



**Paksons Enterprises Limited & another v Kenya Commercial Bank & another; Rotich & 2 others (Applicant) (Suing as the Legal Representative of the Estate of Anna Chebet Koech - Deceased) (Civil Suit 4 of 2022) [2025] KEHC 5396 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5396 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL SUIT 4 OF 2022  
JK SERGON, J  
APRIL 30, 2025**

**BETWEEN**

**PAKSONS ENTERPRISES LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**ANNA CHEBET KOECH ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK ..... 1<sup>ST</sup> RESPONDENT**

**GARAM INVESTMENT AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**WESLEY ROTICH ..... APPLICANT**

**DAVID KIPRONO ROTICH ..... APPLICANT**

**ROBERT KIPNGETICH ..... APPLICANT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ANNA  
CHEBET KOECH - DECEASED**

**RULING**

1. The application coming up for determination is a notice of motion dated 19th March, 2025 seeking the following orders;
  - (i) Spent
  - (ii) That this Honourable Court be pleased to substitute the 2nd Plaintiff (Deceased) with her personal legal representatives WESLEY ROTICH, DAVID KIPRONO ROTICH and ROBERT KIPNGETICH, the Applicants herein and proceed with the hearing and determination of the suit.



- (iii) That upon grant of prayer (ii) above, this Honourable Court be pleased to grant leave to the Plaintiffs to further Amend the Plaint herein to reflect the correct parties to the suit and plead the issues that will enable the court effectually and conclusively determine the dispute between the parties.
  - (iv) That costs of this application be provided for.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Wesley Kipkirui Rotich. The Applicant averred that he is well versed with the facts attending to this matter and that he is duly authorized by the 2nd and 3rd Administrators/Applicants herein, to make and swear this affidavit in support of the Application.
  3. The Applicant avers that the Plaintiffs herein commenced this suit against the Defendants vide Plaint dated the 1st of August, 2022 which was Amended on the 29th of August, 2022 to include a prayer inter alia; a declaration that the intended sale of the property known as LR No. 631/1582 and Kericho Municipality Block 2/80 is illegal, wrongful and unlawful.
  4. The Applicant avers that the 2nd Plaintiff was/is the registered proprietor of the suit property herein upon which a legal charge was registered to secure a facility advanced by the 1st Defendant to the 1st Plaintiff.
  5. The Applicant avers that unfortunately, before the suit could proceed to finality, the 2nd Plaintiff herein passed away on the 26th of September, 2022.
  6. The Applicant avers that they have since applied for and obtained a grant of letters of administration intestate dated the 5th of December, 2024 in respect to the Estate of the Deceased 2nd Plaintiff herein in Kericho High Court Succession Cause No. E023 of 2023 and thus wishes to be substituted with the deceased herein in order to protect the interests of her Estate. (Attached hereto and marked as WKR-3 is a true copy of the said grant of representation).
  7. The Applicant also avers that the cause of action herein survives the deceased Plaintiff and it is only in the interest of justice that she be substituted with her legal representatives in order for the suit to continue.
  8. The Applicant avers that no party stands to suffer any prejudice as a consequence of the orders sought as the same will enable the court to effectively adjudicate over and settle all the issues in dispute between the parties.
  9. The Applicant avers that it is therefore in the interest of justice that this application be allowed and the orders sought granted.
  10. The 1<sup>st</sup> Defendant/Respondent filed the following grounds of opposition in response to the Applicants' Application dated 26<sup>th</sup> March, 2025);
    - (i) The Application is fundamentally defective because the Applicants have failed to annex the proposed Amended Plaint to their Motion. This omission prevents both the Court and the 1<sup>st</sup> Respondent from assessing the nature, scope, and legal merit of the proposed amendments.
    - (ii) The Plaintiffs' prayer under paragraph (c) of the Motion—seeking leave to “further amend the Plaint... and plead the issues that will enable the court effectually and conclusively determine the dispute between the parties”—is vague and over breadth. Crucially, the Plaintiffs' failure to annex the proposed Amended Plaint renders this request impermissibly ambiguous, depriving



the Court and the 1<sup>st</sup> Respondent of clarity on the precise issues or claims intended to be introduced.

