



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO 65 OF 2019**

**(Formerly Nairobi ELC No. 651 of 2016)**

**MAGDALENE NYOKABI GUANDAI (Suing as the Administrator of the  
Estate of GUANDAI KARUGU – deceased) .....PLAINTIFF**

**VERSUS**

**PETER KIBET TUEI.....1<sup>ST</sup> DEFENDANT**

**JAMES MUHORO KARANJA.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 9<sup>th</sup> December, 2019 brought pursuant to sections 1, 1A 3, 3A of the Civil Procedure Rules; Order 8 Rule 3 and Order 5 Rule 1, 2, 3, 4, & 17 (1) of the Civil Procedure Rules. The Plaintiff seeks leave to amend her Complaint and for extension of validity of summons to enter appearance for a further period of twenty-four (24) months. Further, that summons to enter appearance, pleadings and other relevant court documents to be served upon the Defendants by way of substituted service through the 'Daily Nation'.

The application is premised on the grounds on the face of it and the supporting affidavit of Magdalene Nyokabi Guandai where she deposes that despite filing this suit, their efforts to physically serve the Defendants has been impossible. She explains that after they held a meeting with their advocates and other administrators of the deceased estate, they resolved that Nicholas Njau Guandai was the appropriate party to sue but she was to be substituted as the main witness. She further sought to add another parcel of land being KJD/ OLE KASASI/ 11 as suit property as it is critical to the dispute herein. She claims after the firm of messrs Yunis Mohammed & Associates issued a demand to the Pastor of Deliverance Church being the one occupying the suit land land, they realised the appropriate parties to sue are Peter Kibet, Mohammed M. Omar and Hassan Shaba Adan as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. She reiterates that the amendments will be in the interest of justice as it will assist this court to determine the real issue before it.

The Plaintiff filed her submissions to canvass this application.

**Analysis and Determination**

Upon consideration of the Notice of Motion dated the 9<sup>th</sup> December, 2019 including the supporting affidavit and submissions, the following are the issues for determination:

- Whether the Plaintiff should be granted leave to amend her Complaint.
- Whether the validity of the summons to enter appearance should be extended for 24 months and the Plaintiff allowed to serve the Defendants via substituted service of summons.

As to whether the Plaintiff should be granted leave to amend her Complaint. The Plaintiff seeks leave to amend the Complaint in terms of the annexed draft to substitute a different administrator to be the Plaintiff herein instead of herself and include another parcel of land which is in dispute. Order 1 rule 1 of the Civil Procedure Rules provides a description on who should be a Plaintiff and stipulates thus: '**All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.**'

While Order 1 Rule 10 of the Civil Procedure Rules provides as follows: ‘ (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.’

In the case of **Joseph Njau Kingori vs. Robert Maina Chege & 3 others** [2002]eKLR Nambuye J as she then was, provided the guiding principles to be adhered to on enjoining parties to a suit and stated thus: ‘ **When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.**’

While Order 8 rule (3) (2) states that ‘**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.**

Further Order 8 rule (3)(5) stipulates that ‘ **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.**

In the case of **Attorney General v Kenya Bureau of Standards & another** [2018] eKLR, the Court of Appeal held as follows:’.....at any stage of the proceedings, upon application by either party or suo motu, order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added/joined as a party. The guiding principle in joinder of parties is that:

**“All amendments should be freely allowed and 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.”**

See **Central Kenya Ltd. V. Trust Bank & 4 Other**, CA NO. 222 of 1998. Having thus set out the law applicable to the circumstances of this case, we stress that power of the court to add a party to proceedings can be exercised at any stage of the proceedings including at the appellate stage. Indeed, a party can be joined even without applying. We also bear in mind the principle that no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the Court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned.’

I note that the proposed Plaintiff is also an administrator of the deceased estate and no prejudice would be occasioned if he was substituted with the current Plaintiff. Further, as per the contents of the demand letter dated 14<sup>th</sup> January, 2019 from messrs Yunis Mohammed & Associates the proposed Defendants are also named as proprietors of land parcel number Kajiado/ Ole Kasasi/ 12 together with the 1<sup>st</sup> Defendant and hence it is pertinent for them to be enjoined in this suit. It is against the foregoing and in relying on the legal provisions cited above as well as associating myself with the quoted decisions that I proceed to allow NICHOLAS GUANDAI to be substituted as the Plaintiff herein instead of the current Plaintiff. I further proceed to include MOHAMMED M. OMAR and HASSAN SHABA ADAN as 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in this suit.

As to whether the validity of the summons to enter appearance should be extended for 24 months and the Plaintiff allowed to serve the Defendants via substituted service of summons. The Plaintiff seeks an extension of the validity of summons to enter appearance to 24 months and for the Defendants to be served via substituted service. Order 5 Rule 2 (1) and (2) of the Civil Procedure Rules, 2010 provides as follows:- “ **2 (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of the concurrent summons. 2 (2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if it is satisfied it is just to do so.**”

The fulcrum of the suit revolves around ownership of land that belongs to a deceased estate. Further, the Chief Magistrate’s Court had already made certain pronouncements in respect to one of the suit parcels. I note the Defendants’ who claim ownership of the disputed parcels are yet to be served with summons to enter appearance. The Plaintiff lodged the instant application but failed to indicate when the previous summons to enter appearance had been issued.

In the case of **Elegant Colour Labs Nairobi Limited vs Housing Finance Company (K) Limited & 2 Others** [2010] eKLR, Onyancha J held that:-

**“ It seems to me proper and correct to say that extension of Summons aforesaid can only logically be made while the original summons is still valid. If the original summons is left to expire, in my view it would be legally impossible to extend it when it has so expired and therefore ceased to exist...the summons under the said order which have capacity to be extended by the court on the application by the Plaintiff, are the summons that are still valid. This means an application to extend can only be made within the duration of 12 months under Rule 1 fore cited or under any duration allowed in the extension of original summons...”**

In relying the provisions of Order 5 rules (2) 1 & 2 of the Civil Procedure Rules and being persuaded by the aforementioned judicial authority, I find that since the Applicant had never procured summons to enter appearance in the first instance, I am unable to extend its validity as the same never existed in the first instance. However, since this suit had been dismissed for want of prosecution and reinstated on

10<sup>th</sup> July, 2019 by Justice Okongo, in the interest of justice and the Plaintiff's right to be heard as enshrined in the Constitution, I direct that the Plaintiff do procure Summons to Enter Appearance within 30 days from the date hereof and serve the same upon the Defendants via the Daily Nation Newspaper within fifteen (15) days from the said date.

It is against the foregoing, that I find the instant application merited and allow it. Costs will be in the cause.

**Dated signed and delivered via email this 22<sup>nd</sup> day of June, 2020**

**CHRISTINE OCHIENG**

**JUDGE**