



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC SUIT NO. 557 OF 2009**

MACHETHA KARIUKI.....1<sup>ST</sup> PLAINTIFF  
WAMBUI NJOROGE.....2<sup>ND</sup> PLAINTIFF  
WAMBUI NJAU.....3<sup>RD</sup> PLAINTIFF  
MARIA KAROKI.....4<sup>TH</sup> PLAINTIFF  
NYAMBURA KABIA.....5<sup>TH</sup> PLAINTIFF  
NJERI MUNYAO.....6<sup>TH</sup> PLAINTIFF  
NJERI MBINDYO.....7<sup>TH</sup> PLAINTIFF

(Suing on their behalf and as representatives of Kasarani Farmers Co-operative Society)

**VERSUS**

SAMUEL GITHEGI MBUGUA.....1<sup>ST</sup> DEFENDANT  
GRACE MUTHONI GITHEGI.....2<sup>ND</sup> DEFENDANT  
SAMUEL MBUGUA KIBATHI.....3<sup>RD</sup> DEFENDANT  
MARGARET NYOKABI MBUGUA.....4<sup>TH</sup> DEFENDANT  
RUTH NJERI KABOGO.....5<sup>TH</sup> DEFENDANT  
MOSES MBUGUA MWANGI.....6<sup>TH</sup> DEFENDANT  
CHRISTINE MITHIRI MBUGUA.....7<sup>TH</sup> DEFENDANT  
ZACHARIAH KIMEMIA GAKUNJU.....8<sup>TH</sup> DEFENDANT  
MARY WARURII GAKUNJU.....9<sup>TH</sup> DEFENDANT  
COMMISSIONER OF LANDS.....10<sup>TH</sup> DEFENDANT  
REGISTRAR OF TITLES, NAIROBI.....11<sup>TH</sup> DEFENDANT

**RULING**

What is before the court is the plaintiffs' application brought by way of Notice of Motion dated 13<sup>th</sup> June, 2018 under Order 8 Rule 3(3), (4) and (5) of the Civil Procedure Rules, Section 1A and 1B of the Civil Procedure Act and Section 19 of the Environment and Land Court Act, 2011 and all other enabling provisions of the law seeking leave to amend the plaint. The application which is supported by the affidavit of

the 3<sup>rd</sup> plaintiff, Wambui Njau sworn on 13<sup>th</sup> June, 2018 was brought on the grounds that since the filing of the suit, a number of plaintiffs and defendants have died and as such it was necessary to substitute the deceased persons with their estates.

The plaintiffs also contended that there existed fundamental defects on the face of the plaint which required correction so as not to defeat the plaintiffs' claim. In her affidavit in support of the application, the 3<sup>rd</sup> plaintiff stated that the plaintiffs had been advised by their new advocates on record that it was necessary to make further amendments to the plaint to correct fundamental defects therein which may affect the validity of their claim. The 3<sup>rd</sup> plaintiff stated further that the 6<sup>th</sup> and 7<sup>th</sup> plaintiffs were deceased and as such it was necessary to substitute them. The 3<sup>rd</sup> plaintiff stated further that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> plaintiffs were also deceased and it was necessary that they should also be substituted by their estates. The 3<sup>rd</sup> plaintiff stated further that it was also necessary to replace the 10<sup>th</sup> defendant, the Commissioner of Lands whose office is now defunct with its successor, the National Land Commission. The 3<sup>rd</sup> plaintiff averred that the other amendments sought were necessary to ensure that the plaintiffs' claim was maintainable. The plaintiffs annexed to the affidavit in support of the application a number of documents in proof of the death of the 1<sup>st</sup> and the 3<sup>rd</sup> to 9<sup>th</sup> defendants and a draft further amended plaint.

The application was opposed by the 1<sup>st</sup>, 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants. The 1<sup>st</sup> defendant opposed the application through grounds of opposition dated 23<sup>rd</sup> November, 2018 in which the 1<sup>st</sup> defendant contended that while he was not opposed to the substitution of the deceased defendants with their legal representatives, the substitution of the said defendants should not be used by the plaintiffs to amend the plaint so as to introduce new claims or causes of action. The 1<sup>st</sup> defendant contended that the new causes of action sought to be introduced by the plaintiffs would be prejudicial to the 1<sup>st</sup> defendant and that the application was brought several years after the filing of the suit. The 1<sup>st</sup> defendant contended that the application was brought with unclean hands and that the same was unmerited, frivolous, vexatious and an abuse of the process of the court. The 1<sup>st</sup> defendant contended further that the application was bad in law.

