



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 224 OF 2015**

**NURU MOHAMED OMAR**

**ZAINAB TSUME BENGOJA.....PLAINTIFFS**

**VERSUS**

**SUHEEL AHMED NAZIR.....DEFENDANT**

**RULING**

1. Before me for determination are two applications. The first Application dated 23<sup>rd</sup> April 2014 was filed herein before this matter was transferred to Malindi from the High Court at Mombasa. The said application is seeking for orders:-

***1. That this Honourable Court be pleased to grant leave to the Plaintiffs/Applicants to amend the Plaintiff as per the amended Plaintiff annexed hereto.***

***2. That (the) costs of the application be in the cause.***

2. That application is premised on the grounds:-

***i. That in the Plaintiff filed on 31/3/2011, the Plaintiffs omitted to plead that the 1<sup>st</sup> Defendant and the Plaintiffs' were under a mutual mistake when they entered into the Agreement for sale in as far as the acreage of the Suit property known as Plot No. 309 Kawala 'A' is concerned. As such the said Agreement became void ab initio.***

***ii. That after the Plaintiff was filed on 31/3/2011, the 1<sup>st</sup> Defendant sometime in October 2011 unlawfully charged the suit property to the 2<sup>nd</sup> Defendant as the 1<sup>st</sup> Defendant had not paid the Plaintiff the full purchase price of the suit; and***

***iii. That it is therefore necessary and in the interest of justice that the Plaintiffs be granted leave to amend the Plaintiff so as to plead the issue of mutual mistake and to also enjoin the 2<sup>nd</sup> Defendant as a party to the suit. This will enable the Court to effectively determine all the issues involved in this suit.***

3. The Second Application is an Amended Notice of Motion dated 18<sup>th</sup> January 2017 and filed herein on 20<sup>th</sup> January 2017. By the said application, the same Plaintiff prays for orders:-

***1. That this Honourable Court be pleased to grant leave to the Plaintiffs/Applicants to further amend the amended Plaintiff as per the further amended Plaintiff annexed hereto.***

***2. That this Honourable Court be pleased to allow the substitution of the 1<sup>st</sup> Plaintiff's name with that of Said Baya Mwabaya.***

4. The second application is premised on very same grounds supporting the first application save for the added ground that:-

***34. That the 1<sup>st</sup> Plaintiff passed away on 23<sup>rd</sup> September 2016 domiciled in Kenya and one Said Baya Mwabaya has been appointed as the administrator of the estate.***

5. In a Replying Affidavit filed herein on 16<sup>th</sup> July 2014, the Defendant had opposed the grant of orders sought in the First Application. The Defendant averred therein that there was no mutual mistake as alleged and that the purchase price for the property was to be calculated in

accordance with acreage. In addition the Defendant contended that there was no point in enjoining Fidelity Commercial Bank Ltd in the suit as when she charged the property to the Bank, the title was already in the Defendant's name and the dispute had nothing to do with the Bank.

6. And in response to the Second Application, the Defendant has filed a Preliminary Objection dated 28<sup>th</sup> March 2017 objecting to the same on the basis that the application is an abuse of the Court Process as the Claim by Nur Mohamed Omar had abated and there was no order reviving the Claim.

7. I have considered the Plaintiff's two applications and the Defendant's responses thereto. I have also taken into consideration the Written Submissions filed by the Learned Advocates for the parties.

8. From a perusal of the record herein, it is evident that after the filing of the First Application, the parties appeared before the Mombasa Court a number of times during which the application was adjourned the same a number of times. The same was taken off the hearing list on 23<sup>rd</sup> November 2014 after which it was transferred to Malindi. A perusal of the record reveals that the said application has never been prosecuted to-date.

9. It was further evident to me that the Second Application was intended to be an amendment to the first Application. As it were, since the First Application was never prosecuted, no amendment was made to the Plaintiff. In this regard it is entirely erroneous for the Second Application to seek to further amend the amended Plaintiff when there was no such amended Plaintiff.

10. In addition, I note that the draft "Further Amended Plaintiff" attached to the Second Application makes the erroneous assumption that Said Baya Mwabaya and Fidelity Commercial Bank Ltd are parties to this suit. From the records, the two are not yet parties in these proceedings and to the extent that they are cited as parties herein the application before me (the Second Application) is misconceived and incompetent.

11. The said application is struck out with costs to the Defendant.

**Dated, signed and delivered at Malindi this 14<sup>th</sup> day of December, 2018.**

**J.O. OLOLA**

**JUDGE**