



**Kithaka v Kithaka & 3 others (Environment & Land Case
38 of 2019) [2023] KEELC 17969 (KLR) (7 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17969 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 38 OF 2019**

CK YANO, J

JUNE 7, 2023

BETWEEN

M'NDEGWA KITHAKA PLAINTIFF

AND

MAINGI KITHAKA 1ST DEFENDANT

JULIUS B. MARANGU MBURUGU 2ND DEFENDANT

GEORGE RUTERE MBURUGU 3RD DEFENDANT

TARATISIO KIRIMI MBURUGU 4TH DEFENDANT

RULING

1. When this matter came up for hearing on February 14, 2023, both Mr. Wambua advocate for the plaintiff and Mr. Kiruai Advocate for the 2nd, 3rd, 4th and 5th defendants indicated that they were ready to proceed. The suit against the 1st defendant who died on 28th November, 2015 has abated.
2. However, before the hearing commenced Mr. Kiruai stated that in the application dated May 7, 2012, the court granted leave only to the extent that the deceased plaintiff be substituted by one Jane N.N Kaunja. That on November 11, 2022, the advocates for the 2nd, 3rd, 4th and 5th defendants were served with an amended plaint containing more amendments than the court had granted and which alters the substance of the suit. Mr. Kiruai applied that paragraph 7(a) of the amended plaint be struck out and or expunged. Mr. Kiruai submitted that they are guided by order 8 rule 6 of the [Civil Procedure Rules](#) on when pleadings can be amended.
3. Mr. Mwendwa, learned counsel for the plaintiff opposed the application, arguing that the issues raised are non-starter. He submitted that the initial plaintiff was deceased in 2011 and had raised the issues. He argued that to bring conformity to the suit, the plaintiff had to amend the plaint. Counsel submitted that the issue raised is a technicality that is well cautioned by article 159 (2) (d) of [the Constitution](#)



as read together with the overriding objectives under the Civil Procedure Act. He urged the court to decline to strike out the said paragraph.

4. I have considered the issue raised and the submissions made. There is no doubt that the court granted leave to substitute the initial plaintiff who was deceased with the current plaintiff on May 17, 2012. From the record, it appears that the substitution was not done until November 11, 2022 when an amended plaint was filed pursuant to the order issued on May 17, 2012.

5. Order 8 rule 6 of the Civil Procedure Rules states as follows;

“6. Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.”

6. Whereas the court on May 17, 2012, allowed an amendment to substitute the plaintiff who was deceased, the court did not specify the period within which the amendment should have been made. The same should however been done within fourteen day. According to the provisions of order 8 rule 6, the order to amend ceased to have effect after the expiry of fourteen days. Nonetheless, the same rule grants the court the power to extend the period.

7. In this case, the 2nd 3rd 4th and 5th defendant are not challenging the substitution of the deceased plaintiff. Their concern is only about paragraph 7 (a) of the amended plaint which they seek to have expunged. The reason for the application is that the amended plaint, and in particular the said paragraph now alters the substance of the suit.

8. I have perused paragraph 7 (a) of the original plaint. The same has pleaded particulars of trust and particulars of breach of trust. I also note that the amended plaint has pleaded the same issues, save to add grandfather instead of father. In my view, the proposed amendments do not raise any new cause of action other than to substitute the deceased plaintiff and describe his relationship with the current plaintiff. To put in another way, the amendments in question relate back to the original cause of action and do not constitute fresh causes of action.

9. Whereas the amended plaint was filed on November 11, 2022 which is a period of over ten (10 years from May 17, 2012 when the order for amendment was issued, and considering that the court has power to extend the period to amend, and further considering that no prejudice will be occasioned to the defendants if the amendments are allowed to stand, the court will exercise its discretion and decline to strike out or expunge the said paragraph as urged by the defendants. Instead, I will grant the defendants 7 days to file and serve their amended defence and counterclaim if necessary, and thereafter the matter will proceed for hearing on merit.

10. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JUNE 2023

C.K YANO

JUDGE

IN PRESENCE OF

Wambua for plaintiff/applicant – present

Nyaga for 2nd, 3rd 4th and 5th defendant/respondent



No appearance for 1st defendant – deceased.

C.A V. Kiragu

