



Mibei (Suing as the legal representative of the Estate of Elizabeth Kilele) v Kirimi (Sued as the legal representative of the Estate of Kirimi M’Muna) & 4 others (Environment and Land Case Civil Suit 360 of 2018) [2025] KEELC 1074 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 1074 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 360 OF 2018
OA ANGOTE, J
FEBRUARY 27, 2025**

BETWEEN

KENNETH KIPKIRUI MIBEI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH KILELE) PLAINTIFF

AND

FAITH NAITORE KIRIMI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIRIMI M’MUNA) 1ST DEFENDANT

MERCY MAKENA KIRIMI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIRIMI M’MUNA) 2ND DEFENDANT

NICHOLAS KIMATHI KIRIMI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIRIMI M’MUNA) 3RD DEFENDANT

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

NAIROBI CITY COUNTY 5TH DEFENDANT

RULING

1. Before this Court for determination is the 1st -3rd Defendants’ Motion dated 31st May, 2024 brought pursuant to the provisions of Section 3A of the *Civil Procedure Act* and Orders 2 Rule 15(b), (d), 13(2) and 51 of the *Civil Procedure Rules* seeking the following reliefs:
 - a. That the Amended Plaint dated 7th November, 2023 be struck out.
 - b. That the Plaintiffs’ suit be dismissed in its entirety.
 - c. That the costs to the Applicant to be paid.



2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Mercy Makena Kirimi, the 2nd Defendant, with the authority of the 1st and 3rd Defendants of an even date.
3. The 2nd Defendant deponed that as advised by Counsel, the Plaintiff/Respondent did not seek leave of Court before filing the Amended Plaintiff; that the amendments in any case raise similar issues to those pleaded by the Plaintiff in ELC 147 of 2019; that in the aforesaid suit, the Plaintiff accused the deceased Plaintiff of fraudulently selling the suit property, L.R No 330/505 and that the aforesaid suit was dismissed and the Plaintiff proceeded to file an Appeal being Appeal E242 of 2022.
4. According to Ms Kirimi, on or about September, 2015, the Plaintiff lodged a complaint against the deceased Plaintiff with the Director of Criminal Investigations alleging that she sold the suit property without consulting them; that the DCI carried out investigations and concluded that the deceased Plaintiff genuinely sold the property and that it is apparent that there is a conflict of interest because the deceased's Plaintiff's position in this suit is different from the Plaintiff's herein.
5. She contends that the Plaintiff's confirmation that the deceased sold the suit property tallies with their Defence that their late father, Mr Kirimi M'muna purchased the suit property from the deceased Plaintiff who held an Indenture dated 21st December, 1993 and conveyed the suit property to their father vide the Indenture dated 17th November, 2005. Further that title L.R 330/1360 is a forgery.
6. She states that the foregoing position being undisputed, the Plaintiff's suit is compromised and should be dismissed.
7. In response to the Motion, the Plaintiff swore a Replying Affidavit on 1st July, 2024. He deponed that the 1st-3rd Defendants'/Applicants' allegations that he filed the Amended Plaintiff of 7th November, 2023 without leave is false and misguided and that as advised by Counsel, on the 6th November, 2023 after his Motion for substitution was allowed, Counsel made an oral application to amend the Plaintiff dated 17th August, 2018 which application was allowed.
8. The Plaintiff deponed that as further advised, once leave was granted, he was at liberty to make such amendments as may be necessary to determine the real issues in dispute; that this Motion is an attempt by the Defendants to avoid accountability by having the parties heard on merit and that the matter has never proceeded for hearing despite him having several witnesses who are ready to testify in support of his claim.
9. According to the Plaintiff, ELC 147 of 2019 was never determined on merit but was dismissed on account of limitation of actions, a fact conceded to by the Defendants; that this suit seeks to impeach the process of acquisition of the suit property that deprived the Plaintiff and the beneficiaries of their legal entitlement thereto and that this suit was commenced by the deceased, Elizabeth Kilele and the amendment preserves her cause of action and is not in conflict.
10. He asserts that as advised by Counsel, opinions by the Directorate of Criminal Investigations are not judgments that are binding on the Court; that the issues raised in the Motion are triable issues that should be subsumed in the whole suit and the matter allowed to proceed for full hearing and that Counsel on record, Njeru Nyaga, is a potential witness and must choose whether to continue representing the parties or appear as a witness.

Submissions

11. The 1st -3rd Defendants/Applicants filed submissions on the 20th August, 2024. Counsel submitted that pursuant to Order 8 rule 3 of the [*Civil Procedure Rules*](#), after the close of pleadings, a party may



only amend its pleadings with the leave of Court; that vide its Motion of 18th September, 2023, the Respondent sought to substitute the deceased Plaintiff as per the provisions of Order 24 Rule 3(1) of the Civil Procedure Rules and that the only amendments envisaged herein was on the heading of the pleadings.

