



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ELC CASE NO.99 OF 2017

BARASA OBANGO OKWAKO.....PLAINTIFF

VERSUS

ALEX WANDERA MAKOKHA.....DEFENDANT

R U L I N G

1. The defendant – **ALEX WANDERA MAKOKHA** – filed a Notice of Preliminary Objection dated 28/7/2017. The objection intended to be raised was that the reply to defence was filed out of time while the amended plaint herein was filed without leave of Court. According to the defendant, that was in violation of Civil Procedure Rules. The defendant wants both the amended defence and Reply to Defence struck out.
2. On 21/11/2017 it was agreed that the Preliminary be canvassed by way of written submissions. In that regard, the defendant's submissions were filed on 29/11/2017. The plaintiff – **BARASA OBANGO OKWAKO** – had his submissions filed on 4/12/2017.
3. The defendant submitted, *inter alia*, that the plaintiff was served with defence on 7/7/2017 and was supposed to file a reply seven (7) days after that service, meaning 14/7/2017 or thereabouts. He didn't do so but instead filed it on 26/7/2017. He went on to serve it on 23/8/2017. Then the plaintiff also filed amended plaint without leave of Court. According to the defendant, this is unacceptable and the two documents should be struck out.
4. The Plaintiff on the other hand submitted, *inter alia*, that the objection is misplaced and lacking in merit. It was said to smack of legalism at the expense of substance. It was pointed out that Article 159 (2) (d) of the Constitution and Sections 1A and 1B of Civil Procedure Act (Cap 21) enjoin the Court to administer justice without undue regard to procedural technicalities.
5. A further argument was raised regarding the amended plaint. The argument was that the reply to defence was filed on 26/7/2017 while the amended plaint was filed on 3/8/2017. According to the plaintiff, this was before the close of pleadings and no leave of Court therefore was required. The Court was asked to dismiss the Preliminary Objection.
6. I have considered the objection raised and the rival submissions. I have had a look too into the pleadings on record. The plaint was initially filed on 11/5/2017. The defence was filed on 7/7/2017. It is not clear when service was done but two months, which is the period that separate the filing of these two pleadings, seems to be a long time. And since the plaintiff is the one who seems to be beholden to strict compliance with procedure, it needs to be pointed out that he was supposed to file affidavit of service but did not.
7. Further, the defendant avers that the defence was served on the plaintiff on 7/7/2017. According to defendant, the plaintiff was supposed to file a reply within 7 days. But Order 7 rule 17 (1) of Civil Procedure Rules enjoin that a reply is supposed to be filed within 14 days. The defendant is therefore wrong on his 7 days period.
8. If the defendant was served with the defence on 7/7/2017, he was supposed to file a reply by 21/7/2017, latest. But he filed a reply on 26/7/2017. Quite clearly, he was out of time even if disregard the 7 day period and go by the 14 days period provided for in law. The situation becomes complicated when you consider that 14 days after filing of defence, if no reply is filed, the pleadings are deemed closed. What this means is that the plaintiff filed his reply to defence when pleadings had already closed. If we go strictly by the requirements of procedure, the plaintiff was supposed to seek leave of Court before filing his reply. He didn't seek such leave.
9. The amended plaint itself was filed after the reply to defence. We have already seen that by the time the reply to defence was filed, pleadings were already closed. It also follows therefore that the amended plaint was filed when pleadings had already closed. Order 8 rule 3 of Civil Procedure Rules provide that the Court is required to grant leave when amendment is sought when pleadings are already closed. Again herein, the plaintiff didn't seek such leave.
10. In general terms therefore, the defendant is right when he faults the plaintiff for non-compliance with procedure. It bears pointing out that the Constitutional and Statutory provisions cited by the plaintiff to obviate the need for compliance with procedure do not indeed

authorise non-compliance. These provisions are not meant to be a panacea for incompetence in complying with the law. A careful reading of the provisions shows that what is forbidden is “undue regard” to procedural technicalities. What this in effect means is that due regard – as opposed to undue regard – shall be heeded to procedure. It is this due regard that the plaintiff in this case does not seem to have.

11. But should this lead to striking out of what is already filed. The answer to this is No. The Court should not be high handed. In my view, it is enough that the plaintiff be condemned to pay some costs to the defendant.

12. The upshot is that I uphold the Preliminary Objection filed herein as it has merits but I decline to take the action urged. Instead I order the plaintiff to pay shs.3000/= to the defendant on or before the next appearance of this matter in Court.

Dated, signed and delivered at Busia this 19th day of April, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff.....

Counsel of Defendant.....