



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 306 OF 2015**

**1. ADAM SAID JUMBE**

**2. MERCELENE KISHAGA BULUMA.....PLAINTIFFS**

**VERSUS**

**PRESITONE MWAKIO JUMBE.....DEFENDANT**

**RULING**

1. The Plaintiffs herein vide a Complaint dated 12<sup>th</sup> October 2005 and filed on even date sued the defendant seeking a declaration that all land piece or parcel of land known as PLOT NO.CHAWIA/WUSI-KAYA/240 is ancestral land belonging to the plaintiffs and the defendants and that the defendant holds the same in trust for the plaintiffs, and an order for the rectification of the register to include the names of the plaintiffs as owners in common with the defendant.

2. By a notice of motion dated 6<sup>th</sup> February 2018 and filed on 12<sup>th</sup> February, 2018, the 2<sup>nd</sup> plaintiff/applicant is seeking leave to amend the complaint so as to delete the name of the 1<sup>st</sup> Plaintiff who is now deceased. The application is premised on the ground that the 1<sup>st</sup> Plaintiff died on 26<sup>th</sup> October, 2013 and that it is imperative to amend the complaint to strike off the name of the deceased plaintiff and the cause of action continues to the surviving plaintiff. The application is supported by the affidavit of Mercilene Kishaga Buhuma, the Applicant sworn on 6<sup>th</sup> February, 2018. It is deposed that the 1<sup>st</sup> Plaintiff who was a brother to the 2<sup>nd</sup> Plaintiff died on 26<sup>th</sup> October, 2013. A copy of the death certificate has been annexed. The 2<sup>nd</sup> plaintiff avers that the cause of action continues and continues to the surviving plaintiff who is the applicant herein. The applicant avers that no prejudice will be suffered by the defendant if the application is allowed as the amendment sought will enable the court determine the real issues in controversy between the parties now before court.

3. The defendant opposed the application through a replying affidavit sworn and filed on 17<sup>th</sup> April 2018. The defendant avers that the proposed amendment is unnecessary and irrelevant because the 2<sup>nd</sup> Plaintiff has not taken out letters of administration in respect of the estate of the deceased 1<sup>st</sup> plaintiff and cannot therefore purport to act for the estate of the deceased without a grant of representation. The defendant had also filed a notice of preliminary objection dated 16<sup>th</sup> August 2018 which was overruled by the court on 18/3/19.

4. The Application was canvassed by way of written submissions which were duly filed by the 2<sup>nd</sup> Plaintiff and the Defendant. I have considered the Application and the submissions filed. The courts will normally allow amendments of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and on such terms as to costs or otherwise as may be just.

5. Order 8 Rule 3 of the Civil Procedure Rules provides as follows:

**“3. (1) Subject to Order 1, Rules 9 and 10 Order 24 Rules 3, 4, 5 and 6 and the following provisions of this rule, the court at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings**

**(2) Where an application to the court for leave to make an amendment such as mentioned in sub-rule (3) (4) or (5) is made after any relevant period of limitations current at the date of filing the suit was expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just to do so.”**

**(3) An amendment to correct the name of the party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will to substitute new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of other person intending**

to sue or intended to be sued.

**5 (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.**

**(2) This rule shall not have effect in relation to a judgment or order.”**

6. It is clear from the above provisions of the law that the court has discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue between the parties. That discretionally power must however be exercised judiciously and not whimsically.

7. In the instant case, it is not in dispute that the 1<sup>st</sup> Plaintiff is now deceased. Order 24 Rule 2 of the Civil Procedure Rules provides the procedure where one of several plaintiffs dies and right to sue survives. It states as follows:

**2. Where there are more plaintiffs or defendants than one, and any one of them dies and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs or against the surviving defendants.**

8. It is clear from the above provisions that where there are more plaintiffs than one and any one dies, as in the instant case, and the cause of action survives or continues to the surviving plaintiff, all that the court is required is to cause an entry to be made on the record and the suit shall proceed at the instance of the surviving plaintiff. In my view, it is not even necessary to make an application for leave to amend the plaint so as to delete the deceased plaintiff as sought in the application herein.

9. The defendant has submitted that the application is made mala fides and is aimed at arm twisting this Honourable Court into issuing orders that are contrary to earlier orders of interlocutory judgment. Under order 8 rule 3(5) of the Civil Procedure Rules, an amendment may be allowed notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment. The general rule when it comes to amendments of pleadings is that amendments ought to be freely allowed so long as they do not occasion any prejudice to the party facing them. The Respondent has not demonstrated what prejudice, if any, he will suffer if the application for amendment is allowed. On the contrary, if such leave to amend is granted, it would allow the court to effectively, justly and completely determine the real issues in controversy between the parties herein. The respondent can adequately be compensated by costs.

10. Accordingly, and for the reasons hereinabove, I exercise my discretion and allow the motion dated 6<sup>th</sup> February 2018 and grant leave to the 2<sup>nd</sup> Plaintiff/Applicant to amend the plaint and file an amended plaint within 14 days of this ruling. Considering that the amendment is to delete the name of a deceased plaintiff, I order that costs be in the cause.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF NOVEMBER 2019.**

.....

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Mrs. Kabole for Plaintiffs/Applicants

No appearance for defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**