12. Counsel contends that the amendment introduced by the current Plaintiff is a replica of ELC Civil Suit 147 of 2019; that in the aforesaid case, the deceased Plaintiff, who was a Defendant therein, had raised a preliminary objection to the suit alleging that it was time barred, which objection was upheld and the suit dismissed; that the nature of the amendments will mutilate the deceased's Plaintiff's case contrary to what is expected of the Plaintiff as her legal representative and that there are high chances that the Plaintiff will commit perjury because his statements directly contradicts the deceased's Plaintiffs case.
13. The Plaintiff/Respondent filed submissions on the 23rd September, 2024. Counsel submitted that pursuant to Order 8 Rule 3 of the Civil Procedure Rules, the Court may at any stage of the proceedings, grant leave to a party to amend its pleadings; that on the 6th November, 2023, the parties were before the Court where Counsel orally sought leave to amend the Plaintiffs' pleadings for purposes of substituting the Plaintiff who was deceased, and preserving the cause of action which leave was granted and that the averments that leave was not sought prior to the amendment of the Plaintiff is frivolous and vexatious.
14. According to Counsel, the Court is vested with powers to determine the real issues between the parties and that the Plaintiff's amendments have raised issues which clearly articulate and question the sale and transfer of the suit property to one Kirimi M'muna (deceased).
15. Counsel submitted that ELC 147 of 2019 was dismissed on account of limitation of actions and the allegation of res judicata have no basis and that in SRM vs JMM[2021]eKLR, the Court noted that dismissal of a matter without having heard it on merits is different from a dismissal pursuant to a full hearing.
16. It was urged that the Plaintiff has the requisite capacity to represent the deceased, having substituted her pursuant to the provisions of Order 24 Rule 3 of the Civil Procedure Rules and that the Motion is frivolous, an abuse of process and is intended to delay the Respondents' justice.

Analysis and Determination.

17. Having considered the Motion and the responses, the issues that arises for determination are;
 - i. Whether the Plaintiffs' Amended Plaintiff should be struck out?
 - ii. Whether the Plaintiffs' suit should be struck out for being *res judicata*?
18. Vide the present Motion, the 1st-3rd Defendants/Applicants seek to have the Amended Plaintiff dismissed on the grounds that no leave was sought for prior to its amendment. In response, the Plaintiff/Respondent avers that it duly sought and was granted leave to amend its pleadings.
19. As a general rule, a party is allowed to amend their pleadings at any stage before close of pleadings. [Order 8 Rule 1]. However, once pleadings have closed, leave is required from the Court before any amendment can be undertaken.
20. Order 8 Rule 3(1), (2) and (5) of the Civil Procedure Rules under the head 'amendment of pleading with leave' is instructive and provides thus:

“(3)



(1) Subject to Order 1, rules 9 and 10, Order 24, rules 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 otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

(3)

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

“3

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

21. In the present circumstances, the Plaintiff filed a Motion dated 18th September, 2023 in which he sought:

- i. That Kenneth Kipkirui Mibei, the legal representative of the Estate Kilele (the Plaintiff) herein be made a party in this suit.
- ii. Costs be in the cause.

22. The Motion came up for hearing on the 6th November, 2023 where it was granted by the Court. The Court further noted:

“The new amended Plaintiff to show the new party to be served upon the Defendants within 14 days.”

23. It is apparent that the amendment sought by the Plaintiff, and the one granted by the Court was the one contemplated under Order 24 rule 3 of the *Civil Procedure Rules* where a deceased Plaintiff is substituted, and the only amendment anticipated is the change of name in this regard.

24. The record does not indicate that the Plaintiff sought nor was granted leave to make any other amendments apart from the changes aforesaid. Looking at the Amended Plaintiff, substantial amendments have been made therein. The Court concurs that these amendments, save for the substitution of the Plaintiff with the deceased, were done without the leave of Court.

25. Once pleadings are closed, the parties have clarity on the case they intend to present and defend. This is the reason why amendments after the close of pleadings are to be done with leave of Court. Order 8 Rule 3 of the *Civil Procedure Rules* serves as a procedural safeguard, ensuring transparency and fairness in litigation and allowing all parties to be informed, assess the relevance and propriety of the amendments, and, if necessary, contest or respond to them.



26. Sneaking in amendments without leave undermines this procedural fairness and risks taking the opposing party by surprise, compromising the principles of natural justice and the orderly conduct of proceedings. The Plaintiff cannot unilaterally claim that its amendments are intended to determine the real issues in controversy.
27. By not seeking the Court's leave before making the impugned amendments, the Amended Plaintiff is not only an abuse of court process but a significant procedural irregularity not curable under Article 159 of the Constitution of Kenya. In view of the foregoing, save for the substitution of the deceased Plaintiff, the Court strikes out the Amended Plaintiff dated 7th November, 2023.
28. The 1st -3rd Defendant similarly asks that this suit be dismissed. It is their position that the amendments by the Plaintiff differ from the suit as instituted by the original Plaintiff, the deceased and that the same is similar to the issues in ELC 147 of 2019 which was dismissed by the Court on account of limitation of actions and an appeal was filed against the dismissal being E242 of 2022.
29. It is asserted that in view of the Plaintiffs' amendments which conflict with the deceased's original suit, the suit is compromised and should be dismissed.
30. Having struck out the Amended Plaintiff for want of leave, the question of the propriety or otherwise of the amendments, and their import on the matter, the basis upon which the Court has been asked to strike out the suit, is moot.
31. In the end, the Motion dated the 31st May, 2024 partly succeeds in the following terms:
 - i. The Amended Plaintiff dated 7th November, 2023 be and is hereby struck out.
 - ii. The Plaintiff to file an Amended Plaintiff as per the terms sought and granted on 6th November, 2023 within 14 days hereof.
 - iii. The Plaintiff shall bear the costs of the Motion.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF FEBRUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Njeru for 1st, 2nd and 3rd Defendant/Applicants

Ms Maina for Muturi for Plaintiff/Respondent

Court Assistant: Tracy

