



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 441 of 2009

Editorial Summary

1. *Civil Appeal*
2. *Subject of Subordinate Court Case*
 - 2.1 *Uncontrolled tenancy formerly service tenancy.*
 - 2.2 *Lease entered into with appellant/original defendant tenant by one party not party to suit.*
 - 2.3 *Issue of rent arrears arises at ksh.40,000/- per month not paid.*
 - 2.4 *Intention to sell premises to the appellant/ original defendant*
 - 2.5 *Respondent/original plaintiff files suit and seeks orders of eviction and rent arrears payment on 18th August 2005.*
 - 2.6 *Appellant/original defendant files defence. Counter-claims for impersonation made. Prays that sum of improvement of Ksh.1,620,600/- be of set on the rent arrears of Ksh.1,081,010.49.*
 - 2.7 *Respondent/original plaintiff applies for summary judgment application 1st November 2005*
 - 2.8 *Hon. Magistrate dismisses application on grounds of ownership title uncertain to holding to respondent/original plaintiff (22nd February 2006)*
 - 2.9 *Respondent/original plaintiff changes advocate.*
 - 2.10 *Application to amend plant 28th January 2007 to clarify issue of ownership*
 - 2.11 *Leave to amend (28th January 2007) the plaint comes before another Hon. Magistrate*
 - 2.12 *Held no prejudice suffered if allowed leave to amend granted – no time specified (9th May 2007).*
 - 2.13 *Respondent/original plaintiff files application for leave to extend time for filing amended plaint (28th November 2007)*

- 2.14 *Reasons not given.*
- 2.15 *Preliminary objection raised on 9th May 2007 being the next hearing date*
- 2.16 *Preliminary objection comes before 3rd new Hon. Magistrate.*

2.17 **Reasons**

Order VIA rule 6 of Civil Procedure Rules prays that the leave to amend if given and no time limit specified, it be filed within 14 days.

- 2.18 *Respondent/original plaintiff. The leave to extend time given ex parte on 4th March 2008*
- 2.19 *Appellant original respondent not aware of this.*
- 2.20 *Ruling 15th July 2009 held leave to extend time had been given. Objection overruled.*
- 2.21 *Appeal filed to High Court*
- 2.22 *Application for stay of proceedings*
- 2.23 *Stay of proceedings granted. Sitati J on 23rd November, 2010*
- 2.24 *Appeal hearing.*

3. *Appeal*

- *Amended plaintiff did not contain orders extending time to file amended plaintiff*
- *Application to extend time never served*
- *Amended plaintiff fatally defective.*

4. *In reply*

- i) *Was granted application to extend time*
- ii) *Amendment filed in time*
- iii) *Date for leave to amend was endorsed.*
- iv) *Rules does not call for entire suit to be struck out*
- v) *Prejudice to be suffered.*

5. *Held:*

Appeal allowed.

Ruling of trial magistrate be set aside.

Substituted with orders striking out the

Amended plaintiff.

6. *Case Law*

a) *Aspi Variana*

V

Sadru Kurti & others

HCC 120 OF 2002

Ochieng J

aa) *Pan African Bank Ltd*

V

Abraham Kipsang Kiptanui

HCC 106/97

b) *Wilfred Dickson Katuhi*

V

Barclays Bank of Kenya & Others

HCCC 259 OF 2005

Ochieng J

c) *Daniel Kipkemoi Bett & others*

V

Margaret Wangui Chege

HCCC no. 79 of 2004

Ombinja J

d) *Mawji*

V

Arusha Central Stones

(1970) EA 137

e) *Mutuka & 3 Others*

V

United Insurance Co.

(2002) KLR 350

6. *Advocates:*

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

ii) *M. Kirimi 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 15th July 2009 at Milimani Commercial Courts, Nairobi)

J U D G M E N T

I. INTRODUCTION

1. The main suit between the parties is still pending before the subordinate court case at the Milimani Commercial Courts. What is before this High Court at Nairobi is an appeal on a ruling by the appellant/original defendant.

2. The objection raised, concerned the amendment of the plaint under Order VI a rule 6 of the Civil Procedure Rules, which was then in use that states:-

“Where the court has made an order giving any party leave to amend unless that party amends within the period specified or, if no period is specified, within 14 days, the order shall cease to have effect without prejudice to the power of the court to extend the period.”

3. The genesis of the original suit began some time in 1999. The appellant/original defendant, Edwin Dickson Wasuma, therein referred to as the appellant, was originally a service tenant. This meant that he occupied residential premises Known as LR 3437/703 as part of his employment. There was an intention to sell the premises to him. In the meantime, it is evidenced that the premises were assigned to the respondent/original plaintiff (herein referred to as the Kenya Electricity Generating Company Limited.)

4. A lease agreement was entered between the parties in which the appellant was to now pay rents of Ksh.40,000/- per month with effect from 1st August 2002. The appellant paid Ksh.200,000/- but paid no more thereafter, of which Ksh.40,000/- was treated as a deposit.

5. The Respondents filed suit in the subordinate court on the 18th August, 2005, seeking orders to evict the appellant from the premises and recover the rent arrears.

6. The appellant entered appearance filed defence and claimed in a counter-claim filed that he had made extensive improvements to the premises. That the sum of ksh.1,610,600/- that he incurred to offset on the rent arrears of Ksh.1,081,020 49. This means that the respondents owed him arrears.

7. The respondent filed an application for summary judgment. Namely, that the court gave judgment without going to trial. On hearing the parties, the Hon. Magistrate declined to grant the orders on grounds that the ownership of the property was in question. That there were triable issues raised.

8. The respondent changed advocate.

9. This prompted the respondent to file an application thereafter, with the new Advocate on record, of leave to amend the plaint dated the 28th February 2007. This was to clarify the issue of ownership and status of the respondent in the matter.

10. This application comes before another Hon. Magistrate and not the first who heard the application. On the 9th May 2007, the

Hon. Trial Magistrate grants the application for leave to amend the plaint, on grounds that no prejudice would be suffered, if granted. No specific time lines is given in which to file the application. The rules, as stated above, limits the time to 14 days. The respondents advocate on being aware that the said time had lapsed, files a new application.

11. The application dated 28th November 2007 was not served on the appellant. This is admitted in the written submissions that indeed, the application was sent out by post and was not served personally as required by law. An ex-parte date was taken for hearing of the application. The same Hon. Magistrate granted leave to extend time to file the said plaint (4th March 2008).

12. Unknown to the appellant, when the suit came up for hearing before a third new Hon. Magistrate on the 9th May 2007, there was raised a preliminary objection on the existence on the file, of the amended plaint having been filed out of time.

13. The new third trial magistrate dismissed the preliminary objection on grounds that leave to extend time was issued on

4th March 2008. This means that the third new Hon. Magistrate had no powers to set aside the orders of 4th March 2008 already given.

14. The alternative was for the appellant to file an application setting aside the orders of 4th March 2008 or alternatively appealing. The appellant chose to appeal to this High Court against the ruling dated 15th July 2009.

15. An application to stay the proceedings pending appeal was applied and successfully made to the High Court. This was granted by Sitati J on the 23rd November 2010.

II. APPEAL

16. A year after the orders of stay of proceedings was issued, parties addressed this court on a point of law.

17. The appellant argued that whereas the respondent/plaintiff filed an amended plaint the law required that there be an endorsement for leave to file an amend plaint and further leave to extend time of that plaint. The plaint document to amend only described the date of 9th May 2007 as being the date leave was granted to file appeal.

18. The Respondents advocate conceded there was no endorsement as required by law namely

“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 averment was made.”

19. If this had been done it would have alerted the appellant that such orders had been made. The requirement was compulsory and mandatory in this. The appellant relied on the persuasive cases of **Wilfred Dickson Katuhi**

Vs

Barclays Bank of Kenya & 2 Others

HCCC 259 OF 2005

Ochieng J

Where the ruling was held, relying on the case law of

Pan African Bank Ltd (in liquidation)

Vs

Abraham Kipsan Kiptanui

HCCC 106 of 1997

That the provision of the law... is couched in mandatory terms. Failure to comply with, it renders the pleadings invalid in law and ought to be cleansed from the record.

20. In the case law of

Daniel Kipkemboi Bett & 8 others

Vs

Margaret Wanjuri Chege

HCCC 76 of 2004

Ombija J

In which the court relying on the case law of

Mawji

Vs

Arusha Central Stores

(1970) EA 137

And

Mutuku & 3 Others

Vs

United Finance Co.

(2002)KLR 350

Struck out the plaint duly amended as being fatally defective for failing to comply with mandatory provisions of the law.

21. In reply by the respondent, the real issue is that the amended plaint had been so amended out of time. There required to be a ground stating that the rules had not been confirmed with. Leave to file appeal out of time was made. In relying on the case law of

Aspi Variana

Vs

Sadur Kurti & Others

HCC 126 of 2002

Ochieng J

The amended plaint had been filed out of time. The Hon. Judge gave leave to extend the time as it did not occasion any prejudice. This means, to allow justice to be done between the parties.

22. There was nonetheless an endorsement for the amendments.

III OPINION

23. The appeal herein arises from Civil Practice and Procedure. Should this court ignore the mandatory terms of the law and allow the respondent to proceed with this case before the subordinate court.

24. The real issue in dispute would not have been adjudicated. It is required by law that an endorsement be made on the amended plaint. This was not done. The application to enlarge time was made by service through the post, which was irregular as what was served was not a document that was part and parcel of pleadings.

25. I would find herein that the amended plaint as filed was fatally defective. It is herein struck out.

26. The orders of this court being that the appeal is allowed. The ruling of the Hon. Trial magistrate be set aside and substituted with orders striking out the amended plaint.

27. I award costs to the appellant in this appeal and cost to the appellant in the subordinate court.

DATED THIS 23RD DAY OF NOVEMBER 2011 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

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

iv) *M. Kirimi instructed by Hamilton Harrison & Mathews & Co Advocates for respondent/original defendant*