



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 208 of 2001**

**EMMANUEL WENANI t/a**

**NAMOROME ENTERPRISES.....1<sup>ST</sup> PLAINTIFF**

**PHILIP KARANI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL FINANCE CO. LTD.....1<sup>ST</sup> DEFENDANT**

**MUGA AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

This application is made by a Chamber Summons dated 11<sup>th</sup> January, 2010 and taken out under Order VI Rule 13 (1) (b), (c) and (d); Rule 16 of the Civil Procedure Rules; and Section 3A of the Civil Procedure Act. By the application, the defendants seek orders:-

1. *THAT this Honourable Court be pleased to strike out both the amended reply to the amended defence and the amended defence to the amended counter claim filed herein on 17<sup>th</sup> December, 2009.*
2. *THAT this Honourable Court be pleased to strike out the amended plaint filed herein on 17<sup>th</sup> December, 2009; and*
3. *THAT the plaintiff do pay the defendant's costs of this application.*

The application is supported by the annexed affidavit of Jamila Mohammed, a partner in the firm of Mohammed & Kinyanjui, Advocates who have the conduct of this matter for the defendants. It is based mainly on the ground that the said pleadings are frivolous and vexatious and cause the defendants unnecessary anxiety and expense as they were filed out of time in violation of a court order made on 6<sup>th</sup> November, 2009. Consequently, the said pleadings may prejudice, embarrass and delay the fair trial of the suit as they are bound to cause unnecessary expense and delays. It is also the defendant's case that the said pleadings are otherwise an abuse of the court process and that it is just and fair that the said pleadings be struck out.

The genesis of this matter was that on 6<sup>th</sup> November, 2009, the court made an order granting leave to the defendant to amend its defence and counterclaim in accordance with the draft defence and counterclaim. The same was to be filed within 14 days. The court then directed that the plaintiffs would be at liberty to respond to the amended pleadings within 14 days after service. According to the supporting affidavit sworn by Jamila Mohammed, the defendants duly filed and served their amended defence, and the 1<sup>st</sup> defendant's amended counterclaim on 9<sup>th</sup> November, 2009. Thereafter, no pleadings in response were served upon the defendants within 14 days as ordered by the court, and that period of 14 days expired on 23<sup>rd</sup> November, 2009.

By a letter dated 27<sup>th</sup> November, 2009, the defendant's advocates on record wrote a letter to the counsel for the other parties inviting them to attend court on 3<sup>rd</sup> December, 2009, in order to fix a suitable date for the hearing of the case. As the other counsel or their representatives did not attend, the defendants' counsel fixed the case for hearing on 9<sup>th</sup> February, 2010.

As the defendants went about preparing for the hearing of the case, on 17<sup>th</sup> December, they were served with an amended defence to

the amended counter claim and at the same time they were also served with an amended plaint. This was a good 24 days after the expiry of the period during which they were required to have served the defendants. It is for this reason that the defendants/applicants plead that these pleadings are improperly on record and therefore seek their being struck out.

Order XLIX Rule 5 of the Civil Procedure Rules sheds some light on this point. It states as follows:-

*“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules ... or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed ...”*

Either during or upon the expiry of the 14 days within which the respondents were required to react to the amendments effected by the defendants, it was open to the respondents to apply for an extension of time to respond. But they did no such thing. Instead they waited until the suit had been given a hearing date and then came filing amended pleadings. This was a blatant abuse of the process of the court, which in turn prejudiced and embarrassed the defendants who had hitherto been entitled to assume that there would be no further pleadings, and it resulted in derailing the hearing of the suit, and delaying the fair trial thereof. For these reasons, I find that the defendants have made out a case for striking out the pleadings served upon them on 17<sup>th</sup> December, 2009.

An interesting aspect of this matter is that although the respondents were duly served on 14<sup>th</sup> January, 2010, they never filed any replying affidavits or grounds of opposition, nor did they attend court at the hearing of the application in spite of having been served on sufficient time to do so. In those circumstances, I find that the application is not opposed and the defendants are entitled to the orders sought by their application by Chamber Summons dated 11<sup>th</sup> January, 2010.

I accordingly make the following orders:-

1. *The amended reply to the amended defence and the amended defence to the amended counter claim filed herein on 17<sup>th</sup> December, 2009 be and are hereby struck out.*
2. *The amended plaint filed herein on 17<sup>th</sup> December, 2009 be and is hereby also struck out.*
3. *The plaintiff will pay the defendants costs of this application.*

DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of April, 2010.

**L. NJAGI**

**JUDGE**