



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. MISC. APPLN. NO. 114 OF 2017 (OS)**

**CHRISTOPHER MWANGI MUNUHE**

*(Suing in his capacity as Administrator Ad-Litem of*

*the Estate of LUCY WANJIRU MUNUHE).....PLAINTIFF*

**VERSUS**

**WAMBUI WAGACHA.....DEFENDANT**

**RULING**

1. In the Notice of Motion dated 2<sup>nd</sup> April, 2019, the Defendant has prayed for these orders:

***a. That the Plaintiff's Amended Originating Summons dated 11<sup>th</sup> July, 2018 and the Supplementary Affidavit dated 11<sup>th</sup> July, 2018 be struck out.***

***b. That the costs of this Application be borne by the Plaintiff.***

2. The Application is supported by the Affidavit of the Defendant's advocate who has deponed that the suit against the Defendant has been instituted in the name of the wrong person because the Limited Grant of Letters of Administration Ad Litem issued to the Plaintiff is limited to "filing and prosecuting a suit for damages in respect of the death of the deceased Lucy Wanjiru Munuhe and does not extend to prosecuting the present suit."

3. The Defendant's advocate further deponed that the Amended Originating Summons and the Supplementary Affidavit were filed after the close of pleadings and without the leave of the court; that the said Amended Originating Summons introduces new issues and documents which the Defendant did not have a chance to respond to and that the Plaintiff's actions are only intended to prejudice a fair trial.

4. In her Replying Affidavit, the Plaintiff's advocate deponed that the Limited Letters of Administration Ad Litem had typing errors such that it indicated the purpose of the Grant was filing and prosecuting a suit in respect of damages for the deceased instead of filing and prosecuting ELC. No. 44 and 45 of 2015; that his office has since applied to have the said Grant amended and that the court has since issued the Plaintiff with a Grant showing the correct position.

5. According to the Plaintiff's counsel, leave to amend the Originating Summons was granted by the court on 31<sup>st</sup> January, 2018; that the amendment to the Originating Summons was in regard to substituting the name of the deceased Plaintiff with his legal representative and that the amendments do not prejudice the Defendant.

6. In his submissions, the Defendant's advocate submitted that the Plaintiff has no *locus standi* to maintain the suit; that due to their limited nature, each Grant ought to be used for the specific purpose only and that the present suit ought to be struck out as the Plaintiff lacks legal capacity to maintain it as it is *ab initio*.

7. Counsel submitted that under Order 37 Rule 19 of the Civil Procedure Rules, it is only when an Originating Summons is converted into a Plaint that the Replying Affidavit is converted into a Defence; that the Plaintiff did not seek leave of the court to amend its pleadings and that the Plaintiff was required to seek leave of the court before effecting any amendments to their pleadings and filing of Supplementary Affidavits which introduced new evidence.

8. The Plaintiff's advocate submitted that after the Plaintiff's mother died, the Plaintiff applied for Limited Letters of Administration; that the Grant was issued in error and that on learning about the error, the Plaintiff moved with speed and requested the court to rectify the error.

