



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 120 OF 2017

FORMERLY MERU ELC CASE NO. 152 OF 2010

JEREMY MATI & ANO.PLAINTIFFS

VERSUS

THE REGISTERED TRUSTEES CATHOLIC

DIOCESE OF MERU & 4 OTHERS.....DEFENDANTS

RULING

1. This application is dated **19th April, 2016**. It states that it is filed under Order 8 Rule 3 of the Civil Procedure Rules and Sections 1A and 1B of the Civil Procedure Act. The application seeks the following orders:

- a. THAT, the applicant herein be granted leave to amend the plaint in terms of the annexed draft.
- b. THAT, the defendants be at liberty to amend their defence pleadings, if need be.
- c. THAT, costs be in the cause.

2. The application has the following grounds:

- a. Addition of a party is necessary.
- b. The 2nd defendant ceased to exist legally.

3. The application is supported by the supporting affidavit of **ALFRED KATHUNI MUGAA** sworn on **19th April, 2016** which states:

“I ALFRED KATHUNI MUGAA of P. O. Box 12 MAGUMONI Chuka within Tharaka Nithi County do swear and state as follows:

1. That, I am the Chairman of Karamani Primary School capable of swearing this affidavit.
2. THAT, the 2nd plaintiff passed on on 7.8.2013, and a year has passed. Annexed is a copy of the death certificate marked AK-01.
3. THAT, this is a representative suit, where there are other plaintiffs. The 1st plaintiff also passed on on 27.12.2014. Annexed is a copy of death certificate marked AK-02.
4. THAT, I am advised by our advocate that as far as the law is concerned the 1st and 2nd plaintiffs' case has abated as against the defendants.
5. THAT, however there is need to add other plaintiffs to the suit.
6. THAT, it's in the interest of the school committee we represent to add other plaintiffs. Annexed is a copy of the letter from the secretary of the Board of Management of the school marked JM-03.

7. THAT, further due to the adoption and promulgation of the new constitution the 2nd defendant (The clerk to council of Meru South) has legally ceased to exist and it's only fair to bring in the Governor of Tharaka Nithi County.

8. THAT, this application will not prejudice anybody at all.

9. THAT, I pray that the court do allow us to add other plaintiffs and substitute the 2nd defendant with the Governor Tharaka Nithi County.

10. THAT, whatever is deponed herein is true to the best of my knowledge and belief.

4. The application was responded to vide the Replying Affidavit of Father Andrew Mbiko which states as follows:

“I, FR. ANDREW MBIKO of P. O. Box 16-60200 MERU make oath and state as follows:

1. THAT I am the administrator and trustee of the 1st defendant and therefore competent to make and swear this affidavit.
2. THAT the application dated 19th April, 2016 has been read and explained to me by our advocates on record and wish to oppose the same.
3. That the original plaintiffs have died and therefore the case cannot be brought a new by way of amendment and addition of new parties. The case has abated and ought to be marked as such.
4. THAT the application has been brought through the back door and the provisions of order 1 r.8 of Civil Procedure Rules were never followed and have not been followed. The suit is a non starter.
5. THAT I am further advised by our said advocates that the application is bad in law as the same should have been brought by way of MOTION on NOTICE and not by SUMMONS.
6. THAT I am further advised and believe the advice to be sound that the proposed amendment is an abuse of the court process as it brings in new plaintiffs and new defendants after the abatement of the suit.
7. THAT the matter was last in court on 23rd June, 2014 when deaths were reported and by then it was known that the county council had died a legal death but no action was taken to correct the situation.
8. THAT the court should on its own motion dismiss the suit rather than go into side shows and burden itself on useless amendments.
9. THAT the contents of this affidavit are true to the best of my knowledge, information and belief.

5. The application was canvassed by way of written submissions.

6. The applicants have submitted that although the application was filed by way of Chamber Summons instead of by way of Notice of Motion, the form of the application was not fatal to the application.

7. The applicants have argued that by dint of order 3(1) of the Civil Procedure Rules, amendments can be made at any time of the proceedings and have quoted order 3 as, according to them, saying:

“Subject to order (sic) Rules 9 and 10 rules (sic) 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings on such terms as to costs or as it may be just in such a manner as it may direct, allow any party to amend his pleadings.”

