



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

ENVIRONMENT AND LAND CASE NO. 24 OF 2013

THOMAS BUKHEBI WANJALA.....PLAINTIFF/RESPONDENT

VERSUS

SIMON PETER MUNAYI

SALOME FELISTA WAKALA.....DEFENDANTS/APPLICANTS

RULING

[1] This is a ruling on an application dated 13/7/2015. The application is brought under Order 45 rule 1 of the Civil Procedure rules, 2010 where the applicants seek for orders:-

1. *That service of the application be dispensed with in the first instance due to urgency.*
2. *That the court orders dated the 9th of July, 2015 be reviewed.*
3. *That costs of the application be provided for.*

The application is supported by the grounds on the face of it and the supporting affidavit of D.L Were & Co. Advocates. Briefly, the grounds are that D.L Were & Co. Advocates who are the advocates for the defendant/applicants, had filed an application dated 8/05/2015 seeking prayers that:-

- a. *The Plaint be amended to remove claim for general damages for breach of contract.*
- b. *The reply to counterclaim be struck out with costs entered against the plaintiff for Kshs.190,000/=.*
- c. *The costs of the application be borne by the plaintiff.*

That the court delivered its ruling on the 9/7/2015. That the ruling contained mistakes/errors of fact apparent on the face of the record. That the court mistakenly believed that the application had been filed by the plaintiff seeking to have the counterclaim struck out.

That at the end of the ruling, the court dismissed the defendants/applicants application but awarded them costs of the application that had been dismissed.

[2] In reply the plaintiff stated that the applicants are simply interested in obtaining summary judgement

without giving him ample time to ventilate his grievances. That the applicants are keen on amending his pleadings to remove his real grievance so that he is left exposed and almost without a case. That the defendants are also seeking to have his reply to their counterclaim struck out with no reasons advanced for the same.

[3] The issue this court is to determine is whether the application for review is merited.

Order 45 rule 1 provides:-

1. *Any person considering himself aggrieved;*

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

[4] I have looked at the ruling delivered on 9/7/2015 and I indeed do note the following errors.

1. The application dated 8/05/2015 on which I issued a ruling, was brought by the defendants/applicants and not the plaintiff.

2. The application sought to strike out the reply to counterclaim and not the counterclaim itself.

3. The applicants wanted judgement to be entered against the plaintiff for Kshs.190,000/= but I dismissed the defendants/applicants application and at the same time awarded them costs.

Those are glaring errors on the face of the record. My orders should and ought to be reviewed.

[5] The defendant in this case filed a notice of Motion dated 8th May, 2014 praying for the following orders.

1. That the plaint herein be and is hereby amended to remove the claim for damages for breach of contract.

2. That the reply to counter claim be and is hereby struck out with costs and judgment be entered against the Plaintiff for Kshs.190,000/=.

3. That costs of this application be provided for and be paid by the Plaintiff/Respondent.

The defendants rely on order 2 rule 15(1) of the Civil Procedure rules 2010. The defendant erroneously seem to believe that the rule gives them power to amend the other parties pleadings. In civil proceedings parties are bound by their own pleadings. It is only the party that has filed those pleadings that can amend them. However, the adverse party can apply to have the pleadings that is bad in law or disclosing no cause of action or that is offensive to be struck out by the Court under the relevant Section of the Civil Procedure Rules.

The prayer No. 1 in the Notice of Motion therefore cannot be granted.

Prayer No. 2 is for summary striking out of the reply to the Counter claim. The parties to this case should be allowed to canvass the issues therein by tendering evidence and by citing the relevant Law at the hearing hereof. The Plaintiff in this case cites a contract of sale, breach of that contract and that the

contract was null and void and that he suffered loss and damage.

These are not issues that can be determined in a summary manner through a notice of Motion. Evidence must be tendered in Court and if need be, the same be tested through Cross examination in Court. I therefore decline the invitation to determine this suit through a summary manner by way of a notice of Motion. This application succeed with costs. The suit will be fixed for hearing on merits.

It is ordered so.

Ruling read in Open Court.

Dated, signed and delivered on 20th September, 2016.

S. MUKUNYA

JUDGE

In the Presence of:

Joy/Gladys - Court Assistants

Mr. Were for the Applicants

Mr. Sichangi for the Respondents