



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**E.L.C NO. 23 OF 2020 (OS)**

**HENRY GITAU MUHURA (Suing as administrator of the Estate of**

**Muhura Gichini (DECEASED).....PROPOSED APPLICANT**

**HENRY GITAU MUHURA.....1<sup>ST</sup> PLAINTIFF/ APPLICANT**

**AGNES NJOKI MUHURA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**JOSPHAT IRUNGU MUHURA.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**STEPHEN KARANJA MUHURA.....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**MARY WAITHIRA MUHURA.....5<sup>TH</sup> PLAINTIFF/APPLICANT**

**MBOTE GICHINI.....6<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**BERNARD MUTURI KARANJA.....DEFENDANT/RESPONDENT**

**RULING**

**By a Notice of Motion Application dated 11<sup>th</sup> of August 2021, brought under Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, and under Order 8 Rule 3, Order 51(1), and Order 1 Rule 8(3), 9 and 10 the Plaintiffs/Applicants sought for orders;**

- a. That the Honorable Court be pleased to grant the Plaintiffs/Applicants Leave to amend its Originating Summons.**
- b. That the annexed draft Originating Summons be deemed as the amended originating summons duly filed after payment of the requisite fees.**
- c. That the costs of this application be in the cause.**

The Application is premised on the grounds set out on the face of the Application and on the Supporting Affidavit sworn by **Henry Gitau Muhura**. The Applicants contend that he was the personal representative of the **Estate of Muhura Muchina** and he had authority to plead on behalf of the other Applicants. That he obtained grant of letters of **administration ad litem** for purposes of filing this suit for his benefit and for the benefit of the estate of the **late Muhura Gichini**. That it is in the interest of justice and fairness that the orders sought be granted. That inclusion of the said party in this proceedings is necessary to enable this honorable court adjudicate on the questions raised by the Plaintiffs.

The Application is opposed through a Replying Affidavit sworn by **Bernard Muturi Karanja**, who averred that the Court struck out the amended Originating Summons dated **16<sup>th</sup> April 2021, on 29<sup>th</sup> July 2021**. That there is no case to answer in the **Originating Summons** which the Plaintiffs/Applicants seek to amend. That when the Court struck out the amended **Originating Summons** the **Original Originating Summons** ceased to exist. That the Plaintiffs/Applicants are guilty of laches as they are seeking to amend an **Originating Summons** filed more than one year ago. That equity aids the vigilant and not the indolent and the application for amendment cannot therefore get an equitable relief. That the application for amendment has no merit and should be dismissed with costs.

The Application was canvassed by way of written submissions. The Plaintiffs/Applicants filed their written submissions dated 22<sup>nd</sup> October 2021, through the **Law Firm of Chiuri & Chiuri Co. Advocates**.

The Respondent also filed their written submissions dated 19<sup>th</sup> October 2021, through the **Law Firm of T. M. Njoroge Advocates**.

The Court has considered the instant application, the rival written submissions, the cited authorities and the relevant provisions of law and finds the main issue for determination is; ***whether the Application is merited***

### **1. Whether the Application is merited**

The general rule is that amendments sought before judgment should be allowed, unless some prejudice which cannot be cured by an award of damages will be occasioned to the Respondent.

**Section 100** of the **Civil Procedure Act** grants the right to amend pleadings. It provides as follows:-

*“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.*

Further, **Order 8 rule 1 (1)** of the **Civil Procedure Rules** stipulates that:

*“The court may 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.”*

**Order 8, rule 3(supra)** provides for amendment of pleadings with leave. It states to wit as follows;

*“ 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 may 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 is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.*

*3. An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a 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 the person intending to sue or intended to be sued.*

*4. An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.*

*5. An amendment may be allowed under subrule (2) 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.”*

**Order 8, rule 4** proceeds to state that the aforementioned **Rule 3** shall have effect in relation to an Originating Summons, a Petition and an Originating Notice of Motion as it has effect in relation to a Plaint.

