



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 641 OF 2010

**JOSEPHINE NJOKI MWANGI (Suing as the Legal/Personal Representative of the
Estate of the late JOSEPH KIRAGU MURAGURI.....PLAINTIFF/APPLICANT**

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a Notice of Motion Application dated 11th November 2016, brought pursuant to the provisions of Section 1A, 1B, 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya, Order 8 Rule 8 (2) of the Civil Procedure Rules 2010, and all the enabling provisions of the law.
2. The Applicant is seeking for orders that, the Court grant him leave to amend a Plaintiff dated 27th September 2010, and subsequently be granted leave to file the Amended Plaintiff within 21 days from the date of issuance of the said Leave. That the costs of the Application be in the cause.
3. The Application is based on the grounds that the Applicants wants to include crucial facts/issues and prayers in the Amended Plaintiff. That, the said facts will assist the Court in determining the issues in the suit. It is therefore in the interest of justice to allow the amendment.
4. The Application was also supported by an Affidavit dated 11th November 2016, sworn by the Applicant. She deposed that, she is the Administrator of the Estate of Joseph Kiragu and some of the issues she wants to include in the Plaintiff are that:
 - i. The Mortgagor who is her late husband is deceased and the Mortgage debt should be cleared by the Mortgage Protection Insurance Policy.***
 - ii. The title deed to the suit property be released to her unconditionally.***
5. The Application was opposed based on the grounds that it is bad in law, is prompted by mischief and bad faith, and is frivolous and vexatious.
6. The Parties agreed to dispose of the Application by filing written submissions. The Applicant submitted that the law on amendment is clear and relied on the provisions under which the Application has been brought. That the grounds filed by the Respondent are general and have no legal basis, they are baseless and untenable in law, in the sight of the provisions of Article 159 (1) (d) of the Constitution of

Kenya. The Applicant reiterated that the issues to be included in the Plaintiff will assist the Court to determine the matter fairly. That the Respondent will not suffer prejudice as the hearing of the suit has not commenced, neither has the pre-trial conference taken place.

7. The Respondent reiterated the grounds of opposition filed and submitted that if the leave is granted, it will result into prejudice and injustice to the Respondent. The Respondent further submitted that the Application is bad in law, as

i. The Amended Plaintiff seeks to introduce new cause of action,

ii. The issues raised are time barred, and

iii. The Application is Res Judicata.

That Leave to amend pleadings should be refused where the character of the suit or cause of action is changed or where it be prejudicial to the rights of the Parties existing at the date of the proposed amendments. Reference was made to the case of ***Eastern Bakery Vs Castelino 1958 EA***.

8. I have considered the Application in total. It is trite law that Parties are bound by their pleadings. This is the law as stated in the case of ***Joseph Mbuta Vs Kenya Orient Insurance Co. Ltd 2015***. However, Order 8 Rule 3 empowers the Court to allow the Parties to amend their pleadings at any stage of the proceedings in such terms as to costs or otherwise as may be just and in such a manner as it may direct. Under Sub-rules (2), (3), (4) and (5), leave may be granted to amend a pleading, to allow or 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 a Party applying for leave to make the amendment.

10. In the case of ***Kassam Vs Bank of Baroda (K) Ltd 2002 KLR***, it was held that the Court has wide discretion powers to allow an amendment of pleadings, at whatever stage of the suit. The discretion of course is a judicial discretion not to be exercised arbitrarily.

11. In ordinary practice, the amendment of pleading generally change the existing pleadings either through amendment of various paragraphs, words, sentences or prayers. However, while amendments of pleadings are conclusive as to the issues for determination, the original pleadings may be looked at if they contain matters relevant to the issues. ***(See the case of Dhanji Ramji Vs Malde 1970 EA 422)***. I have considered the proposed amendments herein and find that they relate to:

i. Change of the law firm representing the Plaintiff/ Applicant.

ii. Change of amount claimed in the statutory notice dated 16th May 2005, served upon the Applicant's deceased husband. The amendment seeks to replace the figure of Kshs.5,824,771.05 with a figure of Kshs.3,081,232.60. A further figure is amended under paragraph 21 of the Plaintiff to read Kshs.3,909,851.76 instead of Kshs.3,909, 857.70.

iii. An amendment to the Mortgage Account No. to read [...], instead of [...].

iv. Introduction of paragraph 23 – 29, which deals with the new facts relating to the Mortgage Protection Insurance Policy after the demise of the Applicant's husband who was the Mortgagor and the resultant prayers (a), (b) and (c).

12. In my considered opinion, the intended amendments are necessary to assist the Court to decide the issues in dispute fairly and justly. The issues raised by the Respondents in their submissions relating to the claim being statute barred or *Res Judicata* cannot be dealt with before the amendment is allowed. Neither can these issues be considered as raised in the first place through submissions. They are not available to the Court for consideration without being raised through a formal application or a preliminary objection or even as grounds of opposition. Even then the Respondent is not lost of an opportunity to deal

with these issues as they can be raised at the time of the hearing of the main suit.

13. All in all, I allow the Application in terms of prayers 1 and 2, save to order that, the Amended draft Plaintiff, annexed to the Affidavit in support of the Application be filed within **seven (7) days** of this order and upon payment of the requisite fees. The costs of this Application are ordered in favour of the Respondent to be borne by the Applicant.

14. It is so ordered.

Dated, delivered and signed on this 15th day of June 2017 at Nairobi.

G. L. NZIOKA

JUDGE

In Open Court in the presence of:

Mr. Jelle for Nyamayi for the Applicant

Mr. Githera for Abuya for the Respondent

Teresia – Court Assistant.