sup>st</sup> Plaintiff can be substituted with her daughter.
    - c. Who shall bear costs of the application?

**Whether the Applicants have made out a case for joinder as 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs in the suit.**

6. The court has considered the material and submissions on record on this issue. Whereas the Applicants contended that the intended parties are children of the late James Kinuthia Karanja and a granddaughter of Gathoni Muru who was a sister to the Plaintiff. The Applicants submitted that the Plaintiff and the Defendant's late husband Mbuthi Muru were the children of Mugu Igeria who died leaving the stated children surviving him. It appears that the intended plaintiffs have a stake in the suit property known as Land Parcel No. Dagoretti/Riruta/1241 hence necessary parties to the suit. The Defendant only objected to the application herein. He contended that the Application seeks to enjoin people who have no locus.
7. Order 1 rule 1 of the Civil Procedure Rules provides a description on who should be a Plaintiff and stipulates as follows: "All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise."
8. While order 1 rule 10(2) of the Rules stipulates as follows:
  - "(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that 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 in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."
9. In the case of *Joseph Njau Kingori vs. Robert Maina Chege & 3 others* [2002]eKLR Nambuye J as she then was, provided the guiding principles to be adhered to when an intending interested party seeks to be enjoined in a suit: "When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced



without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.”

10. In the case of *Lucy Nungari Ngigi & 128 Others V National Bank of Kenya Limited & Another* [2015] eKLR the Court stated as follows when considering whether to grant leave to join a party:

“Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rules. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.”

11. This court has discretion to join parties at any time if such parties are necessary parties that will help in the effectual adjudication of the suit. The court is also cognizant of the fact that joinder of parties may be refused where such joinder will lead to practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit.
12. The court of Appeal in the said case also referred to its earlier decision in *Civicon Limited v Kivuwatt Limited and 2 Others* [2015] eKLR on the interpretation of Order 1 of the Rules. The court observed as follows:

“Again, the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.

...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

13. In the case of *Attorney General v Kenya Bureau of Standards & another* [2018] eKLR, the Court of Appeal held as follows: “.....at any stage of the proceedings, upon application by either party or



suo motu, order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added/joined as a party. The guiding principle in joinder of parties is that:

“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

See *Central Kenya Ltd. V. Trust Bank & 4 Other*, CA No. 222 of 1998.

Having thus set out the law applicable to the circumstances of this case, we stress that power of the court to add a party to proceedings can be exercised at any stage of the proceedings including at the appellate stage. Indeed, a party can be joined even without applying. We also bear in mind the principle that no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the Court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it is concerned.’

14. Guided by the above principles, I note that the proposed 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs are simply applying to be enjoined to this suit because of their interest in the suit property and from the claim of the other Plaintiffs herein. It is against the foregoing that this Court is of the view that the Applicants have met the threshold for joinder of parties. In relying on the circumstances above including the Court of Appeal decision and the legal provisions above, I am persuaded by the decision in *Werrot and Company Ltd and others v Andrew Douglas Gregory and others*, Nairobi (Milimani) High Court Civil Case No. 2363 of 1998 (1998) LLR 2848 (CCK) where Ringera J. (as he then was) held as follows: “For determining the question whom is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”
15. Therefore, I shall proceed to grant leave to allow Naomi Wambui Kinuthia and John Njoroge Murima to be enjoined as 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs.

#### **Whether the 1<sup>st</sup> Plaintiff can be substituted with her daughter.**

16. The Plaintiff and the Defendant’s late husband Mbuti Muru were the Children of Muru Igeria who died leaving the children listed in the Plaintiff’s submissions surviving him. The Plaintiff’s claim is that the suit property which was family land was allegedly registered in the name of their late brother Mbuti Muru in trust for himself and his sisters in equal shares. It is alleged that the intended 3<sup>rd</sup> Plaintiff is the granddaughter of Gathoni Mburu who was a sister to the Plaintiff herein. That the said Gathoni Muru is deceased. The intended 4<sup>th</sup> Plaintiff is Gathoni Muru’s grandson. Further, the 1<sup>st</sup> Plaintiff is also deceased. The Defendant has opposed the application arguing that the Applicants have no letters of Administration. The applicants seek to substitute the 1<sup>st</sup> plaintiff with her daughter. From the court records, it would appear that the 1<sup>st</sup> Plaintiff died on 14/09/2021.
17. The Applicants have filed a Chamber Summons dated 24/02/2022 on 25/02/2022 seeking for substitution of the 1<sup>st</sup> Plaintiff with her daughter.
18. Order 24 rule 2 of the *Civil Procedure Rules* for the substitution of the Legal Representatives of a deceased plaintiff provides as follows:

“Procedure in case of death of one of several plaintiffs or of sole plaintiff [Order 24, rule 3.]



