

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 441 OF 2002

JAISHREE DHARAMSHI SHAH..... 1ST PLAINTIFF

KALPAT DHARAMSHI SHAH 2ND PLAINTIFF

ANITA DHARAMSHI SHAH 3RD PLAINTIFF

As executors of the estate of DHARAMSHI RAJPAR SHAH

VERSUS

STANBIC BANK KENYA LIMITED DEFENDANT

RULING

The Applicants seek leave to amend the capacity in which they bring the suit under the provisions of Order 6A rule 3 (4) and (8) of the Civil Procedure Rules. In the original suit their capacity is described as Executors of the estate of Dharamshi Rajpar shah and now they want to amend the same and give their capacity as that of Administrators.

Counsel for the Plaintiffs submitted that this was a pure error on the part of the counsel and the first Plaintiff who swore the affidavit in support for having used the word ‘Executors’ and ‘Administrators’ interchangeably in the initial pleadings he further submitted that the said amendment would not prejudice the Defendant’s position in any way

. However, counsel for the Defendant strongly submitted that it would prejudice the Defendant in that there is an interim order of injunction in place obtained on the basis that the Plaintiffs’ were suing in their capacity as Executors.

Order 6A rule 3 (4) does prov

“An amendment to alter the capacity in which a party sues (whether Plaintiff or as Defendant by counterclaim) may be allowed under Sub -rule (2) if the capacity in which the party will sue is one in which at the date of filing of plaint or counterclaim, he could have sued.”

The plaint filed on 11th December 2002 describes them as Executors and so does the Chamber Summons dated 10th December 2002 by which they sought the injunction orders. However in the affidavit in support of the said Chamber Summons sworn by JAISHREE DHARAMSHI SHAH, describes herself in paragraph 1 as a co-executrix and at the same time as an administrator. At paragraph 7 she has exhibited a photocopy of the Grant issued on 3rd September, 2002. It is a Grant of Letters of Administration De Bonis Non. The Defendant was served with the said application and filed a reply to the same. From the pleadings referred to, it is clear the Plaintiffs at the time of instituting the suit held the capacity of Administrators and the Defendant can not say they would be prejudiced when they were in possession of a copy of the Grant describing them as Administrators. In any case, the orders of injunction

sought would not have altered in any form by reason simply of the capacity as at the time the court only considered the reasons advanced in support of the prayer for an interim order of an injunction.

Sub-rule 4 of Order 6A (3) does allow for this nature of an amendment and I see no good reason to bar the Plaintiffs by reason of an error which clearly was and has been admitted by counsel as a mistake on his part. The error is one that can be cured and in the circumstances allow the application with orders of costs to the Defendant. Dated and delivered this 6th day of June, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE