



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 109 OF 2017 (O.S)**

**GLADWEL NYAMBURA CHEGE**

**JULIA WAITHIRA MBUGUA.....APPLICANTS**

**(Suing on their own behalf and as Administrators of the**

**Estate of the late GORDEN CHEGE NGACHA**

**VERSUS**

**JECINTA WANJIRU MUNIU.....1<sup>ST</sup> RESPONDENT**

**(Sued on her own behalf and as the Administrator of the**

**Estate of the late JOSEPH MUNIU (Deceased)**

**SENIOR PRINCIPAL MAGISTRATE'S COURT WANG'URU.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

The application for determination is the Notice of Motion dated 27<sup>th</sup> February 2019 brought under **Order 8, Rule 3 C.P.R.** The Applicant is seeking leave to re-amend the heading of the motion herein from Constitutional Application to a Miscellaneous Application. In her supporting affidavit sworn on 27<sup>th</sup> February 2019, the Applicant deposed that through inadvertence, the original application was filed as a Constitutional Application and they now wish to amend it to read Miscellaneous Application. She stated that no prejudice will be suffered by the Respondents if the proposed amendment is allowed.

In her response, the Respondent filed grounds of opposition opposing the proposed amendment stating that the same will fundamentally change the entire cause of action to her own detriment. The Respondent further stated that she has already responded to the original Originating motion and that any amendment will have no end in litigation as she will keep responding to the Applicant's allegations.

I have looked at the Notice of Motion dated 27<sup>th</sup> February 2019, the supporting affidavit and the response by the Respondent. I have equally considered the submissions by their counsels and the applicable law. The Applicant had initially commenced this case by way of Constitutional Application (O.S). The Applicant now says that she wishes to amend her pleadings so that the case now becomes a Miscellaneous Application and not ELC Constitutional Application (O.S) as had earlier been commenced. **Order 3 of the Civil Procedure Rules** provides the options in which a party may institute a suit depending on the nature of the claim. Where a party wishes to change the choice of track from the one he had instituted in the original suit, that cannot be done by way of amendment. The applicant has to withdraw the suit and file the new suit in accordance with the choice of track he/she wishes to adopt. I agree with counsel for the Respondent that the proposed amendment will not only be prejudicial but will also change the cause of action to her detriment. I also agree with the Respondent that the amendments sought if allowed will prejudice her since she has already responded to the original choice of track which is sought to be changed. The Applicant's remedy in my view is to withdraw this case and file a fresh case under the choice of track she now wishes to adopt.

From my analysis, the application dated 27<sup>th</sup> February 2019 lacks merit and the same is hereby dismissed with costs. It is so ordered.

***READ and DELIVERED in open Court at Kerugoya this 19<sup>th</sup> day of July, 2019.***

**E.C. CHERONO**

**ELC JUDGE**

**19<sup>TH</sup> JULY, 2019**

*In the presence of:*

1. *M/S Ann Thungu*
2. *Mr. Kebuka Wachira*
3. *Mbogo – Court clerk*