The 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants filed a joint grounds of opposition dated 25<sup>th</sup> July, 2018 in opposition to the application. The 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants contended that the intended amendment if allowed would prejudice the 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants in that the 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants and their witnesses had either died or grown old due to age as the case had remained unprosecuted for long. The 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants contended further that the amended plaint which the plaintiffs had sought to amend further was improperly on record as the same was filed without leave of the court. The 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants contended that the plaintiffs had no claim against the estates of the 8<sup>th</sup> and 9<sup>th</sup> defendants since they did not raise any objection during the administration of their estates. The 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants termed the plaintiffs' application frivolous and an abuse of the court process. The 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants also took issue with the plaintiffs' representation contending that the application was brought by a firm which was not properly on record. They contended further that the proposed amendments would raise new causes of action which would prolong the determination of the dispute. The 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants contended further that the new claims set out in the proposed amended plaint were time barred and that the suit had abated as against the deceased defendants. The 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants averred further that there was no evidence in proof of the alleged death of the 6<sup>th</sup> and 7<sup>th</sup> plaintiffs and that in any event, the 6<sup>th</sup> and 7<sup>th</sup> plaintiffs' claim as against the defendants had abated.

The application was heard on 11<sup>th</sup> December, 2018 when Ms. Kioi appeared for the 2<sup>nd</sup> to 7<sup>th</sup> plaintiffs, Mr. Gatitu for the 1<sup>st</sup> plaintiff, Ms. Kinuva for the 1<sup>st</sup> and 4<sup>th</sup> defendants while Ms. Gatuhi appeared for the 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants. In her submissions in support of the application, Ms. Kioi relied entirely on the grounds on the face of the application and on the supporting affidavit of the 3<sup>rd</sup> plaintiff. She submitted that the court had a discretion under Order 8 of the Civil Procedure Rules to grant the leave sought. Mr. Gatitu for the 1<sup>st</sup> plaintiff supported the application. Mr. Gatitu relied on Article 159(2)(d) of the Constitution and submitted that justice should be administered without undue regard to technicalities. He submitted that the amendment sought would assist the court in determining real issues in dispute between the parties. In her submissions in reply, Ms. Kinuva told the court that in principle, the 1<sup>st</sup> and 4<sup>th</sup> defendants had no objection to the substitution of the deceased parties. She submitted that the 1<sup>st</sup> and 4<sup>th</sup> defendants' objection concerned the manner in which the court had been moved. She submitted that the application for substitution of parties should have been brought under Order 24 of the Civil Procedure Rules. She submitted that the issue regarding the manner in which the application was brought was not a mere technicality but an issue of substantive law.

Ms. Gatuhi relied on the 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants' grounds of opposition in opposing the application. She submitted that the proposed amendments would cause prejudice to the defendants some of whom have died while others are old. She reiterated that the amended plaint which the plaintiffs' wished to amend further was irregularly on record as the same was filed without leave of the court. Ms. Gatuhi submitted further that the plaintiffs' application was brought by a firm of advocates which was irregularly on record. She submitted further that the proposed amendments sought to introduce new causes of action some of which were time barred. She submitted further that the suit had abated as against the deceased defendants and there had been no application to revive the same. Ms. Gatuhi submitted further that there was no evidence that the 6<sup>th</sup> and 7<sup>th</sup> plaintiffs were deceased to warrant their substitution.

I have considered the plaintiffs' application together with the supporting affidavit. As I have stated at the beginning of this ruling, the only order sought in the application is leave to amend the plaint. The application was brought substantively under Order 8 of the Civil Procedure Rules which provides for the amendment of pleadings. In the affidavit in support of the application, it has come out however that the plaintiffs are not seeking only to amend the amended plaint but also to substitute deceased plaintiffs and defendants. According to the documents annexed to the affidavit in support of the application, the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> plaintiffs died on 7/5/2017, 19/10/2011, 4/5/1997, 6/4/2017, 16/5/2008 and 30/8/2013 respectively. It is clear from the foregoing that some of the defendants were deceased as at the time when this suit was brought against them while others had died more than one (1) year before the present application; which means that the suit as against them had abated as at the time the application for amendment was made.

A suit against a deceased person is a nullity. A party who has sued a deceased person cannot talk of substituting the deceased with his legal representative. He can only seek to add or join a proper party to the suit. For the defendants against whom the suit had abated, no order can lie against them until the suit is revived. The application for amendment of the plaint is therefore not maintainable against them.

