



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO. 366 OF 2003
IN THE MATTER OF THE ESTATE OF JAMES MBUGUA MUCHUKU (DECEASED)

NYAMATHWE KIBERA

MARGARET

KURIA

JANE WANJIRU

GATHURI

LUCY NYAGUTHIE

MBUGUA

VIOLET WAMBUI

WINNIE NJERI.....APPLICANTS

VERSUS

JOHANNES MBUGUA MUCHUKU.....RESPONDENT

RULING

This ruling is in respect of the application dated 11th June, 2014. By summons premised on **rule 73** and **rule 49** of the **Probate and Administration Rules**, the applicants seeks orders:

1. Spent
2. That the Hon. Judge be pleased to grant leave to the applicants to amend the application dated 12th May, 2011.
3. That the draft amended application annexed be deemed as duly filed subject to payment of the court's requisite fee.
4. That costs be in the cause

The application is premised on grounds on the face of the application namely:

- a. That the amendments sought are necessary in the interests of justice in that the orders sought will be futile if they are granted without first amending the pleadings.
- b. That the Plaintiff/Respondent will not be prejudiced in any way if the amendments sought are allowed, rather justice will be done holistically.
- c. That the advocate previously on record was not familiar with the suit properties and used the word Nyahururu instead of Nyandarua in describing the properties.

It is further supported by an affidavit sworn by Kiongo P. Murimi.

The gist of the grounds and affidavit in support is that the subject parcels of land in dispute are:

- a. Nyandarua/Matindiri/338
- b. Nyandarua/Matindiri/335
- c. Nyandarua/Matindiri/345
- d. Nyandarua/Matindiri/344
- e. Nyandarua/Matindiri/337
- f. Nyandarua/Matindiri/336
- g. Nyandarua/Matindiri/339

It is the applicants' case that their erstwhile Advocate described the properties using the word Nyahururu instead of Nyandarua. The amendments sought are necessary for the interest of justice and for the court to conclusively determine the real issues. No prejudice will be suffered if the orders sought are granted.

The application is opposed and in a replying affidavit the Respondent has deponed that the applicant has failed to disclose that paragraph six (6) of that application was struck out by the court. The said order is in regard to parcel Nos. Nyahururu/Matindiri/338, 337, 335, 336, 345, 344 and 339 which are not subject matter of these proceedings. The said order is said to be illegal as the court had no jurisdiction to make an order which is equivalent to paying wages of a worker to a third party. It is stated that the application to amend is untenable.

Both parties gave brief oral arguments in line with the respective pleadings/Affidavits.

I have had occasion to consider the material before court. The well settled rule with regard to amendment of pleadings has been concisely stated in **Vol.2, 6th Ed. At page 2245** of the **AIR Commentaries** on the **Indian Civil Procedure Code** by Chittaley and Rao in which the learned authors states:

“that a party is allowed to make such amendments 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 has been introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side,”

As held in **Central Kenya Limited V. Trust Bank Limited and 4 Others**, the overriding considerateness in an application like the one before court is whether the amendments are necessary for the just determination of the controversy between the parties. The policy of the Law is that amendments to pleadings are to be freely allowed unless by allowing them (the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs).

In our instant application, the applicants have through affidavit evidence demonstrated that the parcels of Land forming the subject matter of their claim has improperly described by their erstwhile Advocates on record when drawing the pleadings. They seek this court's leave to properly describe the subject matter.

The reply by the Respondent does not raise any possibility of prejudice or injustice being occasioned by the sought amendments. No new cause of action is introduced. Indeed and with profound respect, the replying affidavit is vague and I am unable to make head or tail with the nexus between the striking out of paragraph 6 of the application with the prayers for amendment.

The court's order to strike out that paragraph has no relevance at all to the issue of amendment sought. The essence of that order was that paragraphs six (6) was improperly pleaded as this matter arose under the old constitution and under schedule six (6) (the transition), this case was to proceed under the old constitution.

In the end, I must find and hold that the amendments sought are necessary in order to bring out the real issues in controversy and to avoid a multiplicity of suits. No injustice or prejudice will be occasioned on the part of the Respondent if the orders sought are allowed.

With the results that the application dated 11th June, 2014 is allowed in terms of prayers 2 and 3. The draft application be deemed as duly filed and served upon payment of the court's requisite fee. This being a family matter, each party to bear its own costs.

Dated, Signed and Delivered at Nakuru this 17th day of February, 2016.

A. K. NDUNG'U

JUDGE