



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 25 OF 2008

I.G (minor suing through next friend and mother P.B. O).....PLAINTIFF/RESPONDENT

VERSUS

JAMES NYANGAI OSORO.....1ST
DEFENDANT/APPLICANT

EVANS NYABUTO.....2ND
DEFENDANT/APPLICANT

MAURICE NYABUTO.....3RD
DEFENDANT/APPLICANT

RULING

The original plaint filed on 30th April, 2008 had only the first two defendants. The two defendants entered appearance and filed a statement of defence and counter claim. The latter was filed on 1st July 2008. A reply to the defence was filed on 16th July 2008. An amended plaint was filed on 28th July, 2008. In the amended plaint the 3rd defendant was added and paragraphs 3, 9 and 10 of the original plaint were also amended. No leave was sought to amend the plaint and include the 3rd defendant.

The defendants filed an application dated 13th October, 2009 asking the court to strike out the amended plaint since it had been filed without leave of the court and was therefore an abuse of the court process.

When the suit came up for hearing on 10th June, 2010, Mr. Okenye who held brief for Mr. Reuben Masese for the defendants urged the court to strike out the amended plaint.

Mr. Mboga for the plaintiff argued that the amended plaint was filed before pleadings were closed. He said that the statement of defence was filed on 1st July, 2008 and was served upon his office on 10th July, 2008. A reply to the defence was filed on 16th July, 2008 and served on the same date. Under **order VI rule 11** of the **Civil Procedure Rules**, pleadings are closed fourteen days after service of the reply or defence to counter claim. Fourteen days were therefore expiring on 31st July 2008. Counsel further submitted that the plaintiff did not require leave to add the 3rd defendant.

Under **order 1 rule 10 (2)** of the **Civil Procedure Rules**, it is clear that addition of any party to a suit

requires leave of the court, unless the court directs so on its own motion. The same provides as hereunder:

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any person improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

There is a distinction between substitution or addition of a party to proceedings and amendment of pleadings. See **ATIENO –VS- OMORO**[1985] KLR 677.

It was improper for the plaintiff to amend the plaint by adding a party without leave of the court. Consequently, I allow the application dated 13th October, 2009. The plaintiff shall bear the costs of the application.

DATED, SIGNED AND DELIVERED AT KISII THIS 18TH DAY OF JUNE, 2010.

D. MUSINGA

JUDGE.

18/6/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Ogari for Mr. Mboga for the Plaintiff

N/A for the Defendant

Court: Ruling delivered in open court on 18th June, 2010.

D. MUSINGA

JUDGE.