



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE 165 OF 1993

NEPHAT MUCHIRI WAGACHAU PLAINTIFF

V

MARGARET KARIUKI 1ST DEFENDANT
PATRICK MAINA WANJOHI 2ND DEFENDANT
PETER KABUE WANJOHI 3RD DEFENDANT
DANIEL NDIRANGU WANJOHI 4TH DEFENDANT

R U L I N G

When this case which has been pending in this court since 27th April 1993 after being transferred to this court on 22nd November 1989 from Nyahururu Senior Principal Magistrate's court came up for hearing, **Mrs. Rika**, learned counsel for the Defendant took up a preliminary Objection along these lines;

(i) That the amended plaint as drawn was incurably defective as it offends order via rule 7(1) of the civil procedure rules as there is no endorsement of the order pursuant to which the amendment was made and,

(ii) That there are allegations of fraud in the amended plaint. However particulars thereof are not pleaded thereby offending order VI rule 8 of the civil procedure rules.

In support of the first preliminary point, counsel relied on a ruling of this court on the issue in the case of **Cecilia Wamuyu Kambu & Another v/s Zipporah Wambui Kambu, NYR HCCC No. 108 of 2004 (UR)**.

In response **Mr. Macharia**, learned counsel for the Defendant submitted that failure to plead fraud is not fatal to the plaintiff's claim. Further that the amendment was by consent of the parties. That the history

of the case has to be considered. Finally, counsel for the defendant submitted that the preliminary objection ought to have been raised by way of formal application.

In reply, **Mrs. Rika** submitted that whether or not the amendment was by consent, the rules are very clear and

couched in mandatory terms.

I think that those preliminary objections by Mrs. Rika were well taken. Both orders VI rule 8(a) and VIA rule 7(1) of the civil procedure rules are couched in mandatory terms. Order VI rule 8(1) (a) is in these terms:

8(1) Subject to subrule (2) every pleading shall

**contain the necessary particulars of any
claim, defence or other matter pleaded
including, without prejudice to the
generally of the foregoing –**

**(a) Particulars of any misrepresentation, fraud,
breach of trust, willful default or undue
influence on which the party pleading relies;**

Whereas Order VIA rule 7(1) is in these terms:-

7(1) 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 can be seen there can be no two ways about. If the cause of action is founded on fraud, then the particulars of fraud must be specifically pleaded and proved at the trial. Failure to do so means that at the trial a litigant may not call evidence in support of fraud claimed since it would not have been specifically pleaded. The need to specifically plead particulars of fraud has a purpose. To put on notice the other side so that he/she may be in a position to prepare adequately to respond to the same if necessary. It is to avoid a situation where a defendant is ambushed with evidence of fraud that he is ill-prepared to counter: Fraud is mainly perpetrated on documents. The need to have the particulars of fraud pleaded is to enable the other side to countercheck the veracity of those allegations and if need consider the documents. In the circumstances of this case, the plaintiff by an amended plaint dated 5th June 2008 has claimed in paragraphs 6 & 7:-

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6. That after the plaintiff's sister Apufia Wangari Muraguri (deceased) completed paying for the Settlement Fund Trustee Loan (S.F.T) loan attaching to the said plot David Wanjohi Muraguri (deceased) notwithstanding the succession order fraudulently and without the consent and/or authority of the Plaintiff's sister Apufia Wangari Muraguri and without notice to the said Apufia Wangari Muraguri caused and/or procured the whole of land parcel number Nyandarua/Passenga/59 to be registered and or transferred in his name solely thereby divesting her of her interest and/or share to he said parcel of land Nyandarua/Passenga/59. The said land has during the pendency of the suit been subdivided and distributed to the defendants herein as follows:-

(i) Nyandarua/Passenga/454 transferred to Margaret Njeri Kariuki.

(ii) Nyandarua/Passenga/455 transferred to Margaret Njeri Kariuki, Peter Kabue Wanjohi, Patrick Maina Wanjohi, Daniel Ndirangu Wanjohi and Monica Wangari Wanjohi.

(iii) Nyandarua/Passenga/456 transferred to Patrick Maina Wanjohi.

(iv) Nyandarua/Passenga/457 transferred to Peter Kabue Wanjohi.

(v) Nyandarua/Passenga/458 transferred to Daniel Ndirangu Wanjohi.

7. That the Plaintiff herein stated that the registration of David Wanjohi Muraguri as the absolute proprietor and the subdivision thereafter and transfer of the suit premise to the defendants herein who are heirs of David Wanjohi Muraguri was unlawful and in contravention of the Order of Succession and the same ought to be cancelled and/or ordered rectified."

From the foregoing it is quite apparent that the Plaintiff's claim is anchored on the alleged fraud perpetrated on the plaintiff's sister, **Apufia Wangari** by **David Wanjohi Muraguri**, deceased; yet the particulars of the alleged fraud are not given as mandatorily required by rules of pleading already referred to herein above. Failure to plead particulars of fraud is fatal to the plaintiff's claim the submissions of the plaintiff's counsel to the contrary notwithstanding.

Order VIA rule 7(1) of the civil procedure rules is also clear, that there must be an endorsement of the amendment either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuant to which the amendment was made. As I understand it, the defendant's contention is that the amended plaint has no endorsement on its face as to the date when the amendment was made, or the order allowing the amendment or the number of the rule in pursuant to which the amendment was made. I have perused the record and it would appear that there was no formal application to amend the plaint. The application pursuant to which a consent was recorded on 29th October 2007 was one dated 12th July 2005 in which the plaintiff had sought to enjoin the current defendants to the suit. The consent was therefore limited to adding to the suit the current defendants. However the plaintiff took advantage of the consent to substantially amend the plaint. The consent in my view would only have entailed perhaps amending the intitulement so as to add the 4 defendants to the suit and no more. However the amended plaint shows substantive amendments to the entire plaint. That was not the purpose of the consent entered into as aforesaid. In any event that amendment was on 29th October 2007. That date is not endorsed or reflected on the said amended plaint. Further the said amended plaint does not show that it was made pursuant to a court order, or even the number of the rule pursuant to which it was made. Is this omission by the plaintiff fatal to his case? Of course it is. I have

had occasion to deal with the issue in the following cases.

(i) Cecilia Wamuyu Kabu (supra)

(ii) NYR HCCC No. 225 of 1992

Karoki Kimaru Gathua v/s James Gichuki Muhoro (UR)

In all these cases this is how I have delivered myself on the issue:

“Order VI A rule 7(1) 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 pursuance 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 cases. 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 still 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 Plaintiff’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.

Nothing has been brought to my attention that would compel or persuade me to alter or recant my view on the issue.

For all these reasons I find merit in the preliminary objections raised by the defendants. They are upheld with the consequence that the plaintiff's suit is struck out with costs to the Defendants.

Dated and delivered at Nyeri this 22nd day of July 2009

M. S. A. MAKHANDIA

JUDGE