**Order 8 rule 5** provides that:

*“An amendment shall be allowed under subrule (2) 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.”*

Under **Order 8 Rule 3 & 5** of the **Civil Procedure Rule**, it is clear that Court has discretion to allow amendments to the proceedings any time before Judgment. See the case of **Central Kenya Ltd...Vs...Trust Bank & 4 Others C.A No.222 of 1998**, where the Court held that:-

*“All amendment should be freely allowed at any stage of the proceedings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs”.*

A wider footage on amendment of pleadings was given in the case of **Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991**, where the Court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows:

a) *The power of the Court to allow amendments is intended to determine the true substantive merits of the case;*

b) *The amendments should be timeously applied for;*

c) *Power to amend can be exercised by the Court at any stage of the proceedings;*

d) *That as a general rule however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;*

e) *The Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the Defendant would be deprived of his right to rely on Limitations Act subject however to powers of the Court to still allow and amendment notwithstanding the expiry of current period of limitation.*

The Plaintiffs/Applicants herein seek to amend the Originating Summons dated **21<sup>st</sup> September 2020**, by introducing an additional Plaintiff, who the Applicants allege will help the Court adjudicate the matter better. It is not in doubt that the Applicant had attempted to place the amended Originating Summons on record without leave of court but the same was struck out from the Court record for failure to adhere to the procedure.

**Rule 8 Rule 1 (1) of the Civil Procedure Rules provides that: -**

**“A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.”**

**Order 2 Rule 13 of the Civil Procedure Rules provides:-**

**“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”**

In the case of **Kiru Tea Factory Company Ltd vs. Stephen Maina Githiga & 13 others [2019] Eklr**, the Court of Appeal while dealing with an application that was amended without leave and the amended application filed without leave had this to say:

**“The common thread from the decisions cited above is that where leave of court is required, any pleading filed without leave is a nullity and liable to be struck out.”**

The Court has perused the court file and has satisfied itself that the amended Originating Summons was not struck out based on substance, or merit but based on the fact that it was unprocedurally placed before the court. The Court therefore holds that by bringing the instant application, the Applicants are making good a previous error and approaching this Court as provided by Law. The Application is therefore rightly before the Court.

The Respondent deponed in his affidavit that the Application is without merit as once the Court struck out the initial amended Originating Summons, that order had the same effect on the already filed Originating Summons. It is evident from the ruling of the court delivered on **29<sup>th</sup> July 2021** that the Court only struck out the amended Originating Summons as the same had been filed **without leave** as was required by law. Further, the striking out of an invalid pleading does not have the effect of invalidating the original Originating Summons which the court was yet to consider on merit (see the case of **Stockman Rozen Kenya Ltd v Da Gama Rose Group of Companies Ltd [2002] eKLR**).

On whether the application is merited, the Court has perused the intended amended Originating Summons and notes that the amendment sought has the effect of adding one **Henry Gitau Mahura** in his capacity as an **administrator ad litem** as Plaintiff to represent the interests of the estate of **Mahura Gichini** (deceased). The Court finds that the intended 1<sup>st</sup>

Plaintiff is a necessary addition to the suit as he represents the interest of the estate of **Mahura Gichini** (deceased) who had a beneficial interest in the suit property.

The upshot of the foregoing is that this Court holds and finds that the instant **Notice of Motion** dated **11<sup>th</sup> August 2021**, by the Plaintiffs/Applicants is merited. The said application is allowed entirely with costs to the Applicants to be borne by Defendant/Respondent. The proposed Amended **Originating Summons** to be filed within a period of

14 days from the date hereof.

The Defendant/Respondent shall have 14 days after service to file the Response if need be and thereafter, the matter to be set down for hearing.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 2<sup>ND</sup> DAY OF DECEMBER, 2021.**

**L. GACHERU**

**JUDGE**

**2/12/2021**

In the presence of

Kuiyaki/Alex - Court Assistants

Proposed/Applicant

1<sup>st</sup> Plaintiff/Applicant

2<sup>nd</sup> Plaintiff/Applicant

Mr. Chiuri 3<sup>rd</sup> Plaintiff/Applicant

4<sup>th</sup> Plaintiff/Applicant

5<sup>th</sup> Plaintiff/Applicant

6<sup>th</sup> Plaintiff/Applicant

Absent - Defendant/Respondent

**L. GACHERU**

**JUDGE**

**2/12/2021**