



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 828 of 2006

ALBERT KIHANYU GIKARIAPLAINTIFF/APPLICANT

VERSUS

NATIONAL HOUSING CORPORATION

& ANOTHER DEFENDANT/RESPONDENT

RULING

Before the court is a Chamber Summons dated 12th November, 2008 filed by the Plaintiff/Applicant under the provisions of order VI Rule 13 (1), (b) (c) and (d,) Order VIA Rule 2(1),(2) and 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The same is supported by the Affidavit of **W. K. B. Keitany** dated 13th November, 2008.

The application is seeking for orders that:-

- 1. The Plaintiff's further amended plaint dated 9th October, 2006 be struck out for having been filed without leave of the Honourable Court, thus scandalous, vexatious and an abuse of the court process.**
- 2. The suit be dismissed for being an abuse of the court process**
- 3. Costs of this application be provided for.**

The Plaintiff/Respondent did not file any objection or replying affidavit. At the hearing of the application there was an attempt by the Plaintiff/Respondent to withdraw the amended plaint which application was vehemently objected to. The court ruled that the application be argued.

The Defendant/Applicants' application contends that the amended plaint is not properly before the court as the same was filed without leave. The further amended plaint was filed on 12th May, 2008, previously an amended plaint had been filed on the 9th of October, 2007. The Defendants/applicants further contend that since there was no leave the second amendment is a nullity, and therefore there is no suit to be sustained against them.

The Plaintiff/Respondent on the other hand urged the court to use its discretion to allow the amendment. The counsel for the Plaintiff/Respondent submitted that lack of defence on record gives ample time to the Plaintiff/Applicant to seek for leave.

Order VIA rule 1(1) provides:-

“A party may without the leave of court, amend any pleading of his once at any time before the pleadings are closed”

The first amendment was done by the Plaintiff/Respondent on the 9th of October, 2007. This the Plaintiff did rightly without leave of the court. Any other amendment required leave of the court. The upshot of the matter is that the said amended plaint filed on 12th May, 2008 is on record illegally as no leave was sought before filing of the same.

The effect of an amended pleading is to supersede and replace the previous pleading. Therefore the further amended plaint replaced the amended plaint. The further amended plaint is now the pleading relevant to this matter. However as no leave was obtained the same is illegally before the court. In **MUTUKU & 3 OTHERS vs. UNITED INSURANCE CO. LTD**

(2002) IKL at 250 Ringera J held:-

“(2) Where a pleading has been amended and the same has been struck, out, the party affected has simply no valid pleading left on record.

(3) The Effect of an amended defence is to supersede and replace the original defence.

(4) The further amended defence was a nullity as it purports to amend the amended defence which was a nullity.”

As was observed by the court and from the above authority it is clear that the further amended plaint is a nullity due to the failure by the Plaintiff to seek leave as required that being so I have no alternative but to strike out the said further amended plaint. As the same had replaced the amended plaint it therefore follows that the Plaintiff has no valid pleading left on record.

Having arrived at the above conclusion, I accordingly grant prayers 1, 2 & 3 of the Chamber Summons dated 12th November, 2008.

Dated and delivered this 23rd June, 2009.

ALI- ARONI

JUDGE