



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Suit 9 of 2006
SCHOOL COMMITTEE,
NYANSIONGO D.E.B. SCHOOL.....1ST PLAINTIFF/RESPONDENT
CHAIRMAN, BOARD OF GOVERNORS, RIGOKO
SECONDARY SCHOOL.....2ND PLAINTIFFS/RESPONDENTS
REGISTERED TRUSTEES, DIOCESE
OF KISII.....3RD PLAINTIFFS/RESPONDENTS
KEFA NYAUNDI ONCHIRI (suing on behalf of GESIMA TEA
BUYING CENTRE4TH PLAINTIFFS/RESPONDENTS
VERSUS
SEVENTH DAY CHURCH, E.A. LTD..... 1ST DEFENDANT/APPLICANT
SETTLEMENT FUND TRUSTEE 2ND DEFENDANT
RULING

On 19th October 2006 and 26th of October 2006, counsel for the parties herein argued an application seeking to declare the subdivision of land reference No. Gesima Settlement Scheme/210 to be null and void and to have the titles to the resultant subdivisions thereof, Gesima Settlement Scheme/503, 504 and 505 cancelled. The application was argued before Bauni, J. Ruling was reserved for delivery on 30th November 2006. The typed ruling that is on record bears the date of delivery as 6th September 2006 which is obviously not correct. The ruling was delivered in the presence of the 1st defendant's advocate only. It is not clear whether the other advocates had notice of delivery of the same. In the short ruling, the court ordered the plaintiff to amend the plaint but did not specify the time within which the amendment was to be done.

On 15th July 2008 the plaintiff's advocate filed a further amended plaint. On 4th June 2009 the 1st

defendant filed an application seeking to have the further amended plaint struck out. The application was made on the grounds that the further amended plaint was filed without leave and in contravention of the Civil Procedure Rules. It was also stated that the further amended plaint had not been served upon the defendants.

The plaintiff's advocates filed a replying affidavit and stated that the ruling by Bauni, J. was delivered without notice to him. It was only in January 2008 after being served with the defendant's list of documents that he realized that the ruling had been delivered and the court had directed that an amended plaint be filed. He had earlier filed an amended plaint on 20th of March 2006 when no leave was required to do so since the memorandum of appearance was served upon him on 7th March 2006. According to the plaintiff's counsel, the court did not fix the time within which the amendment was to be made.

Mr. Soire for the 1st defendant urged this court to strike out the further amended plaint and award costs of the suit to the defendants. He submitted that the same offends the mandatory provisions of **order VIA rule 7 (I) of the Civil procedure Rules** which states as follows:

“Every pleading and/or other document 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 pursuant of which the amendment was made.”

Mr. Bosire for the plaintiffs reiterated that the ruling that ordered the plaint to be amended was delivered without his awareness. He however did not state what caused the delay between January 2008 when he became aware of the ruling and 15th July 2008 when he filed the further amended plaint. He also did not state why he did not comply with the mandatory provisions of **order VIA rule 7 (I)**.

I find it difficult to believe that from 2006 when Bauni, J. delivered the ruling and January 2008, the plaintiff's advocate was unaware of the said ruling. But even if I were to give him the benefit of doubt and accept that he became aware of the ruling in January 2008 there is no denial that upto 15th July 2008 he did not bother to amend the plaint or move the court accordingly. He also did not seek the consent of the defendants' advocates to file the further amended plaint belatedly.

Order VIA rule 6 states as follows:

“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 fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.”

The plaintiffs' counsel did not seek leave of the court to extend the period of filing the further amended plaint. The same offends the provisions of **order VIA rules 6 and 7** as hereinabove quoted.

In **STOCKMAN ROZEN KENYA LIMITED -VS- DA GAMA ROSE GROUP OF COMPANIES LIMITED**

[2002] 1 KLR 572, it was held that failure to comply with the provisions of **order VIA rule 7** of the **Civil**

Procedure Rules is fatal. I find and hold that the further amended plaint was filed out of time and without leave of the court and the same is struck out with the result that the plaintiffs' is struck out with costs to the defendants.

DATED, SIGNED AND DELIVERED AT KISII THIS 5TH DAY OF MARCH, 2010.

**D. MUSINGA
JUDGE.**

5/3/2010

Before D. Musinga, J.

Mobisa - cc

Mr. Bosire for the Plaintiffs

N/A for the Defendant

Order: Ruling delivered in open court.

**D. MUSINGA
JUDGE.**