

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 108 of 2004

CECILIA WAMUYU KABU)

FRANCIS WACHUGA KABU) PLAINTIFFS

VERSUS

ZIPPORAH WANGUI KABU DEFENDANT

R U L I N G

This suit was scheduled for hearing on 31st March 2009. On that occasion, **Mr. Mugo**, learned Advocate for the Plaintiff raised a preliminary objection in these terms; that the amended defence and counterclaim was defective as it did not comply with the provisions of order VIA rule 7 of the Civil Procedure Rules. The amended defence and counterclaim ought therefore to be struck out with costs. Consequent upon such an action judgment should then be entered in favour of the plaintiffs. **Mr. Mugo** had earlier signified to the defendant's advocate, **Mr. Muthui Kimani** of his intention to raise the preliminary objection when he filed and served a Notice of preliminary objection dated 28th October 2008.

In support of the preliminary objection, the **Mr. Mugo** cited and relied on the following authorities:

- (1) **Mutuku & Anor v/s United Insurance Co. Ltd (2002) 1 KLR 250 and**
- (2) **Stockman Rozen Kenya Ltd v/s Da Gama Rose Group of Companies Ltd (2002) 1 KLR 572.**

In response to the preliminary objection, **Mr. Muthui** submitted that the Notice of Preliminary Objection served on him was defective as it talked of the statement of defence and counterclaim being "fatally defence" **Mr. Muthui** did not know what the Plaintiffs meant by that statement. That rules of procedure are handmaidens of justice. For this proposition **Mr. Muthui** relied on the case of **Gulam & Another v/s Jirongo (2004) 1 KLR 158**. That the authorities cited by the plaintiffs were irrelevant as the defence and counterclaim was filed in time. No prejudice was in any event occasioned to the Plaintiffs. That the plaintiffs' Advocate was in court when the order for amendment of the defence and court counter claim was made. The plaintiffs having not filed a defence to the counterclaim, no issue has been raised regarding legality of the amended defence. The preliminary objection was thus an afterthought. The court has unfettered discretion to cure any defect in a document filed. Finally the advocate submitted that the court cannot enter judgment in favour of the Plaintiffs as the claim is not liquidated.

I have carefully considered the preliminary objection, the respective submissions made in support and in opposition thereof and the authorities cited as well as the law.

Order VI A rule 7(1) of the civil procedure rules which is relevant for the purposes of determining this preliminary objection provides interalia:-

"..... 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.....”

As I understand it, the Plaintiffs’ preliminary objection is anchored on the fact that the amended defence and counterclaim had no endorsement on it as to the date of the order allowing the amendment or the number of the rule in pursuance of which the amendment was made. From the record, the amendment was pursuant to court order made on 8th February 2008. That being the case it behoved the defendant to endorse on the amended defence and counterclaim the date of the said order. Was that omission by the defendant fatal? On the authorities cited by the Plaintiff, I think so. Though the authorities cited by the Plaintiffs in support of the preliminary objective are not binding on me being decision of my brethren in this court, they are nonetheless of persuasive authority. **Mr. Kimani** dismissed the said authorities as irrelevant. However he did not endeavour to point out to court their irrelevance. On my part I find them relevant and to the point. I have had occasion to deal with this very same issue in the case of **Karoki Kimaru Gathua v/s James Gichuki Muhoro, Nyi HCCC No. 255 of 1992**. It should be noted that in the said case, the authorities cited by the Plaintiffs in this case were also cited to me in the aforesaid case. This is what was said:-

“Order VI A rule of the civil procedure rules provides in mandatory terms that “..... 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 pursuant of which the amendment was made” In the circumstances of this case, it is common ground that the Plaintiff effected amendments to his plaint before the close of pleadings. He thus did not require a court’s order to amend his pleadings. A perusal of the amended plaint show that it was amended at Nyeri on the 18th March 1996. However the plaintiff was enjoined to endorse on the amended plaint the number of the rule in pursuance of which the amendment was made. These requirements in my view are to put on notice the other side that the amendments were pursuant to leave of court or without leave of court as and when necessary. Those requirements were not put in place for nothing. They were to serve a purpose. As correctly observed by Mwera J in *Stockman Rozen Kenya Ltd (supra)* “..... The endorsement is mandatory. The word used is “shall”. That means failure to comply has fatal effects. In this amended plaint, the plaintiff has not endorsed the number of the rule mandating the subject amendment. It is thus not a technical or procedural omission. Order 50 rule 12 Civil Procedure Rules speaks of stating the provisions of law, order or rule under which an application is made not being a basis of that application failing. Here we are not dealing with an application. We are faced with an amended plaint on which the plaintiff did not endorse the number of the rule under which the amendment was effected. The overall impression left is that the amended plaint under attack is incompetent on account of order 6A rule 7 Civil Procedure Rules and it is struck out” The same situation obtains here. Much as the above decision is not binding on me as correctly submitted by Mr. Wachira, it is nonetheless of persuasive authority. Mr. Wachira did point out that the authorities were distinguishable. However he made no efforts at all to distinguish any of them. So that what is on record is his bold statement that the authorities are distinguishable. On my part I am in agreement with Mwera J’s reasoning on the issue. The Plaintiff’s failure to endorse on the purported amended plaint the order and rule of the civil procedure under which he had made the amendment was fatal. Accordingly the purported amended plaint is struck out with costs to the defendant.

For all the above reasons I would uphold the two preliminary objections raised. As stated by Ringera J in *Mutuku & 3 others (supra)* “..... Where a pleading has been amended and the same has been struck out, the party affected has simply no valid pleading left on record.....” Indeed the net effect of an amended pleading is to supersede and replace the original pleading that is the subject of impugned amendment.”

I still stand by my said observations in the aforesaid case. In the circumstances of this case the only substitution being that in place of the number of the rule in pursuance of which the amendment was made I would replace it with the date of the order allowing the amendment. It matters not therefore that the plaintiff’s advocate was in court when the order of amendment was made. Yes rules of procedure should

be seen as hand maidens of justice and not its mistress. On this however I would refer to the detailed observations of **Mwera J** in **Stockman Rozen Kenya Ltd** (supra) regarding whether such an omission is merely technical or procedural. The same observations would seem to answer also the defendant's submission that no prejudice was occasioned to the Plaintiffs by the omission and or that the court has unfettered discretion to cure any defect in a document filed in court.

With regard to the defendant's inability to understand what the plaintiffs meant by "fatally defence", I think this was merely a typographical error. As correctly observed by **Mr. Mugo**, they meant fatally defective. Nothing thus turns on this submission.

For all the foregoing reasons, I am satisfied that the preliminary objection was well taken. I allow it with the consequence that the "**amended defence and counterclaim**" is struck out with costs to the Plaintiffs.

Dated and delivered at Nyeri this 11th day of May 2009

M. S. A. MAKHANDIA

JUDGE