The defendants had raised other objections to the application which I have not found meritorious. The defendants had contended that the amended plaint which the plaintiffs wished to amend was irregularly on record. I have perused the pleadings and the other documents on record. I have noted that the amended plaint sought to be further amended was filed on 18<sup>th</sup> January, 2010. It is not clear whether the amended plaint was filed with leave or not. The records of the court up to 7<sup>th</sup> March, 2010 are missing. However, I have noted that the 1<sup>st</sup> to 9<sup>th</sup> defendants filed amended defence in response to the said amended plaint on 8<sup>th</sup> February, 2010. The 1<sup>st</sup> to 9<sup>th</sup> defendants did not raise any objection to the amended plaint. I would assume in the circumstances that the said amended plaint was filed regularly. The objection being raised by the defendants to the same 8 years later cannot be taken seriously.

The defendants had also contended that the plaintiffs' application was filed by advocates who were improperly on record. The application was filed by the firm of Githima Kioi and Co. Advocates. I have noted from the record that the plaintiffs had appointed the firm of Anyango Opiyo Advocate to act for them in place of Anyango Githogori & Co. Advocates. The said firm filed its notice and change of advocates on 10<sup>th</sup> August, 2016. On 13<sup>th</sup> June, 2018, the plaintiffs once again changed advocates and appointed the firm of Gathima Kioi & Co. Advocates to act for them in place of Anyango Opiyo Advocate. The firm of Gathima Kioi & Co. Advocates filed their notice of change of advocates on 13<sup>th</sup> June, 2018. Due to the foregoing, I am satisfied that the firm of Githima Kioi & Co. Advocates are properly on record as advocates for the plaintiffs.

As rightly submitted by the plaintiffs, the power to grant leave to amend pleadings is discretionary. The law on amendment is now settled. Amendments should be freely allowed at any stage of the proceedings provided the same will not cause prejudice to the opposite party which cannot be compensated in costs. For the reasons which I have given earlier in this ruling, I am of the view that serious prejudice would be occasioned to the defendants if the plaintiffs' application is allowed. I am in agreement with the advocates for the defendants that the application by the plaintiffs is jumbled. In one application, the plaintiffs have sought amendment of the plaint and substitution of deceased parties. I am in agreement with the defendants that the plaintiffs should not have sought substantive amendments to the plaint in the same application seeking substitution of deceased parties. As I have already pointed out, the suit as against some of the defendants has already abated while the suit against some of them is a nullity as the same was filed when they had already died. A suit which has abated cannot be amended until it is revived. A suit which has been instituted against a deceased person on the other hand cannot also be revived through an application for amendment. A proper application has to be brought under Order 1 rule 10(2) of the Civil Procedure Rules for the striking out of the name of the deceased party and the joinder in the suit of the correct party. The issues which I have pointed out affects seven (7) of the defendants out of a total of eleven (11) defendants in the suit. The claim against the eleven (11) defendants is inseparable. This court cannot therefore allow the amendment sought as against four (4) of the defendants while the status of the other defendants has not been regularised. The plaintiffs had also sought to remove two of the plaintiffs from the suit and to replace them with two new plaintiffs on the grounds that they were deceased. There was no evidence placed before the court showing that the plaintiffs sought to be replaced were deceased and if so when they died. There is no material before the court on the basis of which the court can exercise its discretion to allow the substitution of the two plaintiffs.

The upshot of the foregoing is that the plaintiffs' application is not for granting. The order that commends itself to me in the circumstances is to strike out the application so that the plaintiffs can bring a proper application or applications before the court. The Notice of Motion application dated 13<sup>th</sup> June, 2018 is accordingly struck out with costs to the 2<sup>nd</sup> and 4<sup>th</sup> defendants and the estates of the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants.

**Delivered and Dated at Nairobi this 13<sup>th</sup> Day of June 2019**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

**Mr. Gatitu for the 1<sup>st</sup> Plaintiff**

**Mr. Angima for the 2<sup>nd</sup> to 7<sup>th</sup> Plaintiffs**

**Ms. Nduta Kamau h/d brief for Mr. MacCourt for the 1<sup>st</sup> Defendant**

**Ms. Mwachiro for the 4<sup>th</sup> Defendant**

**Ms. Gatuhi for 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants**

**N/A for 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants**

**N/A for the 10<sup>th</sup> and 11<sup>th</sup> Defendants**

**Catherine Nyokabi-Court Assistant**