



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE

CIVIL SUIT 65 OF 2005

FREDRICK WANJALA MASIBO.....PLAINTIFF.
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE SILAS JUMA MASIBO)
VERSUS

HENRY KIPKORIR ROTICH)
ELDORET EXPRESS CO. LTD.)
DAVID NYAKUNDI OMARI).....DEFENDANT.

R U L I N G.

By an oral application under order VIA Rule 8 of the Civil Procedure Rules Mr. Ingosi for the 1st defendant, raised a preliminary objection by a notice dated 17th March, 2006. The notice is to the effect that the amended plaint herein be struck out in that order VIA Rule 7 (1) of the Civil Procedure Rules was not complied with. That the amended plaint was not endorsed with the date of the amendment and either the date of the order allowing the amendment or the number of the rule in pursuance of which the amendment was made.

Service of the amended plaint was effected on 20th March, 2006. The first defendant applied for a certified copy of the same. The copy has some endorsement after the words

“Drawn by”
“Pursuant to the provisions of order VIA
Rules 7(1) of the Civil Procedure Rules.”

But the original plaint served on 20th March, 2006 does not bear the endorsement as enjoined by order VIA Rule 7 (1).

It is significant that the pleadings had not closed. The pleadings were supposed to close on 21st March, 2006. The amendment did not require leave. But the plaintiff ought to have endorsed the same with the date of the amendment and either the date of the order allowing the amendment or the number of the rule in pursuance of which the amendment was made.

It was further contended that the same omission was made in the Kitale H.C.C No. 65/2005, KITALE HCCC NO. 67/2005 and Kitale HCCC No. 68/2005. I was urged to order that the finding and holding herein do apply to Kitale HCCC No. 65/2005, 65/2005 and Kitale H.C.C.C. No. 67/2005.

The plaintiff opposed the application. It was contended on the plaintiff’s behalf, by Mr. Gekonga Advocates, that the plaint dated 17th March, 2006 has an endorsement as required by order VIA Rule 7 (1) of the Civil Procedure Rules. However, the plaint served on the 1st and 2nd defendants have no such endorsement. He owned up to the mistake. He sought the courts discretion to grant leave to serve proper copies.

Order VIA Rule 1 of the Civil Procedure Code provides:-

“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 amendment or, if no order has been made, the

number of the rule in pursuance of which the amendment was made.”

It is clear to me that order VIA Rule 7(1) is couched in mandatory terms. It is equally clear to me that the pleadings in the court file are properly endorsed as enjoined by order VIA Rule 7 (1) of the Civil Procedure Rules.

It is conceded by the plaintiff that only the documents served contravene the provisions of Order VIA Rule 7(1) aforesaid.

By reason of the foregoing the mistake seems to me, to be genuine. Accordingly, I decline to strike out the plaint. I order that the plaintiff do serve the defendant with the correct amended plaint similar to the one filed in court within 7 days of the date of this order. I also order the plaintiff to pay costs of this suit. This order applies with equal force to Kitale High Court Civil case No. 65/2005, No. 67 of 2005 and No. 68 of 2005.

Dated and delivered at Kitale this 3rd day of February, 2009.

N.R.O. OMBIJA.

JUDGE.

Ms. Kendagor for Plaintiff.

Mr. Kiarie for 1st defendant.

Mr. Kimani for 3rd defendant