I opine with due respect, that order 3(1) of the Civil Procedure is not framed in the words alleged in the applicants' submissions. What the applicants intended to allude to is Order 8 Rule 3(1) of the Civil Procedure Rules.

8. The applicants have also relied upon Order 1 Rule 10(2) and quote it as stating:

“The court may at any stage of proceedings either upon or without the application of either party and on such terms as may appear to the court to be just, order the name of any party improperly joined, whether as the 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”.

9. The applicants submit that no prejudice will be occasioned upon the respondents as they will have a right to respond to the amended suit.

10. The applicants proffered no authorities in support of their assertions.

11. The 1st defendant in its written submissions submits that the suit has abated as the 1st and 2nd plaintiffs died way back in 2013 and 2014 respectively. The submissions quote Order 24 Rule 3(1) and 2 of the Civil Procedure Rules as stating:

“3(1) where one of two or more plaintiffs die and the cause of action does not survive or continue to the surviving plaintiff is or plaintiffs alone, or a sole plaintiff, or a sole plaintiff or sole surviving plaintiff dies as the cause of action survives or continues, the court on application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.”

“3(2) where within one year no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff; provided the court may, for good reason on application extend the time.”

12. The 1st defendant submits that the applicants are guilty of inordinate delay by seeking to substitute the plaintiffs many years after they died. It quotes Order 24 Rule 7 of the Civil Procedure Rules as stating:

“Where a suit abates or is dismissed under this order no fresh suit shall be brought on the same cause of action.”

13. The 1st defendant states that the counsel for the plaintiffs who has been in conduct of the suit since it was filed in court ought to have known that the County Council of Meru South had died a legal death after the promulgation of the Constitution of Kenya 2010 and should have substituted the Council with Tharaka Nithi County Government within the legally stipulated time. It submits that no satisfactory reason has been given for the indolence regarding non-substitution of the 2nd defendant. The 1st defendant further quotes Order 24 Rule 7(1) of the Civil Procedure Rules as stating:

“where a suit abates or is dismissed under this order no fresh suit shall be brought on the same cause of action.”

14. Finally the 1st defendant contends that the original plaintiffs did not comply with order 1 Rule 8 of the Civil Procedure Rules regarding representative suits as they did not obtain leave of the court or sought directions when the suit was filed. The 1st defendant submits that the suit is bad in law and a nullity and urge this court not only to dismiss the application but to also dismiss the main suit, rather than allowing itself to be embroiled in side shows, therefore burdening itself with useless amendments. The 1st defendant proffered the case of **WANJIKU Versus STANDARD CHARTERED BANK AND OTHERS (2003) 2EA 701**, in support of its assertion that Order 1 Rule 8 of the Civil Procedure Rules had not been complied with.

15. The 3rd and 4th defendants did not file written submissions. They elected to associate themselves with the submissions filed by the 1st defendant.

16. I have carefully considered the pleadings and the submissions proffered by the applicants and by the 1st, 3rd and 4th defendants in support of their diametrically opposed assertions.

17. Whereas bringing the suit by way of Summons instead of by way of Notice of Motion, may be deemed a procedural technicality in terms of Article 159 2(d) of the Constitution of Kenya, it is nevertheless a legal requirement. However, determination of this application rests on other issues.

18. There is no question that the suit with regard to the 1st plaintiff and the 2nd plaintiff abated in 2014 and 2013, respectively. The applicants have that much conceded in their pleadings. Order 24 Rule 7 (1) of the Civil Procedure Rules is veritably laconic that: **“Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action”**. It is clear that this is not an application for an order to revive the suit. I agree with the 1st defendant that this is an attempt to bring a new suit by way of amendment and addition of parties.

19. I find that the authority proffered by the 1st defendant, to wit, **Wanjiku versus Standard Bank and others (op.cit)** is relevant to the facts and circumstances of this case.

20. In the premises, I find that this application and suit are bad in law. Consequently both the application and the suit are hereby dismissed.

21. Costs are awarded to the 1st defendant as the 2nd, 3rd and 4th defendants did not in any meaningful manner participate in the proceedings apposite to this application.

22. It is so ordered.

Delivered in open court at Chuka this **24th day of April, 2018** in the presence of:

CA: Ndegwa

Manases Kariuki h/b Rimita for the 1st defendant

Miss Mbaikiata for 2nd, 3rd and 4th defendants

P.M. NJORGE

JUDGE