



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 72 OF 2017

MILKA NJERI THUO.....1ST APPLICANT/PLAINITFF

GRACE NJOKI KIMOTHO.....2ND APPLICANT/PLAINTIFF

VS

PAULINE WANGARI GIKERA.....1ST RESPONDENT/ DEFENDANT

MWANGI GIKERA.....2ND RESPONDENT/DEFENDANT

RULING

1. On the 14th January 2016 the 1st Applicant filed a Notice of Motion dated the 10th December 2015 seeking the following orders;-

- a). that the Honourable Court be pleased to substitute the 2nd Applicant herein Grace Njoki Kimotho who is now deceased with Simon Maina Nganga.
- b). That the plaintiff be granted leave to amend the Originating Summons in terms of the draft originating summons annexed hereto.
- c). That the amended Originating summons be deemed as duly filed and served upon the defendants.
- d). That Costs be in the cause.

2. The application is grounded on the following grounds; -

- a). That the deceased Grace Njoki Kimotho died on the 15th March 2015.
- b). That Simon Maina Nganga is the legal representative of the late Grace Njoki Kimotho by virtue of being her son and having been given limited grant ad litem in succession cause No. 472 of 2015.

3. The application is further supported by the affidavit sworn by the said Simon Maina Nganga sworn on the 10th December 2016.

4. The background of this case is that Milka Njeri Thuo and Grace Njoki Kimotho filed an originating summons on the 3rd April 2014 seeking *inter alia* declaratory orders against the defendants that they are

entitled to 2.2 acres each being their equal share of Land Reference Number Loc2/Kinyona/94.

5. Written Submissions have been filed by both parties and I have considered them carefully and the two issues before this Court for determination are;

- a). whether the application for substitution of the 2nd Applicant is meritorious
- b). whether the applicants are entitled to leave to amend the originating summons.

6. It is clear to the Court that that the application for substitution is not opposed by the Respondents as depicted in Paragraph 3 of the Sworn affidavit of the learned Counsel, Mr. George Morara Gori, the respondents Counsel herein. He states as follows;

“That I am not opposed to the substitution of the 2nd Plaintiff/Applicant by her son Simon Maina Nganga”.

In the circumstances, therefore the Court allows the substitution under Order 24 Rule 3(1).

7. On the second issue of whether the applicants are entitled to leave to amend the originating summons, order 8 Rule 5(1) empowers the Court as follows;

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just”.

The application for leave to amend is that of the Applicant. The Court has noticed that though the Notice of Motion mentions in its body of the application that there is an annexed draft amended Originating summons, the applicant has not annexed the same to enable the Court and the other parties to appreciate the substance of the amendments. The learned Counsel for the Respondents did raise this both in his affidavit in opposition of the application and in his written submissions. No reasons have been advanced by the Applicants counsel for this failure to annex the draft amended Originating summons other than to state that;-

“the applicant herein reserves his right to make a formal application to amend the originating summons accordingly after leave is granted for him to be substituted in the suit as the 2nd Plaintiff”.

8. In the case of **Mccoys Vs Allibhai (1939) 5 EACA, 70** the Court stated that, as a general rule, leave to amend pleadings ought not to be refused unless the Court is satisfied the party applying is acting *malafides* or that his blunder has caused some injury to the other side which cannot be compensated by the payment of costs or otherwise. In the instant case, allowing the application for amendment will be immature as the Court is yet to be made aware of the said amendments.

9. That notwithstanding, it is this Court’s view that failure to annex the draft amended Originating summons is not fatal and the applicants are at liberty to move the Court formally for leave to amend the same. Refusal will not enable the Court to determine the controversy as the party to be substituted is the plaintiff in this matter and therefore its import goes to the core of the pleadings. That is if the Court assumes that that is the core of the amendment sought by the applicants. It will be absurd to allow the substitution and not allow the amendment to the pleadings to include the substituted 2nd Plaintiff. Having said that it is trite law that parties are bound by their pleadings and the Court cannot hazard a guess on the nature of pleadings of a party. Doing so would be tantamount to descending to the arena of conflict by forcing on the parties amendments which those parties have not asked for, or albeit asked improperly.

10. In the upshot, this Court makes the following orders; -

- (a) That Leave to substitute Grace Njoki Kimotho with Simon Maina Nganga is allowed.**
- (b) That the Applicant be at liberty to apply for leave to amend the Originating summons at the appropriate time.**
- (c) That Costs be to the Respondents.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH JULY 2017.

J. G. KEMEI

JUDGE