



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 40 OF 2017

MOSES MBOGO GACHANGO

**ANNAH WANGUI GASANGO (Suing as the personal Representatives of
JOSIAH GACHANGO MWANGI - Deceased).....PLAINTIFFS**

VS

RAHAB WANJIRU NG'ANG'A.....1ST DEFENDANT

SIMON GITHUKU NG'ANG'A.....2ND DEFENDANT

RULING

1. This ruling relates to a Notice of Motion dated 8/6/18 and filed on 18/6/18. In it the Applicants sought to amend the Plaintiff by substituting the name of Rahab Wanjiru Nganga with that of Ruth Wanjiru Nganga. The Applicants have averred that the 1st Defendant Rahab Wanjiru Nganga was wrongly written instead of Ruth Wanjiru Nganga. That the same was a clerical oversight by their Advocate on record. That the proper 1st Defendant is Ruth Wanjiru Nganga.

2. The Application is supported by the affidavit of one Anthony Karanja Kagiri who described himself as the Advocate of the Plaintiffs, whilst reiterating the grounds aforesaid in Para 1 above he went on to state as follows;

“That this suit arises from the judgment in Nairobi Succession Cause Number 1946 of 2002 – In the matter of the Estate of Nganga Mwangi alias Suleiman Nganga Mwangi whereby the grant therein was revoked and the Court ordered that this instant suit be filed to establish whether the suit property herein LOC KANGARI/1000 was held in trust by the deceased for the Plaintiffs and their immediate family members.

That I was in conduct of the said Succession Cause and it was clear to me that the 1st Defendant is deceased and in any event the Defendants are supposed to be sued in their capacity as the administrators of the estate of Rahab Wanjiru Nganga (Deceased).”

3. The application was met with the grounds of objection by the 2nd Defendant filed on 9/6/18 expressed on the following grounds;

a) The application is fatally defective, incompetent, frivolous, and vexatious and the same is tended by gross misapprehension of law and procedure.

b) The orders sought in the application are neither tenable nor maintainable in law to the extent that RAHAB WANJIRU NG'ANG'A as first sued is a deceased person having died on the 2/12/2017 and no substitution can occur or be allowed without first obtaining a grant of representation for her estate.

c) The instant application is not a simple application for correction/substitution of names but a serious matter dealing with an estate of a deceased person (A copy of the death certificate serial number xxxxx is annexed hereto).

d) The entire suit as before Court is defective and incompetent and there is no way to redeem the same other than withdrawal of the same.

4. In a further affidavit of the Learned Counsel Anthony Karanja Kagiri he deposed *inter alia* that he is been in conduct of the Succession

Cause No. 1946 of 2002 and therefore is conversant with the suit. In Para 6 of the aforesaid affidavit he stated that all parties in the Succession Cause agreed to appoint the Defendants as administrators of the estate of Rahab Wanjiru Nganga (deceased).

5. Parties have filed written submissions which I have read and considered. The key issue is whether the amendment of the plaint is merited.

6. Section 100 of the Civil Procedure Act provides as follows;

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.

In the Civil Procedure Rules a whole Order 8 is dedicated to amendments of pleadings. The general rule is that leave to amend will be granted so as to enable the real question in controversy between the parties to be raised in the pleadings and where the amendment will not occasion any injury to the opposite party except such as can sufficiently be compensated for by costs and other terms to be imposed by the Court, such application for amendment will be liberally granted.

7. In the instant case the Applicants have averred that the names of the 1st Defendant were wrongly given as Rahab Wanjiku Nganga instead of Ruth Wanjiru Nganga. That the proper 1st Defendant ought to be Ruth Wanjiru Nganga. To that extent the Court would have had no difficulty in granting leave to amend the plaint. It is on record that the 1st Defendant died in 2007 before this suit was filed. The Plaintiffs in this case are the family of the late Josiah Gachango Mwangi (legal representatives) and the Defendants are the administrators of the estate of Suleiman Ng'ang'a(deceased). According to the pleadings Josiah and Suleiman (both deceased) were brothers or step brothers but sons of Gachango Kiarie(deceased).

8. In Para 6 of the Further Affidavit of Anthony Karanja Kangiri it is deponed that it was agreed to appoint the Defendants as administrators of the estate of Rahab Wanjiru Nganga. In Para 6 of the Plaint it is pleaded that the Court in the Succession Cause in Murang'a by consent of the people described in limb (d) of the Judgement be appointed the Defendant herein as administrators of the estate of Suleiman Nganga (deceased). From the two paragraphs therefore it would appear that the Defendants are being sued as representatives of the estate Suleiman Nganga and/or Rahab Wanjiru Nganga (whether case is applicable). It is to be noted that the Plaintiffs have not described the Defendants in the plaint and the capacity in which they have been sued.

9. From the above paragraphs the issue of whether or not the 2nd Defendant is a legal representatives of the estate of the deceased is contested and the same is a triable issue which is safe to leave it for the trial court to determine.

10. Order 1 Rule 9 permits substitution where a suit has been instituted in the name of the wrong person the Court may order any other person to be substituted or added as Plaintiff or Defendant upon such terms as it thinks fit. The Counsel has disclosed as of personal knowledge that he is aware that Rahab passed on and her name was included by error and the proper 1st Defendant is Ruth Wanjiru Nganga.

11. The Court is satisfied that the institution of the suit in the name of Rahab Wanjiru Nganga instead of Ruth Wanjiru Nganga is a bonafide mistake and hereby allows the application with costs in favour of the 2nd Defendant. The Applicant is ordered to amend the Plaint and serve the parties thereto within the next 14 days and thereafter set the suit for hearing.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 29TH NOVEMBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiffs/Applicants; 1 Absent

2

Respondents/Defendants; 1 Absent

2

Irene and Njeri, Court Assistants