



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MURGOR, J.A.

CIVIL APPEAL (APPLICATION) NO. 119 OF 2013

BETWEEN

1. MUNGAI NJOROGE.....1ST APPLICANT

2. NG'ANG'A WAINAINA.....2ND APPLICANT

AND

1. KIARIE NJOROGE.....1ST RESPONDENT

2. MUNGAI MUHINDI.....2ND RESPONDENT

(Being an application for substitution of the deceased appellant with the legal representative of his Estate and an application for leave to amend the memorandum of appeal in Civil Case No 92 of 1991)

RULING

The applicant, Ng'ang'a Mungai Muhindi has filed this Notice of Motion dated 14th December 2018 seeking leave to substitute the appellant, Mungai Njoroge (deceased), and to amend the Memorandum of Appeal in *Civil Appeal No 119 of 2013*. The application is made on the grounds that as personal representative of the Estate of Mungai Njoroge (Deceased) he was issued with Letters of Administration on 9th November 2018 in Succession Cause No. 54 of 2018; that the cause of action survived the deceased appellant. It was further contended that in seeking to amend the Memorandum of Appeal, there are particulars that have come to the attention of the intended appellant's counsel, Anthony Kamunya Advocate who has recently come on record in place of the previous advocates Ngarega Waiyaki Advocate; that the proposed amendments are necessary to the appeal as they will enable the court conclusively determine the issues in contention; that no prejudice will be occasioned to the parties herein.

The application was supported by the affidavit of **Ng'ang'a Mungai Muhindi** sworn on the same day wherein it was deponed that, he had been granted letters of administration in respect of the deceased's estate on 9th November 2018, and with respect to the amendments to the Memorandum of Appeal, the deponent reiterated the contents of the grounds of the application.

The respondents did not file any affidavits in reply to the application.

When the application came up for hearing, **Mr A. Kamunye**, learned counsel for the applicant submitted that the amendments were sought by counsel who had recently taken over the conduct of the appeal who had become aware that there were certain matters that had not been addressed in the Memorandum of Appeal and which required to be captured through amendments; that for instance, the memorandum of appeal did not specify that the judgment of the High Court was based on probability and on the facts that were presented to the court; that furthermore the judgment had allocated the wrong acreage to the appellant which was an issue that ought to have been indicated in the memorandum of appeal as an issue for determination by this Court. Counsel drew the attention of the Court to the draft memorandum of Appeal that was annexed to the applicant's supporting affidavit.

Mr. Mungai Muhindi who appeared in person objected to the application for amendment for reasons that in his view, the suit had been properly concluded by the High Court, there was nothing left for this Court to determine.

With regard to the prayer for substitution, this prayer was granted by this Court on 21st March 2019, and consequently, Nganga Mungai Muhindi was substituted in place of the deceased 1st appellant in Civil Appeal No. 119 of 2013, as his personal representative.

I have considered the application for leave to amend the memorandum of appeal, and the draft memorandum of appeal. There are six additional grounds of appeal for which leave to include them in the memorandum of appeal was sought. In the amended grounds the applicants' complaint is that the trial judge based the decision on probability rather than on the facts that were before the court; that the trial court was wrong in finding that the respondents had proved their case when critical facts were not proved; that the trial court wrongly failed to find that the respondents had already received their share of inheritance, and it fell into error when it shifted the burden of proof to the appellant, when at all times the responsibility remained with the respondent.

Rule 44 of this Court's rules allows for amendment of any document with leave of the Court.

This Court in the case of *[2000] 2 EA 365* outlined the follows;

Central Kenya Limited vs Trust Bank Limited principles for amendment of pleadings as

“A party is allowed to make such amendment as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued right is affected and that the amendment can be allowed without injustice to the other side.”

A consideration of the amendments sought to be relied upon by the applicants in the appeal, makes it clear that they are merely additional grounds of appeal against the judgment of the trial court. In my view they seek to identify with greater clarity the issues which the appellant seeks to canvass for the determination of the Court. I am unable to find any prejudice that will be occasioned to the respondents should the amendments as drafted be included as additional grounds of appeal.

In sum, the application is merited. The applicant is hereby ordered to file and serve a supplementary record of appeal comprising the amended memorandum of appeal within the next fourteen days from the date of this ruling.

The costs of this application shall be in the intended appeal.

It is so ordered.

Dated and Delivered at Nairobi this 6th day of August, 2019.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR