



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL CASE 624 OF 2004

SAMUEL ALOYS MOTURIPLAINTIFF

V E R S U S

EAN KENYA LIMITEDDEFENDANT

R U L I N G

On 27th January, 2006 Senior Principal Deputy Registrar Muiruri granted the Plaintiff leave to amend his plaint following a contested application in that behalf. The Plaintiff had seven days in which to file amended plaint. It had to be filed on or before 3rd February, 2006. As it happened, the Plaintiff filed his amended plaint out of time on 17th February 2006. There was no extension of time by the court, and none was sought.

On 18th May, 2007 the Defendant filed a notice of preliminary objection upon the following grounds:-

1. That the amended plaint dated 31st (not 11th as stated) January, 2006 is fatally defective and ought to be struck out.
2. That accordingly the amended plaint cannot sustain the Plaintiff's suit against the Defendant."

On 26th June, 2008 the Defendant filed a supplementary notice of preliminary objection raising the following additional ground of objection:-

That the amended plaint contravenes the provisions of **Order VIA, rule 6** of the **Civil Procedure Rules** (the Rules) in that it was filed outside the period stipulated by the court, without leave. The amended plaint, therefore, lacks the force of law and is a nullity.

The Plaintiff has opposed the preliminary objection.

I have considered the submissions of the learned counsels appearing, including the authorities cited. Mr. Kimuli, learned counsel for the Defendant, argued the preliminary objection on two points. His first objection was that the amended plaint was not endorsed with the date of the order that granted leave to amend as required by **Order VIA, rule 7(1)** of the Rules in mandatory terms. Failure to comply,

submitted Mr. Kimuli, rendered the amended plaint a nullity in law, and it must be struck out. The second point taken by Mr. Kimuli was that the amended plaint was filed and served outside the time limited by the order granting leave to amend, without extension of time by the court. The amended plaint is thus a nullity, he submitted, and must be struck out.

Mr. Kimuli further submitted that as the amended plaint referred back to the original plaint, and in fact and in law replaced it, once the amended plaint is struck out nothing of the Plaintiff's suit will remain, and it must also be struck out. The Plaintiff cannot be permitted to go back to the original plaint.

Mr. Kimuli however conceded that the court has power under **Order VIA, rule 6** to extend time for filing the amended plaint. But he submitted that the Plaintiff never sought such extension. If he had done so, he would have been obliged to explain the delay. As it is now, that delay is unexplained.

In reply, Miss Thuku, learned counsel for the Plaintiff, submitted that failure to comply with rule 7(1) of Order 6A is not fatal and can be cured. Regarding failure to file the amended plaint within the time allowed by the order granting leave, Miss Thuku submitted that the court has the discretion to extend time in order to regularise the filing of the amended plaint. She pleaded that the preliminary objection ought to be overruled in the wider interests of justice.

I respectively agree with the learned counsel for the Plaintiff that failure to endorse the amended plaint with the date of the order allowing the amendment is not vital to the pleading. The objection raised in that regard is merely technical and therefore forbidden by **Order 6, rule 12** of the Rules. Further, I cannot see what possible prejudice the Defendant may have suffered thereby.

With regard to failure to file the amended plaint within the time allowed by the order granting leave, the court has power under Order 6A, rule 6, as conceded by the learned counsel for the Defendant, to extend the period. The amended plaint was filed some two weeks out of time. I do not consider that period to be inordinate. No prejudice has been demonstrated, and the Defendant will be adequately compensated by an award of costs for any inconvenience it may have suffered on account of the delay. It would be too harsh for the Plaintiff not to be permitted to prosecute his case as amended. Striking out the amended plaint would have the effect of striking out the suit as the amended plaint indeed replaced the original plaint. The Plaintiff would in that event not be permitted to revert to the original plaint. That consequence would not be just in the circumstances of this case.

In the event, I will overrule the preliminary objection and order as follows:-

- 1. The Plaintiff shall within seven days of delivery of this ruling file another amended plaint with the date of the order granting leave to amend endorsed thereon.**
- 2. Time to file the amended plaint is hereby extended to the date on which order No. 1 above is complied with.**
- 3. In default of Order 1 or 2 above, the Plaintiff's suit shall stand struck out with costs to the Defendant.**
- 4. The Defendant shall have the costs of the preliminary objection hereby assessed at KShs. 10,000/00. The same shall be paid within 14 days of delivery of this ruling. In default the Defendant may execute for the same.**

Those shall be the orders of the court.

DATED AT NAIROBI THIS 14TH DAY OF MAY, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 15TH DAY OF MAY, 2009