

REPUBLIC OF KENYA

HIGH COURT AT KISUMU

Civ Case 181 of 96

**DOROTHY ADHIAMBO ODHIAMBO & 5 OTHERS.....
PLAINTIFFS**

VERSUS

SALEN YAKUB IBRAHIM & OTHERS.....DEFENDANTS

RULING

This is an application dated 20th February 2004 in which the plaintiffs seek leave to further amend the plaint in terms of the draft further amended plaint annexed to the affidavit of Dickson Odhiambo Onyango the plaintiffs' counsel who is in conduct of this case. The 3rd, 4th and 5th defendants oppose the application relying on statement of grounds filed on their behalf.

The first ground advanced in support of the application is that the error which is sought to be corrected by the amendment is typographical one which occurred during the typing of pleadings. According to Mr. Odhiambo for the plaintiffs the deceased mentioned in paragraph 2 of the amended plaint was actually an adult and not a minor as described. He claimed that the error emanated from the office of the plaintiffs' advocates and that the plaintiffs should not be penalized for the error. Mr. Siganga for M/S Mereko & Co. advocates for the 3rd, 4th and 5th defendants in opposing the submissions contended that the delay in bringing the application was inordinate and unreasonable and that the reasons given for it are also not satisfactory. He contended that the error sought to be amended is not typographical error.

It is correct that applications for amendments of pleadings should be readily granted provided that the opposite parties are not prejudiced, but in the present case there are two issues which are of concern.

The first issue is the nature of the amendment sought. In the affidavit in support of the application Mr. Odhiambo for the plaintiffs terms the error which is sought to be amended a typographical error. However the description of the deceased for whom the 2nd plaintiff is suing indicates that he was young man of 34 years old who was in good health. The description which is sought to be replaced had stated that the deceased was a minor in good health. I agree with Mr. Siganga that that error is not typographical error.

The other issue is delay and the explanation relating to it. The record indicates that this case came up for hearing on 23/1/2003 when the 1st plaintiff testified and she was cross-examined. The second plaintiff was called to testify when she said that the deceased was her son who was 30 year old when he died. Mr. Gichaba who appeared for the plaintiffs sought an adjournment so that he could seek further instructions. Thereafter the plaintiffs did not take any action until the advocates for the 3rd, 4th and 5th defendants filed an application on 26/1/2004 seeking dismissal of the suit for want of prosecution. On 20/2/2004 the plaintiffs brought this application. Although by 23/1/2003 the advocates for the plaintiffs had become aware of the anomaly of description of the deceased whose estate the 2nd plaintiff represented they did not do anything until 20/2/2004 when they filed this application. There is also no reasonable explanation offered for the delay lasting over one year.

As the prayer sought in this application calls for an exercise of a discretion, I would decline to grant leave to the plaintiffs to further amend the plaint. The 3rd, 4th and 5th defendants will have the costs of this application.

Dated and delivered this 14th June 2004 in the presence of Mr. Odhiambo.

B.K. TANUI

JUDGE