



REPUBLIC OF KENYA
HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 49 OF 2012

RUKIA CHADIKHA ISSA.....PLAINTIFF

-V E R S U S-

DANIEL MDEI MURIUKI.....1ST DEFENDANT

IDIME ENTERPRISES LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. There are two applications before court. The first application is by the Plaintiff and is dated 23rd May 2013 (“the Plaintiff's application”). The second application is by the 1st Defendant and is dated 18th June 2013 (“the Defendant's application”).
2. The Plaintiff's application is for the following main order:
 - i) That the court be pleased to grant leave to the Plaintiff to amend her pleadings in the form of the draft Originating Summons annexed to the affidavit of Rukia Chadikha Issa in support thereof.**
3. The Defendant's application on the other hand seeks to strike out the Plaintiff's application on the basis that the same is prejudicial and an abuse of the court process.

The Plaintiff's Application

4. The Plaintiff commenced this suit *vide* a Plaint dated 10th February 2012. Her claim is that by a contract dated 30th December 2008, she permitted the 2nd Defendant to collect rent from premises situate at Khadija Estate on commission basis. That in December 2011, the 2nd Defendant denied the Plaintiff her rent on the basis that her husband, the 1st Defendant herein, had given the 2nd Defendant instructions not to pay rent to the Plaintiff. The Plaintiff contends that the premises in question belonged to her and that there was no privity of contract between the Defendants and so the 1st Defendant could not stop the 2nd Defendant from remitting rent to the Plaintiff. The Plaintiff therefore sought orders of (unspecified) mandatory injunction against the Defendants, a declaration that the property comprised in the premises belonged to her as well as damages for breach of contract and costs of the suit.

5. It is that suit that the Plaintiff now seeks to amend in terms of the prayer in the Plaintiff's application.
6. In her Affidavit in support of the application sworn on 23rd May 2013 and her written submissions, the Plaintiff contends that this suit is a matrimonial matter involving matrimonial property. That the Plaintiff's then advocates on record, M/s Gichana Bw'omwando & Company Advocates, did not file the matter as a matrimonial cause under the Matrimonial Property Act 1882 but in the form of a Plaint which is not the correct format of bringing before the court disputes relating to matrimonial property. That the mistake to file the suit by way of Plaint was by the Plaintiff's then advocates on record and the same should not be visited upon her, the client.

The 1st Defendant's Application

7. The 1st Defendant's application seeks to strike out the Plaintiff's application. The 1st Defendant contends that the Plaintiff's application is bad in law and is an abuse of the court process as it seeks to amend an existing suit by way of originating summons. That it is wrong for the Plaintiff to lie that she has just discovered that the suit involves matrimonial property because her decision to seek the amendment was informed by the court's ruling of 7th November 2012 which gave directions on the suit to the effect that the parties may move to the Family Division to sort out the feud over matrimonial property.
8. The 1st Defendant submits that Order 37 of the Civil Procedure Rules outlines who can file originating summons and matrimonial causes is not one of them.

ISSUE FOR DETERMINATION

9. The main issue for determination is whether the court can order an action instituted by a plaintiff to be continued by way of an originating summons.

ANALYSIS/DETERMINATION

10. The Plaintiff's prayer is for amendment of pleadings. Although the Plaintiff does not specify which pleading she seeks to amend, the fact that she annexed a draft originating summons indicates that she intends to replace the existing plaint with the intended originating summons. The question that the court needs to answer is whether there is a procedure for the conversion of an existing plaint into an originating summons.
11. Order 37 Rule 19 of the Civil Procedure Rules, 2010 expressly provides that a suit commenced by way of originating summons may be continued as though it was commenced by way of Plaint. However, the reverse is not provided for in the Rules. There is no provision on how an action begun by plaint may be continued as originating summons.
12. In the case of **Bwana –Vs- Said & 2 Others [1991] KLR 454**, the Court of Appeal held as follows:

“It was not possible in my judgment to correct the situation by converting the action into a claim by way of an originating summons as there is no provision in the Civil Procedure Rules, though under Order 36 Rule 10, there is jurisdiction to convert a case which has been incorrectly brought by an originating summons so as to be continued as a normal suit... there appears to be no authority or provision for the reverse procedure, that is to say for an action begun by plaint to be continued as an originating summons. But, even if that could be done, there was no application on that behalf made in the High Court...”

13. **Black's Law Dictionary, Eight Edition**, at page 89 defines “*amend*” as:

“To make right; to correct or rectify. To change the wording of, to formally alter by striking out, inserting or substituting words.”

14. Amendment is only done to make right, correct or rectify an existing

pleading. The amendment is done by changing the words of the pleading either by striking out, inserting or substituting thereof. In deed Order 8 Rule 7 of the Civil Procedure Rules, 2010 provides for the mode of amendment of pleadings which involves deletion and addition of words as follows:

- 7. (1) Every pleading and other documents amended under this Order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made.**
- (2) All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.**
- (3) Colours other than red shall be used for further amendments to the same document.”**

15. The prayer sought by the Plaintiff is for amendment of pleadings yet no draft amended pleading is annexed thereto. The draft Originating Summons annexed to the Plaintiff's application is totally a new pleading. It does not seek to make right, correct or rectify an existing pleading neither does it change the wordings of any pleading either by striking out, inserting or substituting words of that pleading. Instead, it is a totally new pleading in itself. In my view, an amendment of an existing pleading cannot be done by introducing a totally new and different pleading from the one being sought to be amended. This suit was filed by way of plaint and the Plaintiff can only amend it by filing an amended plaint.

16. Even then, assuming that there was provision for an action commenced by way of plaint to be continued as an originating summons, no such order has been sought by the Plaintiff. The Plaintiff's prayer is for amendment of pleadings and not that the suit be continued by way of originating summons. In my view, therefore, the intended originating summons cannot be introduced to the suit as sought.

CONCLUSION

17. The Plaintiff's application fails, first, because there is no provision for converting an action commenced by plaint into a claim by way of an originating summons, and secondly (even if there was such provision), because the Plaintiff did not make a prayer that the claim be converted into action by originating summons. The Plaintiff's application is therefore struck out with costs to the 1st Defendant.

18. The 1st Defendant's application sought to strike out the Plaintiff's application. In my view, the best approach the 1st Defendant ought to have taken is to comply with Order 51 Rule 14 which provides as follows:

“14. (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents:-

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition.”

19. The Defendant, instead of filing any or all of the documents provided for in Order 51 Rule 14 above, chose to file an application for the striking out of the Plaintiff's application. In my view that was not necessary. The upshot of this is that although what the 1st Defendant hoped to achieve, namely to have the Plaintiff's application struck out, has been achieved, the 1st Defendant shall not have costs of the application dated 18th June 2013 because the procedure he chose was not appropriate in the circumstances.

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE