



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMAN COMMERCIAL COURTS
CIVIL CASE NO. 420 OF 2008

SANJEET THETHY.....
.....PLAINTIFF

VERSUS

PATRICK MUSIMBA.....
.....1ST DEFENDANT
MUSIMBA INVESTMENTS LIMITED.....
.....2ND DEFNDANT

RULING

1. The Chamber Summon dated 18th January, 2010 is filed by the defendant, it is seeking for an order that the plaintiff's amended plead filed on 30th January, 2009 be struck out with costs. This application is brought under the provision of Order VI Rule 13 of the Civil Procedure Rules. It is supported by the grounds stated on the body thereto and the supporting affidavit sworn by **Patrick Mweu Musimba** on 18th January, 2010. According to the defendant, the purported amendments to the plead does not comply with provisions of Order 6A Rule 7 which provides that an amended plead must be endorsed with the order showing that leave was granted.

2. This is because after the amendment of a pleading, the amended pleading supersedes and replaces the original plead. Counsel relied on the decision in the case of **Mutuku and 3 others Vs United Insurance Co. Ltd {KLR 2002 page 250}** where Ringera J. (as then was held as follows:-

1. *An unsigned pleading cannot be valid in law. It is the signature of an appropriate person which Authenticates a pleading and an unauthenticated Document is not a pleading of anybody. It is a nullity.*

2. *Where a pleading has been amended and the same has Struck out, the party affected has simply no valid pleading left on record.*

3. *The effect of an amended defence is to supersede and replace the original defence.*

4. *The further amended defence was a nullity as it purported to amend the amended defence which was a nullity.*

Counsel urged the court to dismiss the amended plaint.

3. This application was opposed; Counsel for the plaintiff relied on the affidavit of **Allan Kosgey** sworn on 25th February, 2010. It is contended that the date of the amendment and the date of the order is the same day which is duly endorsed on the pleadings. Counsel for plaintiff submitted that according to the provisions of Order 6A Rule 7, there is no provisions on how an endorsement should be done. He urged the court to find that the suit raises a substantial claim against the defendant and should be allowed to proceed to full trial. The plaintiff has duly complied with discovery and they were looking forward to the hearing of the matter on merit when they were served with this application. Moreover, striking out of pleadings is always a draconian step which is always done sparingly. In this case, there is no defect in the pleadings which even if the court found existed, the court has the discretion to allow an amendment.

4. This application invokes the jurisdiction of Order 6 Rule 13 which provides as follows:

“At any stage of the proceedings the court May order to be struck out or amended any pleading on the ground that:

(a) it discloses no reasonable cause of Action or defence or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial Or the action; or

(d) It is otherwise an abuse of the Process of the court, an may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may.

5. It is trite law striking out pleadings is a drastic measure which is sparingly done and is done when the pleadings complained about are an abuse of the court process and discloses no triable issue. (See the case of **DT Dobie and Co. Limited Vs. Muchina {1982} KLR**) as per Madan JA:

“The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by Amendment. As long as a suit can be injected with life by amendment, it should not be struck out”.

6. The defendant's principle complaint is that the amended plaint does not comply with the provisions of Order VIA Rule 7 of the Civil Procedure Rules which provide as follows:-

1. Every pleading and other document amended under This Order shall be endorsed with the date of the amendment and either the date of the order allowing 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 underling in red ink all added words.

3. Colors other than red shall be used for further amendments to the same document.

7. I have considered the above provisions of the Civil Procedure Rules alongside the pleadings complained about, the plaintiff was granted leave by court on 30th January, 2009. The amended plaint is endorsed with the date of 30th January, 2009. Just like counsel for the plaintiff, I am at a loss as what endorsement the defendant is complaining about. And more so, what prejudice the lack of endorsement (which I have not been able to pinpoint has caused the defendant).

In the premises I find no merit in this application which I dismiss costs to the plaintiff/respondent.

RULING read and signed at Nairobi this 10th day of January 2011.

M. K. KOOME
JUDGE