



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CASE NO.212 OF 2012

MUSYOKA KALOKI MBUI PLAINTIFF/APPLICANT

VERSUS

EXPORT PROCESSING ZONE

AUTHORITY (EPZ) ATHI RIVER (K) DEFENDANT/RESPONDENT

R U L I N G

1. By an **Application** dated **25.8.2012** and a **Preliminary Objection** dated **7.3.2013** the Plaintiff/Applicant seeks orders to strike out the Defendants amended Defence and counterclaim filed on 17.8.2012 on the grounds that the same was filed without leave as pleadings had been closed at the time of the filling of the same. The Respondent opposes the same motion and the Preliminary Objection via grounds of opposition filed on 29.11.2012. The Applicant's case is that the **Plaint** was filed on **19.7.2012**. The Defendant filed **defence** dated **27.7.2015** same date. **Reply** to **defence** was filed on **3.8.2012**. 14 days lapsed and pleadings closed 14 days after 3.8.2012 i.e. by 17.8.2012.

2. Amended defence and counter claim were filed on 17.8.2012. According to the Defendant the Plaintiff was filed on 19.6.2012 and defence was filed on 27.7.2012. Reply to defence was filed and served on 3.8.2012. the amended defence and counter claim was filed on 17.8.2012. The Plaintiff submits that the amended pleadings offends Order 2 Rule 13 as the filing of reply to defence ousted Plaintiff's rights to reply. The counterclaim thus prejudices the Applicant. In any event the amendment introduces new matter which Plaintiff will not be able to respond to. Further the amendment is stated to be lodged out of the stipulated time thus amenable to be struck out of the record.

3. The Plaintiff also submits that the same amendment violates order 8 Rule 7 (1) for not endorsing date of amendment or date the order was made allowing amendment or even the rule under which amendment was made. The Applicant relies on **SYLVESTER KYALO & ANOTHER –VS- BAYUSUF C.A. 38/1981 (1983) KLR 29** to urge court to expunge the amended pleadings from the record.

4. The Respondent's rejoinder is that a simple calculation of time shows that the amendment was done by filing said pleadings 14 days after service of the reply to defence i.e. 3.8.2012 to 17.8.2012. The Respondent have conceded that he has offended order 8 Rule 7 Civil Procedure Rules in that number of rule relied on to amend the pleadings was not endorsed. However, the applicant takes refuge under order 2 Rule 14 which stipulates that no technical objection may be raised on pleading on the ground of

want of form. In any event there is no prejudice to be occasioned to the Applicant.

5. He also relies on Article 159 (d) Constitution of Kenya. He also urges the court to endeavor to do justice without being over technical taking to account that the subject matter is land and land disputes are essentially emotive. After going through the material before the court, the following issues are observed to emerge.

1. Whether the amended defence and counter claim were filed out of time?
2. If yes, what is the appropriate order to make?
3. Has the violation of order 8 Rule seven, warrant striking out the amended pleadings in the circumstances of the case?
4. What is the order as to costs?

Order 8 Rule 8 states that any party may amend without leave pleadings before pleadings are closed.

Order 2 Rule 13 stipulates that:

“the pleadings in a suit shall be closed 14 days after service of the reply or defence to counterclaim or if neither is served, 14 days after service of defence...”

The amended defence and counterclaim was filed on 17.8.2012 after filing and service of reply to defence on 3.8.2012. This was within 14 days as stipulated by the law cited above. The pleadings were and are lawfully filed. The same amended pleadings did not endorse the rule under which the amendment was made. The above omissions offend the provisions of order 8 Rule 7 Civil Procedure Rule 2010. However, the aforesaid omission is a mere matter of form.

6. The same is now curable under the overriding objective provisions Section 1A and 1B of Civil Procedure Act Cap.21, the provisions of order 2 Rule 14 Civil Procedure Rule and Article 159(1) (d) Constitution of Kenya. The Applicant does not demonstrate the prejudice he is going to suffer by the amendment sought. The Plaintiff has right to reply to the counter claim within 14 days after service.

7. The totality of the court’s finding is that the motion and the P. O. are rejected. The court makes the following orders:

1. The amended pleadings be endorsed with the rule upon which amendment is made and served within 14 days. The Applicant shall reply to the same within 14 days of service.
2. The costs shall be in the cause.

Dated and Delivered at Machakos, this 20th day of February, 2015.

CHARLES KARIUKI

JUDGE