

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

Civil Suit 347 of 2006

JIMMY RAYANI PLAINTIFF

VERSUS

METRO EAST F. M. LIMITED DEFENDANT

RULING

1. Before me is Chamber Summons dated 5th February, 2009 filed by the Defendant under the provisions of Order VIA Rule 7, Order VI Rule 13(1) (d) of the Civil Procedure Rules and Section 3 & 3A of the Civil Procedure Act, seeking to strike out the Amended Plaintiff dated 7th August, 2008 for failure to endorse the order in pursuance of which the Amendment was made, costs of the application and the struck Amendment Plaintiff.
2. The Plaintiff vehemently opposed the application by filing a Replying Affidavit dated 18th May, 2009 urging the court to use its discretion under Order VI Rule 12 to disregard technicality. Further that the omission does not go to the substance of the suit, is not prejudicial to the defendant who has acted on the same, as both parties subsequent to the filing of the Amended Plaintiff have filed agreed statement of issues.
3. Parties filed written submission and authorities on 20th May, 2009 and 15th June, 2009 respectively. I have read and considered the submissions and authorities filed by both parties.
4. The defendant's contention is that the plaintiff is fatally defective as it failed to comply with mandatory provisions of Order VIA Rule 7. The defendant relied on High Court authorities where Amended Plaintiffs were struck off for lack of compliance with the said order namely: **Wilfred Dickson Ratibi vs. Barclays Bank of Kenya & 2 Others** (2006) eKLR, & **Rozen Kenya Ltd vs. DaGama Rose Group of Companies Ltd** (2002) KLR 522 & **Alice Wairimu vs. Njihia (Suing as administrator & personal representative to the estate of Njihia Kuria) vs. John Rukenya & Another**, Civil Case No. 1835 of 1999.
5. The Plaintiff on his part contended that the omission is a mere technicality, that does not go to the substance of the case and has caused no prejudice to the defendant. He contends further that the use of the word "Shall" does not make the provision mandatory to the extent that if not strictly complied with it makes the pleads a nullity. In support of his case the Plaintiff urged the court to exercise its wide discretion to allow the endorsement and consider substantive justice as opposed to technicalities. The plaintiff relied on several authorities I will quote just but some. **DT Dobie Company vs. Muchina** (1982) KLR, **Casteino vs. Rodrigues** (1972) E. A, **Esther Wahome Bureau Limited vs. MFI Office Solutions Limited** Misc. Civil Appeal No. 1345 of 2003 & **Musa Malale Misiko vs. Hussein Rabi Aluchio** Civil Suit 90 of 2005 (OS).
6. The cases cited by both learned counsels give incite to the differing position taken by High Court on this subject. Some courts have been strict and have struck off the suits for none compliance whereas some have been liberal and have sustained the suits.
7. I subscribe to the school of thought that where a technical omission does not go to the merit and/or substances of a case then I should not elevate form so as to strike out a pleading. I do agree with those

who hold the view that striking out pleadings on technicalities is draconian and that courts of law should where circumstances of the case allow rise above technicalities in order to dispense with substantive justice. I am guided by the following authorities. 1. **Castelino V Rodriques Civil Appeal No. 4 of 1972** where the Court stated.

“of course rules are made to be observed, but irregularities of form may be ignored or cured by amendment when they have occasioned no prejudice. In those matters of form courts are much less strict today than before.”

2. **Esther Wahome Bureau Ltd V MFI Office Solutions Misc Civil Appeal No. 1345 of 2003** where the application of the word “shall” was considered. The court held that the omission of the requisite words in the body of the application where shall was the operative word did not go to the substance of the claim and the application was declined.

8. No evidence has been adduced of prejudice likely to be suffered by the defendant due to the omission of the endorsement of the order, which endorsement in my view was merely to give reference to the date of the order allowing the amendment, which date is well within the knowledge of the defendant. Indeed the defendant has already taken steps based on the amendments. It is obviously that the omission does not go to the substance of the case.

9. In my considered opinion to dismiss the entire suit for the reasons articulated will be to elevate form. I am inclined to save the suit. I hereby therefore decline to grant the orders as prayed and direct the Plaintiff do file an Amended Plaintiff in compliance with Order VIA Rule 7 within the next fourteen days of the date hereof

Dated and delivered at Nairobi this 23rd day of July, 2009.

ALI- ARONI

JUDGE