



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO. 11 OF 2013

BONFACE OCHIENG ORIARO.....PLAINTIFF

VERSUS

PENINAH ATIENO.....DEFENDANT

RULING

1. This a ruling on an application filed here by way of a summons in chambers on 22/9/2008. The ruling also concerns a preliminary objection dated 5/5/2008 and filed on the same date.
2. The chamber summons seeks, inter alia, for leave to amend plaint. The amendment sought consists in dating and signing the plaint and filing the necessary verifying affidavit. Provision for costs is also sought.
3. From the grounds advanced and the affidavit sworn in support of the application, it is clear that the plaintiff's side inadvertently forgot to sign and date the plaint. It is clear that the necessary verifying affidavit was not filed.
4. It would appear that the plaintiff/applicant anticipated what the defendant/objector might say to support the preliminary objection filed on 5/5/2008. I say so because during hearing the same issues raised in the application were raised while arguing the preliminary objection. The preliminary objection had actually been filed earlier than the application.
5. Apart from the preliminary objection, the defendant/respondent also filed grounds of opposition to the application herein. The grounds of opposition were filed on 17/10/2008, which is about a month after the filing of the application.
6. The grounds of opposition termed the application as fatally defective and unmerited. The application was also said to be an after – thought and overtaken by events. Delay was also alleged and the suit was said to be non-existent since the plaint was unsigned.
7. The Court heard both sides on 10/7/2013. Each side reiterated much that is contained in what was laid before me in writing. In addition however, the plaintiff's side availed two decided authorities while the defendant's side availed one.
8. The two decided authorities availed by the plaintiff's side were

(a) ANYANGO ACHACHA VS ANTONY KIIGO NJIRU & ANOR: HCC NO.59/01, KISUMU

(b) MWATHI WANYOIKE & ANOR. VS EDWARD ODERA ONGONDO & ANOR HCC NO.45/03, KISUMU

These two authorities concerned pleadings that had the same issues as the pleadings herein. The court allowed amendment or rectification.

9. The defendant's side availed the decided case of **ATUL KUMAR MAGANLAL SHAH VS INVESTMENT & MORTGAGES BANK LIMITED & OTHERS: C.A NO.13/01, NAIROBI.**

This authority concerned unsigned pleadings also. The court of appeal stated that the position in Kenya is that an unsigned pleading can lead to dismissal of a suit. The Court of Appeal held that position despite its analysis of positions in other jurisdictions which showed an opposite view.

10. I have considered all what was laid before me. I would hesitate very much to dismiss a suit on such a technicality particularly where, as in this case, it is explained well how the mistake arose. The authority availed by the defendant's side espouse a rigidity that would cause an injustice. It is an authority that was decided long ago before the new Constitutional dispensation. It would be against the spirit of article 159(d) of our constitution to hold that procedural omission as enough to warrant dismissal of the suit herein. I apprehend that that would also offend the letter of Section 19 of Environment and Land COURT ACT which de-emphasizes this Court's adherence to technicalities of procedure and Rules of Evidence. It appears to me that this is the same spirit embraced by Sections 1A, 1B and 3A of Civil Procedure Act (Cap 21)

11. Bearing all this in mind, the application herein is allowed and the preliminary objection is dismissed.

A.K. KANIARU – JUDGE

10/12/2013

10/12/2013

A.K. Kaniaru – Judge

Dianga G. - C/C

No party – Present

Interpretation: English/Kiswahili

Odeny for Respondent/Defendant

Mwamu for Plaintiff/Applicant

COURT: Ruling on chamber Summons filed on 22/9/2008 and preliminary objection dated 5/5/2008 filed on the same date read and delivered in open **COURT.** Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

10/12/2013