



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC CASE NO. 36 OF 2021

WILLIAM OPONDO OMALLA.....PLAINTIFF

VERSUS

GABRIEL OCHONG ORIWA.....1ST DEFENDANT

PHILISTER ACHAPA OBUOR.....2ND DEFENDANT

(An application by administrator ad litem seeking to substitute a deceased plaintiff, leave to amend the plaint and act on behalf of the estate of three other parties who are proprietors in common together with the plaintiff: application allowed)

RULING

Introduction

1. By a plaint dated 18/12/2018, the plaintiff sought several orders against the defendants for encroaching on the suit property known as title number NORTH UGENYA/SEGA/12 (**suit property**) which is co-owned by the deceased plaintiff together with; Augustino Omwanda, Henry Mutula and Dismas Othwilla all of whom were deceased by the time the plaintiff filed suit against the defendants. The 1st defendant entered appearance but has never filed a defence while the 2nd defendant has neither entered appearance nor filed a defence.

2. While the suit was still pending in court, the plaintiff died on 1/11/2021. On 4/05/2021, the plaintiff's legal representative obtained letters of administration ad litem in respect of the estates of; the plaintiff, Augustino Omwanda, Henry Mutula and Dismas Othwilla.

3. Subsequently, the administrator filed a chamber summons dated 18/05/2021 which seeks several orders. The application is the subject of this ruling.

Plaintiff's case

4. The chamber summons seeks:

(i) the administrator ad litem be substituted as the plaintiff in the suit;

(ii) the administrator ad litem acts on behalf of the estates of Augustino Omwanda, Henry Mutula and Dismas Othwilla;

(iii) leave to amend the plaint be granted in terms of the annexed draft plaint; and

(iv) there be no order as to costs.

5. The chamber summons is grounded on the following grounds:

(i) while the suit was pending in court, the plaintiff died on 1/11/2020;

(ii) there is danger the suit may abate;

(iii) letters of administration ad litem have been issued to preserve the proprietary interests of the deceased over the suit property;

(iv) there was necessity for the administrator ad litem to substitute the plaintiff and act on behalf of the estates of Augustino Omwanda, Henry Mutula and Dismas Othwilla;

(v) *there was necessity for the plaint to be amended in terms of the draft plaint; and*

(vi) *the defendants will not be prejudiced.*

Defendants' case

6. The defendants have not filed any response to the summons.

Analysis and determination

7. Having considered the summons, supporting affidavit and annexures thereto, these are the issues for determination:

(i) *whether the administrator can substitute the plaintiff in the suit;*

(ii) *whether the administrator can act on behalf of the estates of Augustino Omwanda, Henry Mutula and Dismas Othwilla;*

(iii) *whether the administrator can be granted leave to amend the plaint;*

(iv) *whether the plaintiff shall serve copies of the amended summons and amended plaint upon the defendants.*

I proceed to analyse the legal and jurisprudential framework on the issues.

8. The first issue on whether the administrator can substitute the plaintiff is anchored in **Order 24 rule 3 (1)** of the **Civil Procedure Rules** which provides;

“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”.

9. Under **Order 24 Rule 3 (2)** and **Order 51 Rule 1** of the **Civil Procedure Rules**, a party who seeks to substitute a deceased plaintiff has to move the court by way of motion within one year from the time a plaintiff dies.

10. Contrary to these provisions of law, the administrator has moved this court by way of summons ostensibly under the provision of **Order 1 Rule 10(2)** of the **Civil Procedure Rules**.

11. The overriding objective of this court is to do substantive justice in cases presented before it. Being guided by **Article 159 (2)** of the **Constitution, Order 2 Rule 12** and **Order 51 Rule 10(1)** of the **Civil Procedure Rules**, this court shall administer justice without undue regard to procedural technicalities.

12. The administrator having obtained letters of administration ad litem and filed the application for substitution within one year from the time the plaintiff died, it is the finding of this court that that the administrator has met the threshold to substitute the plaintiff.

13. The answer on the second issue on whether the administrator can act on behalf of the estates of Augustino Omwanda, Henry Mutula and Dismas Othwilla, lies with the administrator demonstrating that such an authority has been bestowed upon him. On 4/05/2021, the administrator was granted letters of administration ad litem by the honourable principal magistrates' court at Ukwala in **MCSUCC/E108 OF 2021**.

14. In the case of **Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)** (2016) eKLR, the court held that;

“Under section 2 of the Law Reform Act, the person who is entitled to bring a cause of action in respect to the estate of a deceased person is a personal representative or an executor or administrator respectively. In that case such a person ought to first obtain an appropriate grant so as to have the necessary locus standi.”

Consequently, it is the finding of this court that the administrator can act on behalf of the estates of Augustino Omwanda, Henry Mutula and Dismas Othwilla.

15. The court in its direction of 24/09/2021 expunged the plaintiff's amended plaint dated 23/09/2019 from the court records on the ground that the plaintiff had not sought leave of the court to amend his plaint. This court is of the considered view that the plaintiff did not need to seek leave of the court to file an amended plaint on the ground the defendants had not filed their statements of defence and have not done so to date. The underpinning of this consideration is provided for under **Order 8 Rule 1(1)** of the **Civil Procedure Rules**, which grants a plaintiff recourse to amend his pleadings once at any time before pleadings close. The court's direction has not been vacated and be that as it may, I shall proceed with the third issue as to whether the administrator can be granted to leave to the plaint. The provisions of law that allows a party to amend pleadings lies with **Section 100** of **The Civil Procedure Act** and **Order 8 of The Civil Procedure Rules**. These provisions of law give the court jurisdiction to grant leave to a party to amend pleadings at any stage of the proceedings on such terms as to costs or as maybe just. The court of appeal in **Central Kenya Ltd v Trust Bank Ltd [2000] EALR 365** held that: -

“The guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment for joinder as the case maybe, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs”

16. The court has considered the grounds upon which the administrator seeks leave of the court to amend the plaint together with the annexures and this court is satisfied that the administrator has established grounds to warrant this court to exercise its discretion to grant the administrator leave to amend the plaint.

17. The fourth and last issue is whether the plaintiff shall serve copies of amended summons and amended plaint upon the defendants.

The 1st defendant entered appearance on 13/02/2019 and has not filed a defence. The 2nd defendant has neither entered appearance nor filed a defence. **Order 5 rule 6 of The Civil Procedure Rules** provides for the mode of service upon a defendant. This court has had an opportunity to look at the affidavit of service filed by the plaintiff dated 7/02/2019 and it is the finding of this court that the plaint and summons to enter appearance were not properly served upon the 2nd defendant. In the interests of justice and for the court to substantially determine the issues herein, it is the finding of this court that the 2nd defendant has a right to be served with amended summons and plaint.

18. It is my finding that the defendants will not be prejudiced if the application dated 18/05/2021 is allowed and ultimately, I make the following disposal orders: -

- a) The deceased plaintiff be and is hereby substituted by Paul Omalla.***
- b) The amended plaint shall be filed and served within 21 days from today.***
- c) The amended summons shall be served upon the 2nd defendant within 21 days from today.***
- d) The defendants shall have leave to file and serve defences within 21 days from the date of service.***
- e) Costs shall be in the cause.***

Ruling delivered by virtual court.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 6TH DAY OF OCTOBER 2021.

A.Y. KOROSS

JUDGE

In the Presence of:

Plaintiff: M/s Nyamweya for the plaintiff

Defendant: M/s. Nasubo for defendant

Court Assistant: Sarah Ooro