



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Appeal 441 of 2009**

**Editorial Summary**

1. *Civil Appeal*
2. *Finalized appeal*
3. *Subject of appeal*

*Civil Practice & Procedure*

3.1 *Tenancy/landlord.*

*Uncontrolled tenancy formerly  
service tenancy.*

3.2 *Appeal finalized on 23<sup>rd</sup> November 2011.*

3.3 *Issue arose.*

*Settlement of terms of the decree.*

4. *Settlement of terms of decree order*

4.1 *Appeal allowed; that the amended plaintiff  
was irregularly filed. Order 21 r 8 Civil Procedure Rules.*

4.2 *Amended plaintiff struck out, does this mean  
the original plaintiff exists?*

4.3 *Costs were awarded in appeal and in the  
subordinate court.*

5. *Submissions*

*By Respondent*

5.1 *That amended plaint struck out the original  
suit stands.*

5.2 *Costs to be settled.*

*By Appellant*

5.3 *Amended plaint struck out and nothing left.*

5.4 *Costs thus in both courts are awarded.*

5. *Held:*

a) *The amended plaint struck out but original  
plaint still stands.*

b) *Costs in the High Court only awarded.  
Costs to read “no costs in the magistrate’s court  
as trial is still pending.”*

6. *Case Law:*

*Nil*

7. *Statute Law Order 21 r 8 Civil Procedure Rules*

7. *Advocates:*

i) *S. R. Adere instructed by M/s Adere & Co Advocates for appellant/original plaintiff*

ii) *I. Kashindi instructed by Hamilton Harrison & Mathews & Co Advocates for  
respondent/original defendant*

**EDWIN DICKSON WASUNNA ..... APPELLANT/ORIGINAL DEFENDANT**

**VERSUS**

**KENYA ELECTRICITY GENERATING**

**COMPANY LTD ..... RESPONDENT/ORIGINAL PLAINTIFF**

*(Being an appeal from the Ruling of Hon. E.N. Maina Esq Senior Principal Magistrate in Civil Case No.  
9093 of 2005 dated 15<sup>th</sup> July 2009 at Milimani Commercial Courts, Nairobi)*

## R U L I N G

### Settlement of Decree

#### **I. INTRODUCTION**

1. Order 21 r 8 Civil Procedure provides:

- “(1) \_\_\_\_\_
- (2) \_\_\_\_\_
- (3) \_\_\_\_\_

**(4) On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registry shall thereupon list the same in chambers before the Judge who heard the case or, if he is not available, before any judge, and shall give notice thereof to the parties.**

**(5) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.”**

2. On the 29<sup>th</sup> October 2012, the parties appeared before this court for the settlement of the decree of the court.

3. The main appeal, against the ruling of a magistrate, was allowed. The parties were disputing over the issue of an uncontrolled tenancy that was originally a service tenancy.

4. An amended plaintiff had been filed by the new advocates who took over the matter and (respondents in the appeal.) This court in its judgment held that the “amended plaintiff, as filed, was fatally defective”. “It was ... struck out.”

5. The appeal was allowed. The ruling of the Hon. Trial Magistrate was “set aside” and “substituted with orders striking out the amended plaintiff.”

#### **III ISSUE**

6. The question arose by the respondent, who wished to know whether the effect of striking out the amended plaintiff, also meant that the original plaintiff filed remained in place or did it have the effect of dismissing the suit in totality?

7. The respondent argued that the original plaintiff remained and the suit was not dismissed.

8. The appellant was of the view that the whole suit no longer existed. Where the amended plaintiff was struck out, then the main original plaintiff no longer existed. This is the reasons that costs were awarded in the High Court and in the magistrate’s court to the appellant.

#### **III SETTLEMENT OF DECREE**

9. The respondent took over the magistrate’s court case from another advocate. Upon noticing the anomalies in the plaintiff, they attempted to amend the said plaintiff. This was so done irregularly, to which this court found, was fatal and therefore the amended plaintiff was duly struck out.

10. The effect of striking out the amended plaintiff was that the main plaintiff originally filed remains in place. The respondent may be required to begin the process of amendment according to law, afresh, if need be.

11. The issue of settlement of the decree is that whereas the amended plaint is struck out, the main original plaint stands. The suit had not been struck out.

#### **IV COSTS**

12. As to the issue of costs, the appellant is entitled to costs in this High Court.

13. The subordinate magistrate's matter concerned only a ruling. The ruling had allowed the application to amend the plaint with costs in the cause (9<sup>th</sup> May 2007). A further ruling dismissing a preliminary objection was with costs in the cause. (15<sup>th</sup> July 2009.)

14. I would therefore settle the issue of costs in the magistrate's court as being in the cause and to await until the finalization of the main suit.

15. There will be no orders as to costs.

DATED THIS 31<sup>ST</sup> DAY OF OCTOBER 2012 AT NAIROBI

**M.A. ANG'AWA**

**JUDGE**

*Advocates* :

- i) *S. R. Adere instructed by M/s Adere & Co Advocates for appellant/original plaintiff*
- ii) *I. Kashindi Kimani instructed by Hamilton Harrison & Mathews & Co Advocates for respondent/original defendant*