- (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.” (emphasis added)
19. The law is clear on what happens when one of the Plaintiffs dies and the cause of action survives or continues. Upon an application made, the Court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case.
20. Section 2 of the [Civil Procedure Act](#) defines legal representative as follows;
- “ means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.
21. The power of the Court under Order 24 Rule 3 is to cause, an application made in that behalf, “the Legal Representatives of the deceased plaintiff to be made a party...”
22. The person to join as a party to the suit must be “the Legal Representatives of the deceased plaintiff”. It has long been held as the correct position since the Court of Appeal decision in *Trouistik Union International & Anor. v. Jane Mbeyu & Anor* Civil Appeal No. 145 of 1990 [1993] KLR 230 that the Legal Representative of the deceased is the person appointed as such by a Succession Court in accordance of the [Law of Succession Act](#).
23. With respect, the power of the Court under order 24 rule 5 of the [Civil Procedure Rules](#) to determine a question to whether any person is or is not the Legal Representative of a deceased plaintiff or defendant must be exercised in accordance with the law and the Court cannot be at liberty to appoint a person who is not a Legal Representative in accordance of the [Law of Succession Act](#).
24. Notably there is no conflict between the position of the [Law of Succession Act](#) as regards to personal representative and the provision of the procedure for substitution of the Legal Representative upon the death of party to a suit. It only means that the person appointed to substitute the deceased plaintiff or defendant must be legally appointed “Legal Representative of the deceased”, who can only so legally appoint when appointed in accordance with the law enacted for that purpose under the [Law of Succession Act](#).
25. The Applicants are seeking to substitute Florence Wambui in place of the 1<sup>st</sup> Plaintiff. Other than mentioning that Florence is the 1<sup>st</sup> Plaintiff’s daughter, no evidence has been tabled to show that she indeed is a person contemplate by the above definition, that is to say, the legal representative of the estate of the 1<sup>st</sup> Plaintiff. The rule requires substitution of a Plaintiff with a party clothe with legal representation.
26. Can this Court permit the substitution of the 1<sup>st</sup> Plaintiff by the said Florence Wambui? In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the [Law of Succession Act](#). The Law of Successions Act provides the procedure to be followed in the application for such a grant, and the various forms a grant may take including letters of administration. Section 54 of the Act provides that a Court may limit a grant of representation which it has jurisdiction to make in any of the forms described in



the Fifth Schedule. The Fifth Schedule provides as follows at paragraph 14 with respect to grants of administration limited to suit:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

27. It is in doubt whether the Applicants have followed the aforesaid procedure in seeking a legal representative of the deceased 1<sup>st</sup> Plaintiff's estate. The Applicants are at liberty to so cite the intended substitute as per the provisions provided in the Succession Act for the purposes of the pending proceedings. No material has been presented to this Court that indeed the said Florence Wambui is such legal representative of the 1<sup>st</sup> deceased Plaintiff nor whether the Applicant have filed citation proceedings in that regard.
28. I note that the intended substitute was not served with this application and this offends the rules of natural justice and fairness as enshrined in article 50 of *the Constitution*. Order 51 of the *Civil Procedure Rules* provides the procedure to be followed in applications filed in Court, and rule 3 requires that every person who is affected by an application to be served with the same Rule. There is no material on record to show that the intended substitute was served with the application.
29. In the end, the Court finds that the Applicants have not obtained limited grant of letters of administration. They have also not proved that Florence Wambui is a legal representative of the deceased 1<sup>st</sup> Plaintiff as per the definition in Section 2 of the *Civil Procedure Act* and therefore cannot bring a suit for substitution.

#### **Who shall bear costs of the application?**

30. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the provision to Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd* [1967] EA 287. However, since the suit is yet to be heard the court is of the opinion that costs should be in the cause.

#### **Disposal Orders**

31. The upshot of the foregoing is that the application succeeds in part. The Court only finds merit in the application for joinder as party to the suit. Accordingly, the Court makes the following orders for disposal of the application:
  - a. The chamber summons dated 24/02/2022 be and is hereby allowed in terms of prayer (a) thereof.
  - b. That Naomi Wambui Kinuthia and John Njoroge Murima be and are hereby joined as the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs respectively in this suit.
  - c. The costs of the application shall be in the cause.

It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**MOGENI J**

**JUDGE**

In the Virtual Presence of: -

Mr Njuguna for Plaintiffs/Applicants

Ms. Njoroge holding brief for Mr Mutiso for Defendants

Caroline Sagina: Court Assistant

**MOGENI J**

**JUDGE**