9. The Plaintiff's advocate submitted that the Amended Originating Summons was filed with the leave of the court; that the failure to file the Amended Originating Summons within the required timelines is not fatal and that the Application should be disallowed.
10. The Originating Summons dated 8<sup>th</sup> April, 2014 was commenced by Lucy Wanjiru Munuhe. Unfortunately, the said Lucy Wanjiru died on 6<sup>th</sup> March, 2017. The current Plaintiff then applied, and obtained Limited Grant of Letters of Administration Ad Litem dated 7<sup>th</sup> August, 2017.
11. Vide an Application dated 7<sup>th</sup> December, 2017, the Plaintiff applied for leave to substitute the name of the deceased Plaintiff with his own name. That Application was allowed by the court on 31<sup>st</sup> January, 2018.
12. The Defendant has argued that the Plaintiff herein does not have the *locus standi* to prosecute this suit because the Limited Grant that was issued to him in Succession Cause No. 50 of 2017 was "*for the purpose of filing and prosecuting a suit for damages in respect of the death of Lucy Wanjiru Munuhe.*"
13. I have perused the copy of the Limited Grant of Letters of Administration Ad-litem in Mavoko SPMCC No. 59 of 2017. The said Limited Grant of Letters of Administration were granted to the Plaintiff for "*the purpose only for filing and prosecuting suit and until further representation.*"
14. Although the Plaintiff's Application to substitute the deceased Plaintiff with the current Plaintiff was allowed by the court on 31<sup>st</sup> January, 2018, it was not until 12<sup>th</sup> January, 2018 that the Plaintiff filed an Amended Originating Motion in which the Plaintiff substituted the deceased's name with his own name. In addition, to the substitution of the deceased's name, the Plaintiff also filed a Supplementary Affidavit and introduced new documents.
15. I have perused the copy of the Limited Letters annexed on the Defendant's Application dated 2<sup>nd</sup> April, 2019. The said Limited Letters of Administration is the same document that the Plaintiff annexed on his Application dated 7<sup>th</sup> December, 2017. The said Limited Letters of Administration is "*limited to the purpose only for filing and prosecuting suit and until further representation.*" I do not see any contradiction between the said Limited Letters of Administration dated 8<sup>th</sup> August, 2017 and the prosecution of this suit by the Plaintiff. The "*NOTE*" below the order that "*the Grant will be limited for purpose of filing and prosecuting a suit for damages in respect of the deceased*" does not take away the authority that the same Letters of Administration gave to the Plaintiff "*to file and prosecute suit.*"
16. In any event, the Plaintiff has since obtained another Limited Grant allowing him to file and prosecute suits being ELC. No. 44 of 2015 and 45 of 2015, thus curing the anomaly in the order of 7<sup>th</sup> August, 2017. The Plaintiff therefore has the *locus standi* to prosecute this suit on behalf of the Estate of her late mother.
17. The record shows that when this matter came up for directions on 8<sup>th</sup> May, 2018, the court directed that the Originating Summons shall proceed by way of *viva voce* evidence. The parties were granted leave to file statements and documents within thirty (30) days. By that time, the Defendant had already filed her Replying Affidavit.
18. The Amended Originating Summons filed on 12<sup>th</sup> July, 2018 only substituted the name of the deceased and introduced the Plaintiffs' name. The Application for the substitution of the Plaintiff having been allowed by the court on 31<sup>st</sup> January, 2018, the Plaintiff did not require the leave of the court to amend the Originating Summons to introduce the new party.
19. The record shows that on 31<sup>st</sup> January, 2018, the court allowed the Plaintiff to file a further affidavit within twenty one (21) days. The filing of the Supplementary Affidavit on 7<sup>th</sup> September, 2018 was therefore with the leave of the court *albeit* out of time.
20. Considering that this matter has never been heard, the filing of the Supplementary Affidavit out of time is not prejudicial to the Defendant at all. Indeed, the Defendant, if he so wishes, can respond to the said Supplementary Affidavit by filing his further statement and documents.
21. As was held by the Court of Appeal in the case of ***Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 3 Others (2013) eKLR***, lapses in form and procedure which do not go to the jurisdiction of the court, or the root of the dispute, or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to attract punishment of the offending party.
22. Similarly, the procedural lapses on the part of the Plaintiff in filing the Supplementary Affidavit out of time should not be visited on the Plaintiff. The Defendant still has an opportunity to respond to the issues and documents raised in the said Affidavit.
23. For those reasons, I find the Defendant's Application dated 2<sup>nd</sup> April, 2019 to be unmeritorious. The Application is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 6<sup>TH</sup> DAY OF MARCH, 2020.**

**O.A. ANGOTE**

**JUDGE**