



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 367 OF 2010

PHOEBE WANGUI (Formerly Known as Phoebe Wangui Kamore).....PLAINTIFF

VERSUS

JAMES KAMORE NJOMO.....DEFENDANT

RULING

On 12th October 2011, **Mwera, J** granted leave to the plaintiff to file and serve an amended plead within 14 days. On 25th October 2012, an amended plead was filed before this Court. However, the said pleading was not signed.

The defendant has now moved this Honourable Court vide a Notice of Motion dated 8th February 2012 seeking that the said amended plead be struck out with costs and that the costs of the same application be provided for. That Motion is expressed to be brought under the provisions of Order 2 rule 16 and Order 51 rule 13(2) and is supported by an affidavit sworn by **John Njongoro**, the defendant's advocate. The only ground relied upon in the said affidavit is that the said amended plead was not signed contrary to the provisions of Order 2 rule 16 of the Civil Procedure Rules.

Although the plaintiff did not file either a replying affidavit or grounds of opposition the Court, in the exercise of its inherent jurisdiction and in the wider interest of justice, I allowed **Mr Khamati**, learned counsel for the plaintiff to oppose the application on law.

In his submissions, **Mr Njongoro**, learned counsel for the defendant submitted that Order 2 rule 16 of the Civil Procedure Rules mandates that every pleading filed in court must be signed in terms of Order 9 rule 3 of the same Rules. According to counsel since there is no replying affidavit, filed the averments in the supporting affidavit remain wholly unchallenged. On the authority of the case of **Mutuku & 3 Others vs. United Insurance Co. Ltd [2002] 1 KLR 250**, counsel submitted that an unsigned pleading cannot be valid in law since it is the signature of the appropriate person which authenticates a pleading and an unauthenticated document is not a pleading. Where a pleading has been amended and the same struck out, it is contended, the party affected has simply no valid pleading left on the record as the affect of the amended defence is to supersede and replace the original defence. Counsel accordingly urged the Court to strike out the entire suit.

On his part **Mr Khamati**, learned counsel for the plaintiff while conceding the defect in the amended plead submitted that the said defect was caused by mistake of counsel. In counsel's view, the rules cited by the applicant do not state that when a defective pleading is struck out the entire suit is struck out. According to counsel even if the amended plead is struck out the original pleading remains on the record. On the above cited decision counsel submitted that at page 254 of the decision the learned Judge himself confessed that he was only giving an opinion and urged the Court not to strike out the suit. On the other

hand counsel urged the court that in the event that the suit is struck out counsel who filed the pleading in question should be penalised in costs since this was counsel's own making. However, counsel urged the Court to allow the plaintiff filed a proper amended plead.

I have considered the foregoing. Order 2 rule 16 of the Civil Procedure Rules provides as follows:

Every pleading shall be signed by an advocate, or recognised agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person.

Order 9 rule 2, on the other hand, provides as follows:

The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;

(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

That the amended plead that was filed in Court pursuant to the said order was not signed and therefore did not comply with the provisions of Order 2 rule 16 is not in doubt. The only remaining issue for determination is the consequences of the omission to sign a pleading. In **Atulkumar Maganlal Shah vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 13 of 2001** consolidated with **VipinMaganlal Shah Vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 19 of 2001 [2001] 1 EA 274; [2001] KLR 190** the Court of Appeal was of the following view:

“Where a pleading is not signed the same would be struck out rather than being dismissed...A pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognised agent and this is meant to be a voucher that the case is not a mere fiction...The failure to sign the service copy of the statement of claim if the original is signed is not fatal...The position in England is that a pleading must be signed either by counsel or the party in person or the party's recognised agent...In Kenya where a record of appeal is signed by a suspended advocate who is an unqualified person is incurably defective and struck out...The position in India is that the failure to sign a plead is merely a matter of procedure and the Court may allow a plaintiff to amend the plead by signing the same...The object of the legislature in requiring that a plead be signed by either the counsel or the party suing is to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plead or the pleading...In Kenya a party who files an unsigned plead runs a very grave risk of having that plead struck out as not complying with the law”.