- (iii) It is trite law that amendments sought at advanced stages of proceedings must demonstrate good faith and due diligence. The Plaintiffs' failure to annex the proposed Amended Plaint raises grave concerns about whether the amendments: a. Seek to belatedly introduce new claims arising from negligence or tactical delay; b. Are intended to cure deliberate omissions or defective pleadings; or c. Can be granted without prejudicing and causing injustice to the Respondents.
11. For the reasons set out above, the 1<sup>st</sup> Respondent was therefore adamant that the Application fails to meet the legal threshold for amendment of pleadings and urged this Honorable Court dismiss the Plaintiffs' Application with costs.
  12. Wesley Kipkirui Rotich, the Applicant well versed with the facts attending to this suit, filed a further affidavit in response to the 1st Defendant/Respondent's grounds of opposition dated the 4th April, 2025.
  13. The Applicant avers that the amendments they were seeking to make will not in way introduce any new cause of action or fundamentally or otherwise change the nature of their case against the Defendants herein because from the onset, the Plaintiffs have lamented about the regularity and legality of the manner in which the 1st Defendant has purported to exercise its statutory power of sale over the 2nd Plaintiff's properties as are charged to it for the facility advanced to the 1st Plaintiff.
  14. The Applicant avers that they were seeking to amend the pleadings to reflect the correct parties to the suit pursuant to the unfortunate demise of the 2nd Plaintiff in the pendency of the hearing of this case and that this Court allow the substitution of the deceased Plaintiff with her legal representatives.
  15. The Applicant avers that they further wished to plead with specificity and offer the particulars of the irregularity and illegality on the part of the 1st Defendant in exercising its statutory power of sale not only on the grounds that it did not issue and/or serve the 2nd Plaintiff being the guarantor and owner of the properties intended to be sold with the proper notices as required under the Land Act but also that although there exists a floating charge over all the assets of the principal debtor, the 1st Defendant herein has deliberately and maliciously chose to pursue the guarantor's properties instead of first realizing the assets of the principal debtor.
  16. The applicant avers that the above grounds as illuminated are issues already advanced by the Plaintiffs in this suit and the amendments sought only serve to bring out clarity and further particulars of the basis of the complaints of illegality and unfairness raised by the Plaintiffs and they are in perfect consonance with the cause of action already advanced in the pleadings in this suit and that the foregoing does not in any way change the cause of action of the proceedings herein and that the amendments sought will aid and enable the court effectually and conclusively determine and settle the dispute between the parties in respect to the loan facility advanced by the 1st Defendant to the 1st Plaintiff.
  17. The applicant avers that the Defendants do not stand to suffer any prejudice at all as they will have an opportunity to respond to the further Amended Plaint before the hearing of the matter commences after which the court will render its decision upon consideration of all the grievances as pleaded and the evidence submitted by the parties.
  18. The applicant avers that the 1st Defendant's assertions that the proceedings in this suit are an advanced stage is misleading as the hearing of the case is yet to commence and that and even the 1st Defendant itself is yet to fully comply with pretrial directions as it was recently craving the leave of the court to fully comply before the hearing of the matter.



19. The applicant avers that it is in the interest of justice that this application be allowed and the orders sought granted in order that the court may make a final determination based on all the facts and issues in dispute and effectually and conclusively settle the contention as arising between the parties from the subject loan facility advanced to the 1st Plaintiff.
20. This court directed the parties to canvas the application via written submissions.
21. The applicant cited that the enabling provisions of the law directly governing the amendment of pleadings in civil suits to wit Order 8 Rule 3 of the Civil Procedure Rules, 2010 and cited the case of *Inter Tropical Timber Trading Limited v Kenya Power and Lighting Company Ltd* [2021] eKLR, the High Court therein observed as follows, "In ascertaining the requirements for exercising the discretion to grant or refuse amendment of pleadings, I borrow from the decision in the case of *Daniel Ngetich & Anor V K-Rep Bank Limited* [2013] Eklr where it was stated that: "...Normally the court should be liberal in granting leave to amend a pleading... The power to allow amendments is intended to do justice; for, all amendments ought to be allowed which (a) do not work injustice to the other side, and (b) are necessary for the purpose of determining the real question in controversy between the parties; and all the authorities lay down precisely the same doctrine, that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs."
22. The applicant reiterated that the Plaintiffs/Applicants have sought leave of this Honourable Court to further amend their pleadings at a stage in the suit when the hearing is yet to commence.
23. The applicant contended that whereas the 1st Respondent's opposition to the Applicants being granted leave to Further Amend their Plaint is the contention that the Applicants had not annexed the proposed Further Amended Plaint to the motion to enable the court and parties to appreciate the nature and extent of the amendments sought. The applicants in their defence asserted that in their Further Affidavit, the Applicants herein have set out the specific nature of the amendments that they intend to make and have annexed a copy of the proposed Further Amended Plaint which cures the 1st Defendant's concerns and as such, in line with the calling of Article 159 of the Constitution of Kenya, and therefore urged the court to determine the application on its merits.
24. The applicants contended that the proposed amendments do not in any way introduce any new cause of action or fundamentally alter the nature of the Plaintiff's case or set forth anything inconsistent to what has already been pleaded and rather that the said amendments sought by the Applicants only set forth with clarity and precision the particulars of the Defendants' unlawful actions which is already an issue that had been pleaded. The amendments highlight the failure by the 1st Defendant to realize the assets of the principal debtor for which it equally holds a floating charge over and the failure to serve upon the guarantor the requisite statutory notices.
25. The applicant stated that the defendants/respondents do not stand to suffer any prejudice at all as the matter is yet to be heard and they will similarly have an opportunity to respond accordingly.
26. The applicants reiterated that the present application is merited and ought to be allowed as prayed. The amendments sought will enable the court effectually and conclusively determine the issues in dispute between the parties and there is no prejudice whatsoever that the Defendants/Respondents stand to suffer as the matter is yet to be heard and they will similarly have an opportunity to respond to all the grievances set forth by the Plaintiffs.
27. The respondent reiterated that the application is fundamentally defective and lacks merit because the Applicants have failed to annex the proposed Amended Plaint to their Motion. This omission prevents both the Court and the Respondents from assessing the nature, scope, and legal merit of the



