



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO.586 OF 2005**

**EUNICE WAIRIMU MUTURI.....1<sup>ST</sup> PLAINTIFF**

**WASHINGTON MUCHIRI MUTURI .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MAVJI RAMJI PATEL .....<sup>T</sup> DEFENDANT**

**RULING**

On 12<sup>th</sup> July 2011, the Defendant filed a Notice of Motion of the same date under a certificate of urgency, seeking substantive orders that this Honourable Court be pleased to discharge, vary or set aside the Orders of Interim Injunction given by Honourable Mr. Justice Osiemo *ex-parte* on 4<sup>th</sup> July, 2005, and that the costs of the application be provided for.

On 11<sup>th</sup> October 2011, this Court allowed an oral application made by the Defendant's Counsel under Order 8 Rules 5 and 8 of the Civil Procedure Rules 2010 to amend the said application to reflect the substitution of the Plaintiffs. The substitution had been allowed by Hon. Mr. Justice Warsame on 15<sup>th</sup> July 2011, pursuant to an application dated 22<sup>nd</sup> June 2011. The Defendant's counsel was also directed to file and serve the amended application within 7 days, and parties were directed to thereafter, within agreed timelines, file and serve their written submissions on the amended application.

The hearing of the application was held on 22<sup>nd</sup> November 2011, which hearing date had been agreed on by both Counsels for the Plaintiffs and Defendant in court. The Defendant's Counsel was not present at the time allocated for the hearing, and this Court directed that a ruling on the application would be delivered on the basis of the pleadings filed, and written submissions filed by Counsels for the Plaintiffs and Defendant dated 7<sup>th</sup> November 2011 and 15<sup>th</sup> November 2011 respectively.

Upon perusal of the Amended Notice of Motion dated 19<sup>th</sup> October 2011 and filed in Court on the same date, this Court noted a number of irregularities that it will need to consider before addressing the merits of the said application. In addition to substitution of the Plaintiffs, the Defendant's Counsel made other amendments to the said application without leave of the court, and without the Plaintiffs also being accorded the opportunity to respond. The said amendments made without leave were as to the prayers sought, as shown by the following underlined sections:

1. That this Honourable Court be pleased to discharge, vary or set aside the Orders of Interim Injunction given by Honourable Mr. Justice Osiemo ex-parte on 17<sup>th</sup> May, 2005.
2. That this Honourable Court be pleased to review, discharge, vary or set aside the ruling delivered by Honourable Mr. Justice Mbogholi Msagha on 20<sup>th</sup> April, 2010 to strike out the Defendant's Defence and order that the matter proceed for formal proof.

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In addition to this abuse of the court process, the Defendant's Counsel did not comply with the provisions of Order 8 Rule 7 of the Civil Procedure Rules 2010 which provide as follows:-

(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.

No date of amendment as been endorsed on the Amended Notice of Motion, and the amendments made are not shown either by striking out the deleted words or underlining the added words in red ink.

The above cited provisions are couched in mandatory terms, and cannot be overlooked as a mere technicality, and this position has been stated in various decisions of this court – by Ringera J (as he then was) in **Mutuku & 3 Others v United Insurance Co. Ltd (2002) 1 KLR 251**, by Mwera J. in **Stockman Rozen Kenya Ltd v Da Gama Rose Group of Companies (2002) 1 KLR 572** and by Ochieng J. in **Wilson Dickson Katibi v Barclays Bank of Kenya and 2 others H.C.C.C No. 259 of 2005 (Nairobi)**. The procedure provided for in the said provisions must be complied with to ensure that no undue prejudice is occasioned to an Applicant's opponents.

In the present application not only do the prayers sought by the Defendant in the Amended Notice of Motion considerably depart from the one in the original application, they are also sought close to the hearing date without leave. In addition, there is also no way of discerning the amendments made in the said Amended Notice of Motion, as they are not marked in the manner required by the law.

In my opinion the amended application is meant to obfuscate the issues for determination, and more importantly is likely to prejudice the Plaintiffs in the presentation of their case. For these reasons I will not belabor with the merits or demerits of the respective parties' cases, and hereby strike out the said Amended Notice of Motion *suo moto* pursuant to section 3A and 63(e) of the Civil Procedure Act.

The Defendant shall bear the costs of this application.

Dated, signed and delivered in open court at Nairobi this 30<sup>th</sup> day of January, 2012.

**P. NYAMWEYA**

**JUDGE**