From the foregoing, it is clear that the position in Kenya as regards unsigned pleadings is the same whether in the High Court or in the Court of Appeal. Consequently such pleadings are rendered incompetent and are for striking out. It is therefore clear that the fate of the amended plead filed herein on 25th October 2011 is sealed and the Court has no option but to strike out the same. I accordingly accede to the Motion dated 8th February 2012 and strike out the said amended plead with costs to the defendant. This decision would have been sufficient to deal with the application as presented. However, in their submissions counsel also dealt with the consequences of striking out of an amended a plead and out of deference to counsel I have decided to deal with the issue as well.

Although the application did not specifically seek the striking out of the whole suit, **Mr Njogoro** submitted that on the authority of the decision in **Mutuku & 3 Others vs United Insurance Company Ltd** (supra) the striking out of the amended pleadings automatically renders the suit a nullity. Order 8 of the Civil Procedure Rules which deal with amendments of pleadings does not expressly deal with the fate of the original pleadings subsequent to amendments. However Rule 7(2) therefore provides:

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.

The status of amended pleadings was dealt with by the Court of Appeal in **Delphis Bank Limited vs. Caneland Ltd & 2 Others Civil Application No. Nai. 33 of 1999** where it held that amended pleadings may be looked at by the Court. This was the position in **South British Insurance Co. Ltd. vs. Samiullah [1967] EA 659** where **Law, JA** was of the view that even if an amended pleading does relate back to the date of the original pleading for some purposes, such relation back cannot operate so as to preclude a Judge from taking note of the amendment if such date is material to the issues for decision. Similarly, **Newbold, JA** (as he then was) in **Eastern Radio Services & Another vs. R J Patel T/A Tiny Tots and Another [1962] EA 818** was of the view, which view I share that:

“whereas a pleading as amended may be treated as if it were the original claim, there is nothing which requires that it must be so treated for all purposes and in all circumstances. Logic and commonsense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed”.

I have read the decision of **Ringera, J** (as he then was) in **Mutuku & 3 Others vs United Insurance Company Ltd** (supra). Whereas I agree that the effect of an amended pleading is to supersede and replace the original pleading, that is only true with respect to the issues for determination. That, in my view, does not mean that the only relevant document is the amended pleading. In my view, that is the rationale behind the provision that the amendment in the amended pleading be legible and ought not to be obliterated. To say that once an amended pleading is struck out, the party has no pleading on record would ignore the fact that a suit is not instituted by an amended pleading but by original pleading. Order 8 rule 2 for example empowers the Court to disallow or strike out an amended pleading if the same was improperly amended. That rule does not state that in that event the whole suit is struck out. **Ringera, J**, himself recognised the difficulty of holding otherwise and did express doubts as to the legal position. Accordingly, it is my view and I so find that the mere striking out of an amended pleading does not *ipso facto* amount to the striking out of the whole suit. It is, in my view that it was on that basis that the defendant herein did not seek in the application itself to have the suit itself struck out.

Even if I were to accept that the position taken by **Ringera, J** was the correct position the circumstances have since changed. Since the advent of the overriding objective, the Courts are now more than ever reluctant to summarily terminate proceedings unless the defect complained of is so fundamental that there is no alternative cure to it. In **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the Court of Appeal expressed itself as follows:

“the applicant’s submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of section 3A and 3B of the Appellate Jurisdiction Act...The advantage of the CPR over the previous rules is that the court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out. In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives”.

Therefore before I can adopt the more draconian option of striking out the suit, I must ask myself whether there are alternatives available to striking out since the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Since the enactment of the said provisions the Court of Appeal has made pronouncements on the same. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, the Court of Appeal held *inter alia* that:

“the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible”.

The same Court in **Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

“where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case”.

I accordingly, decline to strike out the suit in the circumstances of this case.

Ruling read, signed and delivered in court this 27th day of July 2012.

G.V. ODUNGA

JUDGE

In the presence of:

Mr Khamati for Plaintiff

Mr Gacheru for Mr Njogoro for the defendant