proposed amendments. The failure to attach the Proposed Plaintiff has significant legal consequences, as established in *Josephat Mwangi Moracha & another v HFC Limited* [2021] eKLR, where the court refused to allow an application to amend pleadings specifically because the amended plaintiff was not annexed to the application. In paragraph 71 of the said decision, the court made the following observation: “Without annexing a draft further amended plaintiff, the respondents herein are deprived of the opportunity to determine if a new or inconsistent cause of action is introduced or a vested interest or accrued legal right has been affected and that the sought amendment could be allowed without injustice to them. In the circumstances, the failure to annex the draft further amended plaintiff is fatal to the plaintiffs’ application as it is incapable of an informed response from the respondents. This prayer is not available to the plaintiffs.”

28. The respondent reiterated that it is well-established that amendments sought at advanced stages of proceedings, such as in the instant case where amendment was sought during the hearing date, must demonstrate both good faith and due diligence—neither of which can be assessed in the absence of the actual proposed amendments. They cited the case of *Lewar Ventures Limited v Equity Bank (Kenya) Limited* [2022] KEHC 998 (KLR) where the court held as follows with regard to amendment of pleadings: “The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows; that the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.”
29. The respondent reiterated that the application fails to meet the legal threshold for amendment of pleadings and therefore urged this to the Court dismiss the Applicants’ Application with costs.
30. I have considered the application, response and submissions by parties and I find that the issue (s) for determination are whether to allow the applicant to substitute the 2nd Plaintiff (Deceased) with her personal legal representatives and to grant leave to the applicants to amend their pleadings.
31. On the issue as to whether to substitute the 2nd Plaintiff (Deceased) with her personal legal representatives, whereas the Applicant has sought for substitution, it is not in doubt that by the time the Application of substitution was being sought, the suit had already abated as one year had already lapsed from the date of the Deceased’s demise and therefore in accordance to the provisions of Order 24 Rule 7 (2), the Applicant ought to first have sought for the revival of the suit since the suit had abated before seeking to be substituted. In his submissions the Applicant has not submitted as to whether he intends to make an Application for revival of the suit and subsequently proceed with it. However, the provisions of law provide that a revival must first be sought and prove to the Court that sufficient cause has been shown before a substitution is done. The Court of Appeal in *Rebecca Mijide Mungole another v Kenya Power Lighting Company Ltd 2 others* 2017 KECA 544 (KLR) observed as follows; “Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff’s legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it.” In light of the foregoing, the suit having abated against the 2nd Plaintiff, this court cannot therefore proceed to entertain the prayer to grant leave for the applicants to amend the pleadings.
32. Consequently, the notice of motion dated 19th March, 2025 is hereby struck out in its entirety.



**DELIVERED, SIGNED AND DATED AT KERICHO THIS 30TH DAY OF APRIL, 2025.**

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**J.K. SERGON**

**JUDGE**

In the Presence of:-

C/Assistant – Rutoh

No Appearance for the Defendant

Kirui holding brief for J. K. Mutai for Plaintiff

