



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 231 OF 2011

NARUTI OLE MEPETO PLAINTIFF

VERSUS

SINKA J. LENKUME DEFENDANT

RULING

1. The plaintiff by a notice of motion dated 28th February 2014 brought under Order 1 Rule 10 and Order II Rule 7 (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks the following orders:-

- (i) That the honourable court be pleased to grant leave to the applicant to amend the pleading namely the plaint.**
- (ii) That the proposed defendant Joyce Lenkume be substituted as defendant in this suit instead of Sinka J. Lenkuma who is now deceased.**
- (iii) That costs of this application be provided for.**

The application is premised on interalia the following grounds that appear on the face of the application:

- (a) There is need to substitute and amend the name of the defendant.**
- (b) The proposed amendment and substitution of necessary party is for the interest of justice.**
- (c) The court has general powers to allow the amendment and substitution of a party to replace the deceased party.**
- (d) The defendant died on the 12th day of December 2013.**
- (e) That the said substitution of a party was not working injustice to the other side.**
- (f) The purpose of substitution is to determine the real question in controversy between the parties.**

2. By the supporting affidavit the plaintiff avers that the defendant died on 12th December 2013 and that Joyce Lenkume who he wishes to be substituted is the wife of the deceased defendant. Though yet to become a party Joyce Kiramatishio Lenku who the plaintiff sought to be substituted in place of the defendant has filed a replying affidavit sworn on 21st July 2015 in opposition to the application where she

depones that she and her co-wife one Narikurenkera Ene Lenkume occupy respective portions of land parcel **Transmara/Oldanyati/ 276** which was owned by their late husband. She depones that each of them occupies a clearly delineated portion of the same and questions why the plaintiff has singled her out as the person to be substituted to replace the defendant yet she is not the legal representative of her deceased husband's estate.

3. I have reviewed the application by the plaintiff and the submissions made by the plaintiff's counsel in support thereof and the issue for determination is whether the plaintiff's said application is a competent application for substitution of a party who has died. The plaintiff has brought his application under the provisions of Order 1 Rule 10 of the Civil Procedure Rules which provides for the substitution of parties where the suit has been instituted in the name of the wrong persons and/or where a party has been improperly enjoined in the suit for deletion of his name. The provision also provides for the joinder of new parties to the suit where their presence is necessary to enable the court to adjudicate and settle all questions involved in the suit. The provision does not envisage the substitution of a party who has died by another party.

4. Where a party has died Order 24 Rules 3 and 4 of the Civil Procedure Rules require that an appropriate application should be made for the legal representative of the deceased party to be substituted in place of the deceased. The plaintiff's application before me is not one to have the personal legal representative of the deceased defendant to be substituted as a party in place of the defendant. The plaintiff emphatically states the defendant died on 12th December 2013 but instead of making an application for the legal personal representative of the defendant to be substituted in place of the defendant, the plaintiff has made an application for joinder of one Joyce Lenkume to replace the defendant. The said Joyce Lenkume has stated that she is but one of the wives of the defendant and not the legal representative. She cannot be properly substituted in place of the defendant. She has to be the personal legal representative of the deceased defendant's estate to be so substituted.

5. The plaintiff's application is misconceived and incompetent and I accordingly order the same struck out with costs to the defendant.

Ruling dated, signed and delivered at Kisii this 15th day of July, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

..... for the Court Assistant

J. M. MUTUNGI

JUDGE