



IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 2522 OF 1996

PHILIP KIPCHIRCHIR MURGOR PLAINTIFF

VERSUS

JOSIAH NYAWARA & 2 OTHERS..... DEFENDANTS

Coram: Mwera J
C. Odera for plaintiff
A. Shah, Mrs. Ngala for 2nd defendant
N/A for 3rd party
Njoroge court clerk

RULING

On 3/2/10 the plaintiff filed a chamber summons under the now repealed Order 1 Rules 10, 22, Order VIA Rule 3, 8 of the Civil Procedure Rules and Section 3A of Civil Procedure Act with 2 prayers:

- i) that the court do grant leave to add Gilbert Kiptoo Murgor and Margaret Chemutai Murgor as plaintiffs in this suit; and then
- ii) the plaint herein be amended as per the draft annexed.

In the grounds it was stated that the plaintiff had obtained a limited grant of administration (ad colligenda bona) for the purposes of filing this suit and that was done. Then the plaintiff with the said Gilbert Kiptoo Murgor and Margaret Chemutai Murgor filed ELD HC Succ. C. No. 85/2000 and jointly obtained a confirmed grant to administer the estate of the late Robert Kiprotich Murgor. Therefore this application has been brought, as it were, to have all the 3 administrators of the subject estate made, co-plaintiffs in these proceedings.

The plaintiff Philip Kipchirchir Murgor, swore a supporting affidavit as per the grounds set out above adding that pursuant to Khamoni Judge's order of 3.12.09, the sought joinder of the two other administrators as plaintiffs, be granted. A draft of an amended plaint was annexed to the application. The substantive part of the amendment is to add the two co-administrators otherwise the rest of the contents remain as in the original plaint.

On 10/8/10 the 2nd defendant, the International Organization for Immigration filed grounds of opposition to the application under review. It was contended that Khamoni Judge's ruling of 3.12.09 did not permit bringing into the proceedings additional parties whose claims had been time - barred. That the cause of action for the benefit of the estate of Robert Murgor arose on 11.10.1993 and the claim was laid under

both the Law Reform and the Fatal Accidents Acts. The claim became time-barred after 3 years by virtue of Section 4 of the Limitation of Actions Act, **the Act**. *The plaintiff obtained a grant ad colligenda bona in HC Succ. C. 2166/96 at NRI but this was not a grant ad litem or a full grant. So it was not warranted in law for the personal representatives of the late Robert Murgor to come on record after 11.10.96 –after the statutory bar to sue had fallen in place. There is no legal basis to extend time to sue in the event of a claim following death – only in special cases for personal injuries. Another ground was that after 14 years after the statutory time passed the plaintiff could not bring in other parties in whatever capacity. Stopping there for a moment and probably it will become clear eventually, it appears to the court that the order sought by the plaintiff is simply that his co-administrators of the estate of Robert Murgor, now join him in this suit. The aspect of extension of time after the statutory 3 years under **the Act** is not a prayer in this application. But be that as it may. It was added that Order 1 Rules 10, 22 and Order VIA Rule 3, 8 of Civil Procedure Rules did not avail the plaintiff and could not override the Act. And that the temporary grant (P&A 47) at Eldoret only related to the plaintiff alone. But if it may be asked: Could such an initial grant not be amended by order of the court to add other applicants/administrators at the time of confirmation (P&A 54)? That can be done, it is considered.*

At the time of submissions the plaintiff went over the history of the suit herein, pleadings therein and all else. This does not appear to be in dispute. But it was added that on 3.12.09 Khamoni Judge ordered that the plaintiff do apply to court in 60 days to join his co-administrators – hence the present application.

Joining the other 2 administrators did not introduce a new cause of action subject to limitation of actions at all. This court should grant the prayers to facilitate a just and expeditious way to have the dispute in question resolved.

In response the 2nd defendant did not wish to repeat what was contained in its grounds of opposition but it was maintained that as the plaintiff sought to join his co-administrators in this suit, the cause of action which arose on 11.10.93, was statute – barred 3 years later, on 11.10.96. Accordingly, in the authorities that abound, the plaintiffs could not bring in the intended claimants. Several authorities were then cited. It was just too late to do so. Then the submission ordered:

“ The fact that Khamoni J has directed that the plaintiff to (sic) bring on board others by an application by substitution is no grant of leave to extend time to lodge suit which otherwise became time – barred 14 years ago. In any event, there is no application for enlargement of time which is mandatory.” (underlining supplied).

If the court may take the last part of the 2nd defendant’s submission as underlined (above), as its starting point in determining this application, true indeed there is no application to enlarge time to bring up claims which are statute - barred. That is not the application under review here, and the court has so commented earlier. Accordingly, the argument based on **the Act** are irrelevant as at this point. What the court is asked to determine is whether it can permit the plaintiff to bring into this suit his co-administrators, now that all 3 have a joint grant of administration in regard to the estate of Robert Murgor.

On 3.12.09 Khamoni J delivered himself, inter alia that:

“Accordingly, I do hereby decline striking out this suit; but do order stay of further proceedings, other than proceedings herein under allowed (?), in the suit, for 60 days, from the date of this ruling, within which anyone claiming to be administrator in the estate of the deceased, is at liberty to apply for substitution and prosecute that application to finality.....”

The learned judge added that the defendants could apply to dismiss the suit in the event the order for 60 days was not complied with. It is not in dispute that the present application was then filed timeously Judge Khamoni spoke of an application to substitute. The applicant invoking the powers donated by Order 1 Rule 10 Civil Procedure Rules sought to add other plaintiffs. That provision of law speaks of the court to:

“.....order any other person to be substituted or added as a plaintiff....”

And to do that it is necessary to amend the plaint accordingly (Order VIA Rule 3 Civil Procedure Rules)

It is a known principle that when an amendment is done to a document that amendment relates back to the time where that document originated. The prayer by the plaintiff here to amend the plaint by adding the 2 co-administrators will mean that they must be taken to have been plaintiffs right from the time the suit was instituted. That is all. Whether the cause is time – or statute – barred is not of any effect here because of joining the co-plaintiffs. Adding or substituting a party does not mean or require that a new claim is being introduced. And such a course does not militate against the status of a given case – whether time – barred or otherwise. If the subject of statute – bar comes up at any time, it is not in issue now, it shall be appropriately addressed.

In sum orders granted. Costs in the cause.

Delivered on 3/3/11.

J. W. MWERA
JUDGE